

Right to Information and Good Governance

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Official Secrets Acts & RTI

Hi, this is Raghav Parthasarathy, and I am working as a teaching associate at the Centre for Environmental Education, Research and Advocacy National Law School of India University, Bangalore. In this video, I will make an attempt to bring out the interface between the Right to Information Act 2005 and the Colonial Period Legislation Official Secrets Act of 1983. Before commencing with the topic, I will raise few questions and answer during the course of this video. Let me start about the topic with a few questions that I have taken from different cases, which have already been decided by various courts across the country.

And the first question which I have for you is, whether any newspaper publication of any content, the meeting held by the government, can be considered as a violation under the Official Secrets Act? The second question is, whether downloading any content from internet despite being marked as confidential, amounts to an offense under the Official Secrets Act? The third question is, whether sharing any information with a foreigner about any content, which has been already classified as confidential, amounts to an offense under the Official Secrets Act?

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- Whether publishing any content of the meeting held by the Government can be considered as violation under the Official Secrets Act?
- Whether downloading any content from internet despite being marked as Confidential amounts to offence under OSA?
- Whether sharing any information with a foreigner about any content classified as Confidential amounts to offence under OSA?
- Whether entering any public premises wherein any equipment relating to military is stored amounts to offence under OSA?
- Whether a Company can be held liable for the offences under this Act?



The fourth question is whether entering any public premises, wherein, any equipment relating to war has been stored, amounts to any offense under the Official Secrets Acts? And the last question, as you can see from this slide, whether a company can be held liable for the offenses under this provision? Let me start with the history or the background of this legislation.

The Official Secrets Act is a British era legislation, and it was first introduced in the 1889. The government back then, felt that it was not strict enough to deal with offenses, and subsequently it thought that, it has to be more stringent and stricter. Hence, in the year 1994, they introduced a legislation which was more stringent and which was stricter, and had more provisions for the punishment. Due to the stiff opposition, the provisions were diluted to some extent, and the present Act of 1923 came into legislature, came into being.

The intention behind coming up with this legislation, was to suppress the Nationalist Movement and to prosecute those who are involved in such movement. If you see, there was a misconceived objective behind this legislation which was quite visible, when it was used to threaten and abuse the publishing houses, and the journalist was spreading information against the policies and the misgovernance of the colonial government.

Then I think there is one obvious question which arises, as to why did we continue with this legislation, when the intention behind the enactment was only to hide information, that too post-

independence? The answer to this is, during that time, India did not have any Act, which specifically dealt with the offenses of leakage of information, espionage, spying and other related activities. Well, the Official Secrets Act was the only Act, which dealt with these offenses, and also provided for punishments. So, this act was amended after making necessary changes and in a democratic system, this was the only legislation which provided further provisions for explanation and other related items.

Now let us try to understand why was there a need to address the issue of espionage? The term espionage has not been specifically defined in the act, but if you go by what has been defined in the dictionary, espionage refers to the activity of secretly collecting and reporting information, especially in secret, political, military, business, or industrial information. The unity, integrity and sovereignty of any country is dependent on several factors.

Well, the intended job objective of the Official Secrets Acts goes hand in hand with the national security. But, in the recent days, there are a lot of demands for the act to be repealed, because it is not just used for the intended purpose. Some of the critics of the Official Secrets Acts have called it an antithesis to the Right to Information Act. Because in a democratic setup, opacity and transparency cannot go hand in hand.

Now let us try to understand what the actual Act contains. If you read the short title and applicability of the Act, you will see that Official Secrets Act is applicable to every citizen. Moreover, it has been given an extraterritorial applicability as well. And it is also applicable to those citizens who are residing outside India. If you glanced through the Act, will notice that there are several words which have been included, like a spying, or an agent's prohibited place, wrongful communication, secret information, forgery, impersonation, unauthorized use of uniforms, both of military and police, harbouring spies, among other things.

Even though the Act is titled as Official Secrets Acts, there is no definition which defines what is meant by the Official Secret. The Act is short, it has only 16 provisions, but the Act is very significant. Let me now try to explain some of the important provisions of the act. To start with, Section 3, it deals with the (pro) penalty for spying. This means anyone who enters any

prohibited place, involve himself in making any sketches or collects any records and communicates, he may be sent to jail for a period of 3 years.

