

## Right to Information and Good Governance

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### Lecture 49

#### Exempted Information - 3

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#### Provisions of law under which information may not be disclosed.



- Information that may not be disclosed: sec. 8
- Sec. 9
- Sec. 8 (2)
- Sec 11



Friends to continue our discussion on exempted information under the Right to Information Act. Let us now look at the provisions of law under the Right to Information Act 2005, under which information may not be disclosed. First and the foremost, the nature list of exemptions from providing information is found in Section 8 of the Right to Information Act. Section 8 of the Right to Information Act list out those restrictions which we will so call as reasonable restrictions on the Right to Information.

And it lists out the kind of information that may not be shared if the citizens apply under this law, but it is not only Section 8 under which information may be denied to a citizen Section 9 also lays down those kinds of information whose copyright, it is held by the state cannot be provided under certain circumstances. The exemption that are laid down under Section 9 is not a qualified exemption, but rather an absolute one.

It is primarily intended to prevent the misuse of the Right to Information Act by government

agencies, especially on the matters of infringement or copyright and their like. So, Section 9 also is a provision under which the government may decide not to disclose the said information. Also Section 8 (2) also says that the state even when an exemption provision or the Official Secret Act applies, an official will still need to disclose the information requested if public interest in the disclosure outweighs the harm to the protective interest, which means under Section 8 (2) the state may decide that exempted information either under the RTI Act or the Official Secrets Act may be disclosed. However, on the condition the public interest in disclosure of the said information outweighs the protective interest.

Kindly note, while this public interest is something that appears also in Section 8 in certain cases because when we say that some of the exempted information can also be provided. As I will use the word may not be disclosed, which means in certain circumstances it may be disclosed. So, when public interest outweighs protection interest then in such cases even an exempted information can be provided. However, what is public interest is not defined under the Right to Information Act.

And hence there is no objective criteria to determine public interest and probably the public interest that is decided by the information commissions on a very subjective basis. However, I think it is important to underline the fact, that the exempted information are not absolutely exempted. And obviously the courts can adjudicate on the matter whether the said information should be provided or should not be provided.

One would also look at Section 11, which deals with third party information to also look at the right of a third party to raise objections from providing the said information and hence you will notice protection of confidentiality of third party is something that is provided under the Right to Information Act and hence if the third party information, which is confidential and which should not be disclosed will be exempted under Section 8 of the Right to Information Act.

So these are a gist and in brief some of the provisions and sections in the Right to Information Act that deal with in exempted information.

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Sec. 8 (1)(a) 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

- Sovereignty
- Integrity
- Security of State
- SC Sharma v Ministry of Home Affairs, CIC 2006
- Venkatesh Nayak, CHRI
  - Case study 1: MHO
  - Venkatesh Nayak v PMO 2017 CIC
- Incitement of Offence: Union of India v. Central Information Commission July 2012 Delhi HC



Now let us move ahead and look at Section 8 (1) (a) so we are starting with Section 8 to discuss in detail the different aspects of application of the Right to Information Act in terms of what information is available and what information is not available. Now Section 8 (1) has a, b, c, d in which certain information have been restricted. 8 (1) (a) of the Right to Information Act says the disclosure of some information, which would prejudicially affect the sovereignty and integrity of India.

The security, strategic, scientific or economic interest of the state in relation with the foreign state or may lead to an incitement of an offence is not provided with the Right to Information Act. Now you will notice that when you deal with Section 19 (2) of the Constitution of India, sorry study Article 19 (2) of the Constitution of India, you will definitely see some of the reasonable restrictions in the constitution being replicated over here.

It is important that information that deals with the security of the state, the sovereignty of the country, the integrity of the country are generally those information or those duties that the state has to perform, under which the right of information may not be entertained. Sovereignty, integrity and security of the state can be read as something like that is core and important to the defense of the country, it maybe in relation to procurement of arms and ammunitions.

The requirement of the defense forces, the deployment of defense forces in different parts of the country probably the movement of some of the defense and paramilitary forces or probably anti-terrorist operations and so on. And hence you will notice that some of these are affecting or if the information is provided may prejudicially affect the sovereignty and the security of the state and hence any information which prejudicially affect the sovereignty or integrity of the state may not be provided under the right to information act. And hence confidentiality of such information is paramount and the state will have a non-disclosure policy, citizens cannot persist or insist upon such information being disclosed under the Right to Information Act.

Now you will also notice that sometimes when we talk about the sovereignty, integrity and security of the state, development and research in defense products and international trade of defense, in defense are also issues that we come or be covered under Section 8 (1) (a). So, Section 8 (1) very clearly deals with the country's security and strategic interest and it clearly states that some of the agencies that are dealing with the said information need not provide the same under the Right to Information Act to a citizen.

