

Right to Information and Good Governance

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Whistleblowers Protection Act and Right to Information – II

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If we look at the evolution of whistle blowing laws in India, it would be evident that the different events that led to the enactment of the Whistle Blowers Protection Act in 2014, was spread across 15 years and it required the intervention of both the government as well as the higher judiciary, particularly the Indian Supreme Court. Now, the first step towards enacting whistle blower protection legislation was taken by Mr. N. Vittal in 1999, who was then the Chief Vigilance Commissioner.

Now, Mr. Vittal had requested the law Commission of India to draft a bill that could persuade honest persons to report corrupt practices of public functionaries and could also safeguard the interest of the persons who are making such disclosures. The Law Commission after undertaking an exhaustive study and considering the needs and circumstances which are peculiar to the

Indian subcontinent, drafted the Public Interest Disclosure Protection of Informers in December 2001.

The Commission recognized the need to strike a balance between the Right to Free Speech and the Right to Know and it also stressed on the need to do away with corruption and the mismanagement of affairs in the governmental public sector. Now, unfortunately, the bill was not passed. The bill was followed by the gruesome assassination of Mr. Satyendra Dubey, a 31-year-old civil engineering graduate from IIT Kharagpur, who was gunned down by unknown assailants in November 2003.

And the death of Satyendra Dubey added momentum to the drive towards a comprehensive legislation that would afford protection to people who expose public frauds. Now Mr. Dubey was working on the Golden Triangle, the Golden Quadrilateral Project, a 12 million venture of the National Highways Authority of India, and he was martyred in Bihar nearly a year after he had written to Mr. Atal Bihari Vachpaye, the then Prime Minister of India, informing him about the public money that was being plundered in the implementation of the project.

Now his death triggered unprecedented public outrage and denunciation. In a country like India, the misappropriation of public money over multi crore government projects is extremely commonplace. The incident also depicted the triviality of the lives of whistleblowers, and it reinforced the struggle for enacting laws for the protection of whistleblowers. Now, two years later in 2005, an Indian Oil Corporation Officer Manjunath Shanmugam was murdered for sealing two petrol pumps that were selling adulterated fuel for 3 months.

When the pump started operating again a month later, Manjunath decided to conduct a surprise raid, and around twelfth November, 2005 he was also killed. So, these two events actually helped to add a lot of momentum to the drive towards enacting a Whistle Blower Protection legislation. Now, right after the death of Satyendra Dubey a writ petition was filed in the Supreme Court, and the apex court directed that until a suitable whistle blowing legislation is enacted, and appropriate machinery should be put in place that receives an axe on the complaints of the whistleblowers.

On the direction of the Supreme Court, the government notified a resolution in April 2004, which authorized the CVC that is the Central Vigilance Commission, to act as the designated authority for receiving written complaints or any kind of disclosure on any act of alleged corruption or abuse of official position by any central government employee or any person who works in a corporation, companies, society or local authority which is owned or controlled by the central government.

Now, it was around the same time that the Right to Information Act was enacted, that was the year 2005 and this Act provided a practical regime for the exercise of the Right to Information and to a great extent revolutionized the means through which the common man could have access to information which is under the control of public authorities. However, the Act does not provide protection to whistleblowers, although officials acting in good faith are afforded some kind of protection under the Act.

Now, this was followed by the Second Administrative Reforms Commission submitting its fourth report, 'Ethics and Governance'. Now the Second Administrative Reforms Commission was a commission which was inquiry commission and it was entrusted with the task of preparing a detailed blueprint for refurbishing the public administrative system. In its fourth report, it highlighted the vital role which are played by whistleblowers in providing information about corruption, and it also recommended the immediate enactment of a legislation for the protection of whistleblowers.

So, after the fourth report of the Second Administrative Reforms Commission, in 2010 the government drafted the Public Interest Disclosure and Protection to persons making the Disclosures Bill, 2010. This bill sought to replace the resolution, which authorized the Central Vigilance Commission to act as the designated authority, which was empowered by the government by the resolution 2004.