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ABOUT THE ACT

- First introduced in 1889, again in 1904 and the prevailing Official Secrets Act, 1923, a colonial legislation introduced to suppress any information being released, to muzzle nationalist publications, during the independence movement;
- Official Secrets and National Security are interconnected, and has been considered along with Foreign Recruiting Act, 1874; Unlawful Activities (Prevention) Act, 1967;
- This is a main statute for fighting espionage activities, fundamentally affecting the National Security.
- Act is applicable for every citizen of India who is residing outside India as well.
- OSA is the one of the aspects of the public administration system, post independence.
- Spying or entry into prohibited place, transmission and collection of secret information; wrongful communication of, or receiving secret information of the specified type; harbouring spies; impersonation, falsification, forgery etc; interference with police and military;



The punishment, under this provision is also extendable up to a period of 14 years, if it is committed in relation to any work of defence, arsenal, navy, military establishments. The provision has an interesting subsection, that is subsection 2, where the person need not have committed any act, and the conviction can happen merely based on the circumstances of the case and the person's conduct. The prosecution only has to prove that it was against the safety and interest of the state.

If you look at Section 4, it clearly provides that if any person has been alleged of any offence under this law, and if he has made any communication with the foreign agents, that will be considered as a sufficient evidence of commission of an offense. And this is quite strange, because this provision has to be read along with the provision of Section 3. If you look at Section 5, it is an interesting provision. And this deals with the offense of wrongful communication, wilful communication, negligence, which means failure to take sufficient or reasonable care, sharing of passwords, lance, sketches, etc. The punishment prescribed under the provision is up to 3 years and also prescribed some amount of fine which has not been clearly mentioned.

Moving onto Section 6, the provision deals with the use of uniforms, unauthorizedly, also find the reports, forgery personation and even false documentation. If you are a law student, you will realize that, the same words have been mentioned in some other legislation as well. And that legislation is Indian Penal Code. The Indian Penal Code is more of a general act, which provides for these offences. However, the Official Secrets Act is a special legislation which provides for these provisions again.

If you see that the Indian Penal Code, even though it specifically mentions forgery, impersonation, false documents, but the punishment prescribed under the Penal Law is only up to a period of years. Whereas under the Official Secrets Acts, the imprisonment for all these offenses, especially under Section 5, the period of imprisonment is up to 3 years. It goes without saying, there is also some kind of imposition of fine.

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- Section 3 - Penalties for Spying - Prejudicial to the safety of interests of the State, affecting relations with foreign states, provides for 14 years for any act of spying on defence related establishments, for all others it is 3 years.
- Section 4 - Communication with foreign agents shall be a presumption, against those who are alleged of committing an offence under Sec.3.
- Covers the offences the following offences
 - Sec.5 - Wrongful communication, etc. of information.
 - Sec.6 - unauthorised use of uniforms, falsification, forgery, personation and false documents.
 - Sec.7 - Interfering or causing obstruction to police officers or members of armed forces.
 - Sec.8 - Duty of every person to give information upon demand.
 - Sec.10 - Harboring spies and the penalty prescribed.



Upon reading Section 7, it will be clear that the provision covers the offense for interfering or causing obstruction in the duty of the officers, of the police or members of the armed forces of the Union Government, they are doing their duty of guarding, patrolling or any other similar duties, as has been provided under Section 7. If you just look at the provision, you will see that there are certain essential elements that should be fulfilled for attracting the offense under this provision.

Firstly, a place should be a prohibited place. Secondly, there should be an obstruction, wherein the offender tries to mislead or interfere. Thirdly, the interference should be in the duty of the police officer, member of the armed forces. Fourthly, the said officers should be deployed to guard or patrol the prohibited place. Punishment prescribed under this provision is 3 years along with fine.

Moving on to Section 8, which lays down a duty on every person to give information about the commission of any offence. Under Section 3 of the act, which has been demanded to be given, the superintendent or the police or any other officer who has been designated for this purpose. If you look at the provision, if a person fails to give the information regarding the commission of any offense, that the person, (wi) who has a knowledge about such an offense, he also is liable for prosecution. And he can also be punished up to a period of 3 years.