Now let us take some of the instances where Section 8 (1) (a) has been applied and where the information in question has to be decided whether it should be probably provided or can it be brought within the exemptions of Section 8 (1) (a). Once such case came about in 2006 in this case called RS Sharma versus the Ministry of Home Affairs. The important question in this case was the matter that the CIC has to look into was interceptions of telephone because you will notice that telephone tapping is something that can be done by the state in the interest of the security and strategic interest or in terms of the, in terms of prevention of crimes and offences.

And though there are strict guidelines on how telephone tapping or interceptions can happen, sometime this said information is there on the government. However, when a citizen applies under the Right to Information Act should this information be provided? That was the question in this case. You will notice that under Indian Telegraph Act of 1885 interceptions of telephone is possible and generally this is done in the interest of sensitive national security and the sovereignty and integrity of the state.

And you would appreciate why such interceptions are done and generally such interceptions are considered as top secret from the government. And hence, the question is, if matters connected to interception of the phone is found under the Right to Information Act should the government, especially the Ministry of Home Affairs provides the said information or can they claim exemptions under Section 8 (1) (a).

Now in this case CIC clearly held that the process of telephone interception is it cannot be divided and into what can be given and what cannot be given, it is one, it is unfortunately indivisible part of the process provided under the Indian Telegraph Act and the way and manner in which the government goes about doing this matter of interception. And hence, what information was sort by the appellant, unfortunately attracts not only Section 8 (1) (a) it also attracts Section 8 (1) (g) and (h) of the Right to Information Act.

So, the CIC in this case quite early in 2006 as probably a year after the Right to Information Act was enacted clearly laid down the path on which RTI will be in operation. Which means that RTI Act will not be available whenever a top-secret aspect of the government is being undertaken, where the strategic interest of the state is involved, where it is an issue of national security, interestingly the Ministry of Home Affairs can deny information regarding the same. They can take exemptions under Section 8 and the said information will not be disclosed.

So, this is where I think in the SC Sharma versus the Ministry of Home Affairs very clearly guidelines have been laid down about what is available as disclosure and what is not available in terms of non-disclosure under the Right to Information Act.

Moving forward we will discuss the 2 cases from an RTI activist by name the Venkatesh Nayak. Now Venkatesh Nayak who happens to work with a Commonwealth Human Rights Initiative is an RTI activist, very well known RTI activist like Shri Subhash Chandra Agrawal and he has filed numerous RTI applications seeking information from different organizations in the government. In some cases, he has succeeded in getting the information, but in many cases because of the fact that he is seeking information, which can be covered under Section 8 (1) (a),

the information that he said sought has not been providing for.

The first case study that I would want to bring about is a very recent one. And why I say it is a case study is because it is not the decision of the CIC or the courts. It is an order that was passed by the Home Ministry. And based on that order, based on newspaper reports this case study is being brought before you. So Venkatesh Nayak sort photocopies of all official records that contain the written reasons for issuing authorization to 10 security and intelligence agencies who can actually tap or intercept your internet communication.

So, the Government of India has authorized 10 national security and intelligence agencies to actually monitor your online content. And such a gazette notification has been issued by the government under Section 69 (1) of the Information Technology Act and the Home Ministry is the rural agency for giving such authorization and you will notice that probably this is required in terms of national security to prevent any terrorist activity or unlawful activity.

And the national 10 security and intelligence agencies will monitor all our online content be it content of the internet through email or be it content on say use of internet for calls messages and so on and so forth. Now when Venkatesh Nayak asked for the official records from the Ministry of Home Affairs about why these agencies were given such authorization and what were the reasons for the same, the home ministry refused to disclose the said of information.

They said that the information that is there is a top secret and you will notice that this information that is collected, is collected under an authorization that is there under the Information Technology Act 2000, which gives government that kind of authorization to regulate online content and to check the misuse and abuse of the online content, under which such an official notification was issued authorizing this 10 security and intelligence agency to actually prevent any kind of cyber terrorism or a cyber-crime.

Now when Mr. Venkatesh Nayak asked the home ministry, obviously, the home ministry denied the said of information saying that it is a top-secret information and it cannot be disclosed under Section 8 (1) (a), 8 (1) (g) and 8 (1) (h). The similar sections that were used in the SC Sharma

case were also the same section that were used by the Ministry of Home Affairs in denying Venkatesh Nayak this said information.

So, you will notice how Section 8 (1) (a) operates, especially in terms of the security of the state and you will notice that obviously though the Ministry of Home Affairs is under the purview of Right to Information Act most of the intelligence agencies are exempted. So Venkatesh Nayak could obviously not have applied to these intelligence agencies and sought this information directly. However, he sought it from the home ministry in terms of why and what reasons or what are the noting before which such a notification was issued and he wanted to study the same and the same was denied and I think it was denied rightly. And if you apply the ratio that was decided by the CIC in 2006 in the SC Sharma case, the denial to Venkatesh Nayak seem to be adequately justified.