Now, the bill was referred to the Parliamentary Standing Committee, the Standing Committee made several recommendations to the bill and it also proposed that the name of the bill be

changed to the Whistle Blowers Protection Bill, the long-awaited struggle and the journey for the Whistle Blowers Protection Act ultimately saw the light of the day on the ninth of May 2014, when it received the assent of the President and it was finally enacted.

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Key provisions of the Whistle Blowers Protection Act, 2014



- Object - *disclosure of any alleged act of corruption or deliberate abuse of official power or conscious abuse of discretion by any public servant, to inquire into such revelation and to provide adequate protection against victimisation of the person making such complaint*
- **Public interest disclosure** - made by public servant or any other person including NGO. Section 3(d)-**disclosure** under the Act includes:
 - *Commission of an offence or the attempt to commit an offence by a public servant under the Prevention of Corruption Act, 1988;*
 - *Deliberate abuse of power or discretion by a public servant which causes verifiable loss to the Government or verifiable wrongful gain to the public servant or to any third party;*
 - *Commission or attempt to commit an offence of a criminal nature by the public servant.*



Now let us look at the key provisions of the Whistle Blowers Protection Act of 2014. To start off with the objective of the Act, the Act is a three-fold objective. First, to establish a mechanism which is well equipped to receive complaints of disclosure of any alleged act of corruption or abuse of official power by a public servant. Second, to inquire into such disclosures and third to provide adequate protection against victimization to any person who makes such disclosure.

Now, why has the word alleged been used? It is because the disclosure has been made only about a corruption which is alleged. It is just an allegation and it has yet to be proved. Now an interesting fact about the Act is though it is called the Whistle Blowers Protection Act, the term whistle-blower has not been defined anywhere under the Act. But the word complainant has been used to denote a person who makes a public interest disclosure.

So, complainant in every sense means a whistle-blower. Now, the Act allows any person including a public servant, or a non-governmental organization, and any general a person of the general public to make a public interest disclosure to whom, now this public interest disclosure has to be made to a competent authority, who is a competent authority? We will come to that a little later.

Now, what kind of disclosure is qualified as a public interest disclosure under the Act has been defined under Section 3(d) and as per Section 3(d), any kind of disclosure about commission or attempt to commit an offence by a public servant under the prevention of corruption act, any deliberate abuse of power or discretion of a public servant which causes loss to the government or wrongful gain to the public servant or a third party and thirdly, any information about commission or attempt to commit an offence which is of a criminal nature by a public servant can be reported to the competent authority and it could amount to a disclosure or a public interest disclosure under the Act.

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Offences committed by public servants that may be reported as a public interest disclosure

- taking gratification other than legal remuneration for an official act,
- Procuring any valuable thing without consideration, or for a consideration which is inadequate
- misappropriating or converting for own use any property entrusted to him or under his control
- acquiring any valuable object or monetary advantage by abusing official position
- being in possession of pecuniary resources or property disproportionate to his known sources of income



Now, the Act says that any kind of commission or attempt to commit an offence by a public servant under the prevention of corruption act also qualifies as an offence under the Whistle-blower Protection Act of 2014 and any disclosure or revelation about any such offence committed by a public servant may be reported to the competent authority. Now, what are these offences which are identified under the prevention of corruption Act? First, taking gratification other than legal remuneration for an official act.

Now, this may be defined as bribe. So, a public servant who is supposed to do an official act takes bribe in addition to a legal remuneration, which is already getting for the job that he is doing. Secondly, procuring any valuable thing without consideration or for a consideration which

is inadequate from any person who is involved in any proceeding or business executed by such public servants.

Now, if I have to give an example of this now for instance, a public servant has been given the responsibility of looking into the building of a park, a children's park in a public space. Now what does this public servant do? He asks the contractor to deposit some bags of cement or some bricks, either free of cost to his residents or for a cost which is grossly inadequate. Now, the prevention of corruption act also identifies certain criminal acts of misconduct, that is criminal misconduct, and it punishes such criminal misconduct, when committed by a public servant.

Now, what are these acts; firstly, misappropriating or converting for the public servants own use any property which has been entrusted to him or which is under his control. Now, this can be any kind of goods which the public servant is supposed to use for official purposes, he takes them for his own personal use. Second, it could be acquiring any valuable object or monetary advantage by abusing his official position.