Let us skip Section 9, and move to Section 10, which is an interesting one. This one deals with the harbouring of spies and prescribes penalty up to 3 years of imprisonment. This is about the substantive aspect of the Official Secrets Act. Let us now try to understand some of the provisions which deal with the procedural aspect for the trial of offences under this act, primarily for the prosecution to have a case, they should have gathered sufficient evidence for this, the magistrate has to issue a search warrant under the Section 11 of the Act, to the police authorities for undertaking any investigation under this law.

Interestingly, if you read the provision, it also provides for the use of force, by the police authorities to search the premises, which is suspected to have some information which can jeopardize the national security. As we all know, criminal law is set into motion, with the registering of the first information report, as has been provided under Section 154 of the Code of Criminal Procedure.

So, once the investigation and the required evidences are collected, the FIR is filed, and the proceedings will commence. Now, an important question arises, what about the court proceedings, should not be held in some place which is beyond the reach of the public? Well, to answer this, we can look at the provision that has been provided under Section 14 of the Official Secrets Act, wherein the public can be excluded from witnessing the proceedings.

The procedure for this has been clearly mentioned and the provision as well, which states that, only the prosecution has to make an application on the grounds and not the respondents or the defence, seeking that the public shall be excluded from witnessing the proceedings. And the court has to make such an order, this effect that the public cannot witness the proceedings. If you look at it from the other terms, it is simple that any proceedings under the Official Secrets Act have to be an in-camera proceedings, which makes obviously a sense.

Moving on to Section 15, it provides for offences by the companies. This particular provision, can be better explained by the use of a case, which was, which happened in the year 1998. This was a case, which was filed against the group president and the vice president of the Reliance Industries. The allegation against them was that, they were found to be in possession of a

document, which was recovered after their, after raiding their office premises. What did the document contain? The document which was recovered from them, related to the discussion at the cabinet level on economy and plans for disinvestment.

Actually, this was a classified document, and the contents of the documents were marked as confidential or secret. The trial court passed an order of conviction against the offenders, anyhow, the right of appeal was excised. And an appeal was filed before the High Court of Delhi, which said that, the information contained in the documents, that are already in the public domain and it has been reported in the newspaper as well.

It was also further corroborated by the department secretary, stating that the information that contained in the report, was not important, or it was not, was not important for the purpose or from the point of national security. The court said in its judgment, that the information was not prejudicial to the security of the country. The court came down heavily on the prosecution, for having put those persons on trial merely because a document has been marked as confidential. The nature of information contained in the document is more important, and the court has to decide, if the nature of information is prejudicial to the security of the nation.

By now, you would have got slight understanding, that the Official Secrets Act and the national security are interconnected. But if you read through the several news articles and opinions of different scholars, you will see that many of them have called, the British Colonial Act as draconian and against the values of the Democratic covenants. Some people say that due to the ambiguous definition of the word secret, provisions of the Act is being implemented on the innocent, which is leading to its misuse.

Let us now see some of the cases that have been decided on various issues by the court of law and see what amounts to breach of Official Secrets. Based on the questions which I had raised, let me put that slide on. I had raised 5 questions in the beginning, let us try to take one by one. The first question was, whether publishing any content of the meeting held by the government can be considered as violation of the Official Secrets Act? The straight answer to this question is

no. The reason behind this being, meetings held by the government and the discussion that takes place in the meetings can be classified as privileged, and in some cases confidential as well.

But not all meetings can be classified as confidential and secret. If I can quote this example, or the case of Mr. Shantanu Saikia who was a journalist, he was accused of publishing a content, which was an excerpt from the meeting of the cabinet. He was charged under the provisions of the Official Secrets Act, the court held that mere publication of a document labelled as secret does not make one liable under the provisions of the Act. Fortunately, he was acquitted.