The second case study that I would want to put across and this is a decided case from the Central Information Commission in 2017 is a case between Venkatesh Nayak and the Prime Minister's Office. Now this is again a very, very interesting application that was put by this RTI activist by name Venkatesh Nayak he is a very prominent activist as I told you in the past and probably he is filing lot of RTI petition on sensitive information or government held information, information that may affect the sovereignty and integrity of the state very directly obviously something that should have been known to this activist who has worked in this particular area for a long period of time. However, I think he has experimented with the use of RTI by filing such applications.

Now what did Venkatesh Nayak do in case study 2 was that he filed an RTI application with the Prime Minister's Office and what he wanted to do was to get a copy of an agreement that was entered by the Government of India with a group in Nagaland. This group is called the National Socialist Council of Nagaland and Nagaland is a volatile place there are certain insurgency groups over there and to curb that kind of insurgencies the Government of India had proposed a kind of a negotiated settlement and a framework agreement and this was in the news that the Government of India had actually entered into such an agreement and probably it was like a peace accord that was necessary in that instance. And Venkatesh Nayak wanted the copy of the framework agreement.

Now the prime minister's office very clearly denied the said information and they said that the sovereignty and integrity of India and the strategic and security interest on the states maybe prejudicially affected if this framework agreement is disclosed.

And they also said that the public interest in this case by disclosure will not be served rather it will be adverse to it. So, when you wait the information from being provided to not being provided what is more important. So, it is not necessary that this agreement has to be immediately disclosed it may probably not benefit the public and the stakeholders, rather the benefit is to withhold the, this information.

I think people must have the trust in the government and the main purpose of the government to make this framework agreement was to promote peace in the Northeast region. And hence by disclosing the same it may actually adversely impact that kind of a peace and the effort that the government was putting in the state of Nagaland. And interestingly the government was trying to solve a very long-standing issue and trying to bring about enduring peace and prosperity in that region.

And hence, I think, it was more beneficial to not disclose the said information at this point of time is what the Central Information Commission actually decided. So, the Central Information Commission very clearly held that the said disclosure is not an appropriate disclosure at this moment and this point of time and Venkatesh Nayak is not entitled to copy of the framework agreement. And hence the prime minister's office denied the set of information and the denial was upheld by the Central Information Commission.

And hence you will notice that the strategic and security of the state is a very paramount interest, which is protected and the Right to Information Act will not be applicable in such cases and in such matters.

Now if we move forward from the sovereignty and integrity and security strategic interest of the state, to the other wordings in Section 8 (1) (a) we could look at the aspect of three things here



then. First is the economic interest of the state, which can also be an exempted ground. Second is the relationship with its foreign states, and last something that may lead to an incitement of an offence.

On the incitement of an offence we have a very interesting case from the Delhi High Court. It is the case of Union of India versus the Central Information Commission decided by Delhi High Court in July 2012. And this case is a long case, the case probably started somewhere in 2007 by RTI applicant by the name C Ramesh.

And what he did was he wanted certain information, which was in relation to documents and correspondence, precisely to be honest letters that were written by President, KR Narayanan as he was then the President of India to former Prime Minister, Vajpayee because during that time you will notice, the President KR Narayanan was a government, sorry a Congress appointee and prime minister Vajpayee was from a different political party and the Gujarat Government at that point of time was a BJP government and there were unfortunate riots in Gujarat, which led to a lot of deaths. And these were communal riots.

And at that point of time the President of India being the head of the state out of concern probably had written to the Prime Minister and probably given certain concerns or voices or directions about how the Gujarat riots should be handled. And this was already in the public domain that such communication had happen between the President and the then Prime Minister Shree Vajpayee. Now C Ramesh wanted a copy of this communication or correspondence between the President and the Prime Minister. So, he said please give me the documents correspondence and let us that were written by the President to the Prime Minister.

Now you will notice that in this case, interestingly, there are certain communications in the government that are considered to be privileged communications. And you will notice that some of the privileged communication cannot be disclosed, if you apply Section 123 and 124 of the Indian Evidence Act 1872.

Also, if you look at the constitutional provisions of India, you will notice that under Article 78

and 361 of the Constitution, you will notice that these are privileged communications between 2  
functionaries in the government. And when they are privileged communication can you deny the  
same, can you exempt the same, is it something that can be brought within Section 8 of the Right  
to Information Act is something that was viewed by the Delhi High Court in this particular  
matter.

Interestingly, the Government of India, while defending its non-disclosure of the said privileged  
communications clearly said that there were 2 commissions that were appointed to look into the  
Gujarat riots. The first one was the Justice Nanavati Commission and the second was Justice  
Shah Commission of inquiry in to the Gujarat riots and interestingly these 2 commissions are had  
requested for these letters and communications.