Third, it could be in possession of any pecuniary resources that is any monetary resources or any property, which is disproportionate to his known sources of income, that is, if a public servant is found in possession of money, which he is not legally deserving of, then that can also be seen as an act of criminal misconduct and a public interest disclosure may be made to the competent authority under the Whistle Blowers Protection Act against any such action taken by a public servant.

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- *Competent Authorities identified under the Act*

- *Prime Minister or Chief Minister of a State or Union Territory*
 - *Chairman of the Council of States or the Speaker of the House of the People and the Chairman of the Legislative Council or the Speaker of the Legislative Assembly*
 - *High Court*
 - *Central Vigilance Commission*
 - *State Vigilance Commission*
 - *authority or authorities specified by the Central Government or the State Government*
- *Public interest disclosure - how to be made*
 - *made in good faith*
 - *within a period of seven years*
 - *no anonymous complaints*
 - *identity of the complainant and documents and information furnished by him as the case shall not be revealed unless...*



A few competent authorities, that is authorities who can receive complaints or a public interest disclosure from a whistle-blower have been identified by the Whistle Blowers Protection Act. Now, as per the provisions of the Act, who are these competent authorities? It can be the Prime Minister or the Chief Minister, in relation to members of the Union Council of Ministers or of the state or union territory. Secondly, the Chairman of the Council of States or Speaker of the House of the people, and the chairman of the Legislative Council or the Speaker of the Legislative Assembly, there may be again competent authorities for any act or this act of disclosure, which is made against the members of the Union Parliament or against a member of the State Legislature.

The High Court of the state has also been identified as a competent authority in relation to judges but these judges are not Supreme Court or High Court judges. Apart from High Court and Supreme Court judges, other judges of the lower judiciary, any Liquidator, Commissioner, Receiver Arbitrator or other officials who discharge adjudicatory functions or work towards the administration of justice. For these officials, the High Court may be the competent authority.

Then the Central Vigilance Commission or any other authority stipulated by the Central Government may also be a competent authority under the Act in relation to any Central Government employee or any person who is working for an authority, society or company owned or controlled by the Central Government or Government Company. Then it can also be

competent authority for any person who is involved in the conduct of elections of the Union Parliament or State Legislature.

Then any Chairman, member or employee of any Central Service Commission or Board, then the Vice Chancellor, the governing body member, any professor or employing for Central Government University or any office bearer or employee of any Educational, Scientific, Social, Cultural, or other institution which receives any financial assistance from the Central Government. Similarly, the State Vigilance Commission can be appointed as the competent authority for the counterparts of the people against whom public interest disclosures may be made to the Central Vigilance Commission.

So similarly, the State Vigilance Commission can for certain officials, be the competent authority. Then, in addition to these authorities, any other authority identified by the Central or the State Government by notification in the Official Gazette can be a competent authority. Now, how is a public interest disclosure made? It has to be made to the competent authority in good faith and the declaration has to be given by the complainant that he believes that the information that he is disclosing is true.

Now the disclosure has to be made in writing or it can also be sent in any electronic form like an electronic mail message or an email and this disclosure has to be made within 7 years from the date of the occurrence of the Act. However, the Whistle Blower Protection Act does not entertain any anonymous complaints. So, the complainant has to reveal his identity. But the Act has taken several measures to ensure that the identity of the complainant is not revealed by the competent authority. But the Act also identifies 3 circumstances when the identity of the complainant may be revealed.

What are these circumstances? Firstly, if the complainant or the public servant who is making a public interest disclosure, himself reveals his identity. Secondly, it may so happen that the competent authority may have to seek certain comments, explanations, or reports from the head of the department or any organization where the public servant against whom a complaint has been made is working.

In such circumstances the identity of the complainant with the permission of the complainant with written consent of the complainant has to be revealed to the head of the organization, to tell that who is the person who has made the complaint and on what grounds and inquiry or something has to be initiated against the public servant who is working under that particular authority. Thirdly, it may again become necessary to reveal the identity of the complainant to produce any document or information if it is asked for by a Court of Law.