Moving on to the second question. Whether downloading any content from internet, which has been marked as confidential, amounts to an offense under the Official Secrets Acts? The straight answer to this question again is simple, no. If I can quote the case of Mr. Santana, rather of the Mr. Iftikhar Gillani, he was a Kashmiri journalist who downloaded a content way back in the year 2002, from the internet source, for which he was arrested for possessing secret documents relating to the deployment of military.

Fortunately for him, the case was withdrawn, because the documents were easily available on the internet, and it was not a secret per say, moreover, it would have been an offence, if you consider that anything could have been considered as an offence. For the provisions of this act to be attracted, had Mr. Geelani hacked into the service of the ministry to procure the information, then he could have been charged under the provisions of this act.

Moving onto the third question, whether sharing any information with a foreigner about any content classified as confidential amounts to offence under the Official Secrets Act? The question that I have raised here is pertaining to a case, of a former deployment, Miss Mathuri Gupta. This is the latest case of conviction under the Official Secrets Acts. Mathuri Gupta was posted at the media and press division of the Indian High Commission, at Islamabad.

It was alleged that, she was in contact with an ISI agent, and she was sharing some of the confidential details with him. The interesting part here is that, she was not directly arrested in Pakistan. Rather, she was called to India and on the premise of attending a program, when she

landed in Delhi, she was arrested by the authorities, over charges of spying and sharing of confidential information. In the year 2018, she was sentenced to 3 years in prison. Moreover, being a government servant, there was a duty cast on her, to protect the interest of the country, which she clearly violated.

Let us now focus on the fourth question, whether entering any public premises wherein any equipment relating to military is stored amounts to any offence under the Official Secrets Act? This was a query that was decided by the court in the case of Mr. Tarakant Divedi. He is a journalist from Mumbai, who is reporting for a popular newspaper Mumbai Mirror. In this case, a report was published in the newspapers that expensive weaponry were stored in the rooms of Railway Protection Force armory, and the roof was leaking, as it was in a ruinous condition, damaging the expensive weapons.

The premise behind this article was the 26/11 terrorist attack by Ajmal Kasab and his gang, on the Taj Hotel in Mumbai. The armory where these weapons were stored, were inside the Chatrapati Shivaji Terminus, which we all know is a railway station and more so, a public place. So, can such reporting be considered as violations under the Official Secret Act, I do not think so, because the act is applicable for those, who are in possession of any information, and there is a duty cast on them to protect such information from being leaked.

In this case, Mr. Tarakant was neither in possession of any information, and nor he was duty bound to protect any such confidential data. Fortunately for Mr. Tarakant, the case against him was dropped, and the government felt that, his reporting did not constitute any offence under the Official Secrets Act, thanks to the Attorney General, Advocate General of the state. Despite there being so many issues with regard to the Official Secrets Act, why do we still think there is a need for this law? As there are so many cases being foisted against journalists and other civilians?

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Cases under OSA

- SANTANU SAIKIA CASE ON REPORTING OF MEETING EXCERPTS.
- IFTIKAR GILANI CASE
- MADHURI GUPTA CASE
- TARAKANT DWIVEDI CASE
- SHANKAR ADAWAL V. CBI, 2019 SCC ONLINE DEL 9434 - offences against the company and classification of documents as Confidential and its impact on the national security.
- NAVY WAR ROOM LEAK CASE



. I think to answer this case, answer this query, I have to again rely on one of the recent decisions that was given by the Supreme Court of India. Let me explain another famous case, pertaining to the Navy War Room leak case, as was called Supreme Court bench headed by the former Chief Justice of India. Mister Deepak Mishra, along with justices A.M. Khanwilkar and Mohan Shantanu Gaudar, upheld a conviction of two naval officers, one Commander Vijendra Rana and commander VK (())(21:32).

The case was decided by the Armed Forces tribunal, the allegation against them was, they had leaked sensitive defence data of around 7000 pages from the Naval War Room and the Army Headquarters, which was having a direct bearing on the national security. Furthermore, they were actually found to be in possession of an authorized pendrive, containing secrets of defence forces. The board of inquiry recommended the sacking of these officials and accordingly, they were dismissed from the service in October, 2005. They exercised the right of appeal, and they approached the Supreme Court again, and the decision was turned down by the Supreme Court.

