



# सूचना के जन अधिकार का राष्ट्रीय अभियान

## NATIONAL CAMPAIGN FOR PEOPLE'S RIGHT TO INFORMATION

### **Make Public Private Partnership Projects RTI Compliant**

#### Press Statement

The NCPRI is extremely disappointed by the Union Law Ministry's reported legal opinion that Public Private Partnership Projects (PPPs) do not fall within the ambit of the *Right to Information Act, 2005*. The legal opinion itself has not been officially disclosed yet. Citizens, people's movements and the Central Information Commission have for long demanded that a mechanism be established for ensuring transparency at all stages of design and implementation of PPP projects. PPPs and government departments have opposed this demand arguing that these projects are implemented by private entities and that government departments or agencies do not hold or control majority share in the equity base of the PPP.

The NCPRI draws the attention of the Government to its own description of PPPs contained in its notification regarding the procedure for their approval. The annex to the notification issued by the Department of Economic Affairs issued in November 2005 reads as follows:

*"PPP projects in sectors such as roads, ports, airports and urban infrastructure are not ordinary private sector projects, which are governed by competitive markets, where prices are determined competitively and government resources are not involved. In the PPP projects, there would be need for due diligence by the government because the projects typically involve:*

- [a]. Transfer of public assets, including land (e.g. an existing road or airport facility);*
- [b]. Delegation of governmental authority to collect and appropriate user charges that are levied by force of law and must therefore be 'reasonable';*
- [c]. Provision of services to users in a monopoly or semi-monopoly situation, which imposes a special obligation on the government to ensure adequate service quality; and*
- [d]. Sharing of risks and contingent liabilities by the government, e.g. when claims are made under the respective agreements or when the Central Government has to provide a backup guarantee for non-performance by the entity granting the concession. Even where an explicit guarantee is not included there is a danger that non-performance on the part of State Governments could attract claims under bilateral investment promotion agreements."*

The aforementioned description makes it amply clear that PPPs fall within the definition of the “State” as understood in Article 12 of the Constitution and often exercise sovereign functions such as collection of tolls, fees and similar kinds of charges. The Supreme Court of India has laid down the test for determining whether or not an entity falls within the definition of “State”, in several judgements ranging from *Ramana Dayaram Shetty v International Airports Authority of India* [AIR1979SC1628] and *Ajay Hasia and Ors v Khalid Mujib Sehravardi and Ors* [AIR1981SC487] to the more recent- *Binny Ltd. and Anr. v V V Sadasivan* [2005 (6)SCC 657]. Where an agency despite being in the private sector performs a public function; or provides a public service; or is in a position of monopoly guaranteed by Government action or policy; or where public assets have been transferred to it for a public purpose, it must be treated as an agency of the State. The Delhi High Court has also used the same test to determine the status of at least four agencies as public authorities under the RTI Act, namely the Commonwealth Games Committee, the Indian Olympic Association, Sanskriti School and the National Stock Exchange.

The NCPRI believes that that PPPs unequivocally fall within the definition of the terms “State” and “public authority” and have no option but to comply with their obligations of transparency under the RTI Act. Further all PPPs receive large sums of money from the concerned government in the form of viability gap funding or assistance in kind such as land on lease or tax concessions. There is a strong element of substantial financing of the entities implementing PPPs undertaken directly or indirectly by the Central or State Governments. This is also a valid criterion for treating PPPs as public authorities under the RTI Act.

The NCPRI calls upon the Government to immediately notify all PPPs as public authorities under the RTI Act. Every government department or public sector agency responsible for a PPP must also be required to publicise all relevant information about it under the provisions of the RTI Act.

#### **For the National Campaign for People’s Right to Information**

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New Delhi  
25/07/2011