

**Analysis of CIC's Double Bench Decision on Disclosure of Immovable
Property Statements of Public Officials- February 2010**
July 02, 2010

Dear all,

I have given below a brief analysis of a double-bench ruling of the Central Information Commission (CIC). In this decision the Commission has remanded the disputed matter back to the Central Public Information Officer (CPIO). However the reasoning elucidated in the decision has the undesirable effect of opening the door to retrogressive interpretation of the provisions relating to third party information. To access the decision readers may click here: <http://cic.gov.in/CIC-Orders/AT-22022010-01.pdf>

What was this case all about?

In the matter of *P P Rajeev v Cochin Port Trust* (Appeal No. CIC/AT/A/2008/00707) a double bench of the CIC gave its decision on February 22, 2010. The subject matter of the dispute was access to "copies of the Statement of Assets filed by the Class I & II Officers of Dock Labour Division of Traffic Department of Cochin Port Trust, Cochin for the calendar year 2006 & 2007 (2 years) sought by the applicant" (emphasis supplied). The CPIO rejected the application on the ground that the information sought was personal information of third parties protected under section 8(1)(j) of the RTI Act. The requestor filed a first appeal before the designated authority. The appellate authority upheld the decision of rejection stating that the applicant "did not have an automatic right to be revealed the information (sic) he had sought and that there was no public interest cited by him that would warrant disclosure of admittedly personal information of third-parties".

The CIC double bench examined the meanings of the term 'personal' and 'privacy' and their application to the information contained in assets statements filed by public officials. It also examined the procedures required to be applied under Section 8(1)(j) which exempts personal information from disclosure on certain grounds and also Section 11 which provides for a procedure to seek objections from third parties if the request is for information that relates to them. It has quoted selectively from a couple of decisions of the Delhi High Court in related matters, in support of its reasoning, and has remanded the matter back to the CPIO.

What are the problems with this decision?

1) The decision asserts that all kinds of personal information can be disclosed only in public interest:

At paras 12-15 the meaning and implications of the terms 'personal' and 'public' are discussed with references to dictionaries and legal lexicons. Para 16 discusses section 8(1)(j) and the two circumstances in which personal information may not be given i.e., if its disclosure has no relationship to any public activity or public interest or if disclosure will cause unwarranted invasion of privacy. Then the bench makes a conceptual jump and states as follows: "According to the wordings of this Section, once it is established that a certain category of information is personal, the only reason for its disclosure should be it serving public interest." **This conceptual shift is uncalled for, untenable and this assertion is problematic.** The most personal information about an individual is his/her name. Disclosure of this information may not in all circumstances violate one's privacy. A full bench of the Andhra Pradesh High Court decided that even names of police officers who are involved in extra-judicial killings must be disclosed in the First Information Report filed with the police about such an incident (See: *A P Civil Liberties Committee and Others v Government of Andhra Pradesh*, MANU/AP/0031/2009. An appeal against this decision is pending before the Supreme Court). Under the RTI Act personal information may not be disclosed under the two circumstances mentioned in Section 8(1)(j), ordinarily. **If those circumstances are not attracted then there is no ground for refusing access to personal information. The CIC bench's decision unnecessarily widens the scope of the privacy exemption provided in the RTI Act.**

2) Problematic interpretation of provisions relating to third party procedure:

At paras 17-19 the bench discusses the procedure laid down for consulting third parties in relation to an RTI application. This discussion flows from the previous paras regarding what constitutes personal information and when it should not be disclosed. The conceptual jump which the bench takes at para 16 continues to have its regressive impact in these paras also. At para 20 the bench states as follows: "From the wordings of these two Sections, it can be fairly inferred that while the RTI Act uses 'public interest' as generally the reason for overriding the exemptions which might apply to an information, in the matter of personal information, it uses 'public interest' as the essential precondition which needs to be satisfied before CPIO authorizes disclosure of this category of information. The evaluation of disclosure of a confidential third-party information has been made even more stringent in Section 11(1) where a CPIO is also to assess imperatives of public interest vis-à-vis possible injury to a protected interest before deciding on the disclosure of a confidential-third-party-information." **I respectfully submit that the CIC bench has conflated the two procedures explained in Sections 8(1)(j) and 11. These are not identical procedures nor is one linked to another in the decision-making tree under ordinary circumstances.**

Section 8(1)(j) relates to an exemption to the general rule of disclosure given in the RTI Act. If the PIO invokes this sub-section to reject a request, then that decision is subject to the public interest override mentioned in that very sub-section and also to the general public interest override mentioned in Section 8(2). Unlike other exemptions in relation to personal information, the PIO is empowered to conduct the 'balancing test' and determine if the information may be disclosed in the public interest. If such public interest outweighs the harm caused to the protected interest then the information may be disclosed. If the PIO rejects the request that decision may be overturned on public interest grounds by the appellate authority or the Information Commission under Section 8(2).