As we now know, the Official Secrets Act is a colonial legislation which was passed to prevent espionage and spying in India. Let us now try to understand whether this largely requires to be repealed. And why are their demands for doing away with this legislation. Law Commission of India headed by K.V.K Sundaram first took up this issue in the year 1971. In its forty third report, which was titled as offenses against national security.

The committee recommended the repeal of the Official Secrets Act, and to include it as a chapter in the umbrella law, called the National Security Bill of 1971. This was the recommendation that was done by the Commission. The Commission's primary objective was to consolidate laws on the national security and consider the various laws which are enforced in the country. There are several aspects of the national security which were scattered in different legislations, few of which are chapter 6 of the Indian Penal Code, which deals with the offenses against the state, and chapter 7 of the same legislation on offenses relating to the Army, Navy and Air Force.

There were other legislations also which were considered, which included the Foreigners Recruiting act of 1874, the Official Secrets Act of 1923, criminal law amendment of 1938, and of 1961, the Unlawful Activities Prevention Act of 1967, and not to exclude the Foreigners Enlistment Act of 1870. But the recommendations were not fully considered, and the National Security Act was passed in the year 1980. The present legislation as of now is the National Security Act of 1980 was passed without making any changes to the Official Secrets Act.

Whereas, the National Security Act as of now deals mostly with the aspect of preventive detention, which meant that the replacement of the maintenance of the Internal Security Act, which was earlier prevailing. The issue with the Official Secrets Act is basically that, the colonial opinion of mistrust of people and privacy of public officials in dealing with the officials were evident. During those times, confidentiality was the norm and disclosure was an exception. The basic objective of the law was to address the issue of security, providing a framework for unity and integrity of the nation.

It is well known that the government deals with tremendous amount of sensitive data on a day-to-day basis. Several opinions and views are taken to consideration before a decision is made. It is only for the officials, who are handling such information. They have to be aware of the consequences, whether and what if, what will happen if the information is released. On several such instances, the information is sensitive, which may affect and harm the security of the country.

Apart from the law Commission of India in 2006 second administrative reforms commission, in its first report on the Right to Information Act made several recommendations, which was on the lines of the 1971 record law Commission of India. The reforms commission also thought that it was appropriate that the laws relating to the national security should be consolidated and the chapter in the National Security Act should be introduced, which is relevant to the Official Secrets Act. After having gone through the provisions of the Official Secrets Act, let us now try to understand some of the provisions of the Right to Information Act of 2005. And try to bring a correlation between the two acts.

Subsequent to the enactment of the Right to Information Act in the year 2005, the citizens of India had the right to seek any information from the government regarding any decisions or orders, copies of meetings and various other records pertaining to the transaction of the business. This has also been recognized as a fundamental right under Article 19, 1A of the Constitution of India by the Supreme Court of India. It has also been held in several decisions across the High Courts as well as in the Supreme Court that, the Right to Information Act always strengthens the citizenry of the country, and it is one of the foundations for a strong democracy.

The Supreme Court of India in the case of SP Gupta versus the President of India, which was decided in the year 1981, held that the Section 123 of evidence as to the affairs of state and Section 124 of official communications, which have been specifically mentioned under the Indian evidence Act, which along read, when you read it with Article 74 of the Constitution, as safeguard the high government and official secrets and any disclosure is prohibited in public interest unless the court is fully satisfied that the disclosure will not harm the public interest.

The Right to Information Act was enacted with the aim to build a regime of right to information for citizens, to secure access to information which are in the custody of the public authorities. The main objective was to promote transparency and accountability in the functioning of every public authority. Apart from this, there is also a provision for the preservation of the confidentiality of sensitive information.

Earlier, we had a regime which was under the Freedom of Information Act, whereas where the government was very reluctant to provide information, or provide access to information to the citizens. However, also in to the Right to Information Act of 2005, the Act provides an essential right under Section 6 are any citizen seek any information from the concerned government. But the right to seek information, as we all know, is not an absolute right. It carries with it certain restrictions mentioned under Article 19, clause two of the Constitution of India.

Restriction as reflected in Section 8 of the Right to Information Act, wherein the exemptions have been granted for disclosure of some information which are affecting the sovereignty and integrity of the country.