But other than these circumstances, the Whistle Blowers Protection Act strictly penalizes any person who negligently or with mala fide intention reveals the identity of the complainant and what can be the punishment for this? A person who reveals the identity negligently or with mala fide intentions may be punished with imprisonment for up to 3 years and the person may also have to pay fine which may extend to 50000 rupees.

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- *Inquiry on receipt of public interest disclosure*
 - If satisfied, Competent Authority will seek response from the Head of the Department of the organization, authority, board, corporation or office
 - Shall recommend to public authority to one/more of following steps:
 - Commencing formal proceedings against the delinquent public servant
 - Taking suitable administrative measures to remedy the loss caused to the Government
 - Recommending the initiation of criminal proceedings against the public servant concerned if the facts and circumstances of the case so warrant
 - Recommending corrective measures to be taken
 - Taking any other measure which may be necessary for the purpose of the Act
- *Powers of Competent Authority*
 - all the powers of a Civil Court
 - proceedings before it shall be deemed to be judicial proceeding
 - Annual report of activities to be submitted before Central/State Govt.
- *Protection afforded by the Act to person making disclosures*



If we had to look at what is the process of inquiry after a public interest disclosure is made. Now, after receiving a public interest disclosure, the competent authority has to first verify that the complainant has actually made the disclosure and that the complaint has been made by this person who claims to have made the disclosure. After that the competent authority has to make certain inquiries to decide whether the complaint made also merits further investigation.

Why is this? Because several vexatious like revengeful or frivolous complaints may also be filed. To ensure that no kind of investigation or inquiry is initiated on the basis of a frivolous complaint, the competent authority has to first verify that the complainant has indeed made a public interest disclosure. Now, if the disclosure is found to be vexatious or frivolous, or one that does not merit further investigation, the matter will be closed there and then, but an opportunity shall be given to the complainant of being hurt.

As to why, if he has to say that, no, I think the investigation shall be carried on should be carried on. Now, the Act does not let of people who make fabricated or frivolous disclosures and any person who makes a disclosure with a mala fide intention and with full knowledge that the disclosure is false or deceptive can be punished and the punishment can be imprisonment of up to 2 years and fine which may extend to 30000 rupees.

So, after this, what happens the competent authority also has to seek response from the head of the department of the Organization, Authority, Board, Corporation or Office concern, if it is satisfied that this head of the department does be minimized in the objective of the Act. Now, the public authority to whom the recommendation has been made, has to decide on the recommendation within 3 months or at the maximum 6 months. If the public authority does not agree to the recommendation, it has to record its reasons for the disagreement. And the final outcome of the complaint and the action taken has to be intimated to the complainant or the public servant by the competent authority.

So, the person who is actually making the complaint deserves to know what actually happened with his complaint and this information of the ultimate outcome of the complaint has to be given by the competent authority. Now, what are the powers of the competent authority? The competent authority has all the powers of a Civil Court for the purpose of conducting an inquiry and all proceedings before it are deemed to be judicial proceedings. So, the competent authority also has the power to require documents to be produced before it or it can also ask people to come before it and record the person's evidence.

Now, certain protection has to be awarded or afforded to the person who makes public interest disclosures and this is also one of the objectives of the Act. Now, if any person is actually victimized for making a public interest disclosure, then an application can be filed to the competent authority and the competent authorities shall take action or give directions to the public servant who is alleged to have committed the wrongful act or the public authority under which the public servant works to ensure that the person who is being victimized is safeguarded or further victimization is prevented.

Now, then it may so happen that the victimization to maybe of such a level that the person or the public servant who has made a complaint may be removed from office. So, the powers of the competent authority also include the power to direct that the public servant who has been removed for making a disclosure is reinstated to his official position but before any give giving any direction and an opportunity of being heard is given to all the concerned parties.

Now, if any person deliberately disobeys the direction of the competent authority, then the person can be penalized under the Act and the penalty could be paying a fine of up to 30000 rupees. The competent authority also affords protection, including police protection and through government authorities to the complainant, the public servant, who may have made the complaint, witnesses and any other person who may render assistance in any kind of inquiry against a public interest disclosure. If the competent authority is satisfied that such protection is required, but it is not that all the orders of the competent authority are final, because orders of the competent authority may be appealed against within 60 days from the date of the order before the High Court within whose jurisdiction the cause of action arises.