And the Government of India had denied these 2 commissions the said information and they had  
sought exemption sharing the said of information under the communication being a privileged  
communication. So, the matter when it came to the Delhi High Court. The Delhi High Court had  
to view, whether immunity can be granted to the government from disclosure. And it was  
important for them to apply the Right to Information Act and view the facts that can the  
information be disclosed and is there a public interest in the disclosure of the said of information.

Because in light of the provision of the Right to Information Act you will notice that if such  
communication and correspondence and documents are disclosed. It may probably instigate  
another riot. It may probably lead to an incitement of offence in another case or as the case  
maybe and hence you will notice that the Delhi High Court did raise the possibilities and the  
arguments laid by the Government of India and came to the rightful conclusion that I think the  
sharing of the said information is not necessary it is an exempted information under the Section 8  
(1) (a). I think the information may affect prejudicially the sovereignty, integrity and the  
secretary of the state and also would may lead to incitement of the offence.

So, I think with those reasoning you will notice that the said information was not provided. And  
the Delhi High Court agreed with the arguments of the Government of India saying that the  
disclosure with the said information may not be necessary at this point of time.

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## Relationship with foreign State, economic Interest



- Anuj Dhar v. Ministry of External Affairs, CIC/OX/A/2006/00671 dated 23rd March, 2007
- Ms. Suchitra J.Y., Bangalore v. Bharatiya Nabhikiya Vidyut Nigam Ltd. 2008 CIC
- Delhi Metro Rail Corporation Ltd. v. Sudhir Vohra Delhi HC 2011
- Reserve Bank of India Vs. Jayantilal N. Mistry 2015 SC



If you continue our discussion further on Section 8 (1) (a) and if one views the aspect of those kind of information that results in relationship with a foreign state or with that of the economic interest of the state. One could relate with certain examples decided, decisions that were made by the CIC or by the Supreme Court or the High Court.

Now when you look at the Anuj Dhar versus the Ministry of External Affairs, it is a CIC case decided in the year 2007. The issue in this case was the PIO in the Ministry of External Affairs received an application in 2006 for seeking certified copies of the complete correspondence by the Ministry of External Affairs with the Government of Russia on the matters of disappearance of Netaji Subhas Chandra Bose. There were numerous communications that were made by the Government of India with the erstwhile USSR. And these were those communications that were in relation to Netaji Subhas Chandra Bose's unfortunate disappearance. And then finally the kind of death that was reported by Russia.

Now this information was there with the Ministry of External Affairs, certified copies were sought. However, the Ministry of External Affairs decided that such information is not subject to disclosure under the Right to Information Act. And the ground on which the ministry external

affairs did take was that this disclosure of information may affect the relationship with the foreign state, which is the erstwhile USSR, currently the country of Russia.

Now the commission, the settle information commission held that correspondence have to be examined by experts to come to the conclusion that whether such an information may be affecting the relationship between India or any other country. Now the expert in this case is the Ministry of External Affairs and whether the said disclosure should be done or should not be done is something I think the best decision should be left with the government.

And if the government feels that by disclosing the said information its relationship with the foreign state is going to be adversely affected because the information is in relation to a very sensitive matter. A matter that has finally ended or concluded about the disappearance of Netaji Subhas Chandra Bose. In those cases, I think what the government decide would be probably final and it would probably be in the best interest of the state and hence the exemption that is sought by the Ministry of External Affairs should be upheld.

So you will notice that certain classes of documents are entitled to constitutional protection from disclosure. And hence it is inherent that we will try and classify records and documents into what can be given and what cannot be given. So, if the document is considered secret or top secret or confidential. You will notice though these kinds of classifications are no longer valid after the Right to Information Act because prior to that they've had probably a practice in the government.

Right now when you even categorize them or classify them for easy understanding about what can be shared and what can be disclosed, I think there is a way, there is a clear categorization of the fact that here is where certain information can be provided for and certain information can be denied.

Now coming to the economic interest of the state, which is also one of the exemptions under Section 8 (1) (a) the case in point is Suchitra J.V. versus Bhartiya Vidyut Nigam. This was CIC judgment on 2008 and here the information that was sought was about a fast breeder reactor that was been constructed by this company called Bhartiya Vidyut Nigam. Now the fast breeder

reactor, you will notice is a very, very sensitive matter, it is something that is based onto the relationship between 2 states, you will notice that most of what is done through atomic energy is an exempted information.

And in this case the court, the commission held that the information can be denied because whatever is done in terms of nuclear energy or in terms of atomic energy is something that cannot be disclosed under the Right to Information Act. It is important that such disclosures be restricted, such disclosure cannot be made, because I think the economic and the security of the state because atomic energy is under the security exemption on the state. And hence, in such cases such information may be withheld under the Right to Information Act.