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RTI v. Official Secrets Act

- Effective implementation of RTI Act will provide a powerful means for fighting corruption and creates an environment which will help promote functioning of a more participatory democracy.
- In a mature democracy, RTI is an evolution to enable participation of people.
- Critiques of OSA say that, OSA has been conveniently used as smokescreen to deny members of public to access information.
- Arbitrarily invoked to deny information under RTI, classifying it as secret. Confidentiality became the Norm and Disclosure was an exception.
- Which law will prevail in case of a conflict?
 - S.8(i) Exemptions under 8(i) and OSA may not be considered in public interest outweighs harm to the protected interests.
 - S.22 of RTI provides for overriding clause wherein RTI will prevail over other laws including OSA.



Not just this, any information that is affecting the security, strategic scientific or economic interest of the country, and also the foreign relations, the public authority may not disclose or provide access of such information to citizens. Section 8, subsection 1 clearly exempts disclosure of information, on the grounds that I have already mentioned. If you look closely, the provision prohibits the authorities from giving out the information which are prejudicial to the interests of the country.

On the other hand, the primary objective of the Official Secrets Act, is to protect information which could be prejudicial, to the safety and security of the country. Now let us try to answer the dilemma as to which act will prevail, whether it is Official Secret Act, being the act of 1923, or is it the Right to Information Act of 2005. Official Secrets Act of 1923, provides for the state to classify information as secret or confidential and thereby prosecutes or makes provision for the prosecution of any person, who is found to be in violation.

On the other hand, the right to information regime is a move towards disclosure of information and the secrecy should be maintained only if the information pertains to any of the classes mentioned under Section 8 subsection 1. The Right to Information Act, under Section 8 subsection 2 clearly specifies that the public authority may allow the information, if the public interest outweighs the protected interests. This means, that the public interest shall be the sole

criteria for the public authority to decide whether any information has to be released to public or not.

Section 22 of the Right to Information Act, also clearly mentions that the right to information will prevail over the Official Secrets Act, with regard to the maintenance of secrecy and disclosure of information. The issue surrounding the right to information and official secrets have been in the news after the government refused to give out certain information. Recently in the case of Rafael jets procurement pricing, the Supreme Court has also said that the Right to Information law has revolutionized governance and overpowered the notions of protected information that have been created or carved out under the Official Secrets Act of 1923.

The government defended, the purchase and maintenance of secrecy about the pricing of Rafael jets on the grounds of security and friendly relations with foreign country. The government also alleged that the documents were stolen from the Ministry of Defence and, any such production before the Supreme Court as evidence, the value of such evidence under Section 123 is not legally acceptable. Government had decided to initiate prosecution under the Official Secrets Act for stealing of documents from the custody of the ministry, against N. Ram and the Hindu newspaper, which is, which was the first one to break this news.

But Supreme Court, advised the government that any information that is already available in the public domain, and there is no provision for publishing any information claimed as secret is available for prosecution under the Official Secrets Act. Even though both the Acts operate, operates in different planes and with different objectives, the conflict as to the access of information has been clearly mentioned under the right information regime.

So, if any information outweighs the protected interest, such information has to be released for the public to access. Previously, the Official Secrets Act was arbitrarily denied, invoked to deny the information to the citizens, to conclude, the effectiveness of any legislation, as we all know, is dependent on its enforcement. In this era of free flow of information, the officials handling the information should know what information has to be classified as confidential, and what information has to be released to the public.

The aspects of secrecy cannot be brought in to all forms of information. Authorities classifying any information as confidential should know that because of the fear of prosecution, under the law, and not under the Right to Information Act. But as a matter of ethics, the issues of defence and security should be given prominence and should be dealt with utmost seriousness.

In my opinion, the Act has to be further strengthened to address the issues of espionage and spying, by introducing more stringent provisions and archive provisions, causing harassment to innocence may have to be reviewed. Right to Information Act of 2005 has already laid down the pathway, decide what amounts to secrecy and confidentiality. Changes to the official secrets may be necessary and such issues has to be addressed for the greater public interest. Thank you.