However Section 11 is not an exemption-related provision. It is a procedural provision.

Section 11(1) begins in this manner: "Where a CPIO or an SPIO, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act..." (emphasis supplied). **The import of this opening line is that the CPIO has made up his/her mind to disclose the information. In other words it implies that under ordinary circumstances the PIO has applied his/her mind and found that none of the exemptions mentioned in Section 8(1) are applicable to the information requested and has therefore determined that it is fit for disclosure.** There is further support for this interpretation in Section 11(2) which states as follows: "Where a notice is served by the CPIO or SPIO, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure." (emphasis supplied). **The RTI Act expects the third party to be told that the PIO is proposing to disclose the information and therefore make a representation, objecting to such disclosure. The CIC bench's reasoning does not take into account these crucial phrases at all.** The reason why such extra protection has been provided for third party information is because the PIO may not be fully conversant of all the interests that need to be balanced against each other. So the third party is given an opportunity to make a representation against disclosure and the PIO must keep that representation in mind while making a final decision.

If after taking into consideration the third party's objection/s to disclosure the PIO agrees with those objections and changes his/her mind even then he must justify his decision of rejecting the request based on the grounds provided in Sections 8(1) and 9. This is because, according to section 7(1), a decision of rejection must be based only on the grounds mentioned in Sections 8 and 9. No other reason is valid. So if the PIO is unable to match the objections of the third party with the grounds mentioned in sections 8(1) and 9, he has no choice but to make a decision favouring disclosure and communicate this decision to the third party and the applicant. The third party has a right to challenge this decision before the first appellate authority and later before the relevant Information Commission. Until finality is reached in the matter the information originally requested is not to be disclosed to the applicant. (For a detailed

discussion on the third party provisions, please take a look at our Guidance note on the subject available at this URL: http://www.humanrightsinitiative.org/publications/rti/third_parties_appl_appeals.pdf

There could be a second scenario - an extraordinary circumstance where the PIO finds that the requested information attracts the exemption under section 8(1)(j) but he/she believes that the public interest is served better by disclosure. He/she will nevertheless have to invoke Section 11 and make contact with the third party if the information requested relates to or has been supplied by such third party and if that third party has treated that information as being confidential in nature. If after taking the third party's objection into consideration the PIO changes his/her mind, it means that he/she has found that the protected interest outweighs the public interest. This means he/she goes back to invoking section 8(1)(j) to deny access. It is only in this context that the procedures given in Section 8(1)(j) and Section 11 will overlap. These procedures equally apply to all kinds of third party information to which Section 11 applies and not merely to personal information of a third party. So the hairsplitting argument between public interest as a general reason to override 9 out of 10 exemptions but as an essential precondition to override the exemption relating to personal information in Section 8(1)(j) is not very convincing.

3) Applying the CIC's reasoning to disclosure of assets statements:

At para 25 of the CIC bench's decision the effect of the confusion created by the conflation of Sections 8(1)(j) and 11 becomes more apparent. The bench states as follows: "Therefore, a statement of immovable assets of a public servant held by a public authority meets the two conditions laid-down in Section 11(1), viz. (1) It is a third-party information and (2) It is held confidentially. Therefore, any decision to disclose or not to disclose such information will have to be made in the context of Section 11(1). The parties to whom such information might relate to will have to be consulted and their objection, if any, to the disclosure of such information will have to be factored in by the CPIO before he decides to disclose or not to disclose such an information." **We have already stated above that under both ordinary and extraordinary circumstances, Section 11 may be invoked only if the PIO intends to disclose the information. It is respectfully submitted that this position in law has not been taken into consideration by the CIC bench. If this interpretation of Section 11 is taken into consideration the CIC's reasoning in para 25 will imply that assets statements of public officials belong to a category of information that is always fit for disclosure, however the third party needs to be consulted as it has been held in confidence by the public authority.**

Consequent to our reasoning, in the instant case, the action of the CIC bench in remanding the matter back to the PIO may not be entirely appropriate. The PIO and the AA have already found that section 8(1)(j) is attracted and that the information is not fit for disclosure. Consequently the PIO rejected the request and the appellate authority upheld that decision of rejection. Therefore the CIC bench cannot compel the PIO to change his mind and invoke Section 11 to issue notice to the third parties because he did not intend to disclose the information in the first place. By sending the matter back to the CPIO the bench is forcing the CPIO to change his mind. In my opinion this is not allowed under Sections 11 or 19 at all. The issue of disclosure of the statements of assets ought to have been decided by the CIC bench itself.

It is respectfully submitted that the effect of the bench's decision is that it does not seriously take into account the opinion given by the Cabinet Secretariat during the consultation held on the subject of disclosure of assets statements. The Cabinet Secretariat wrote to the CIC as follows: " The law in the matter under discussion is clearly laid down by section 8(1), read with section 11 of the RTI Act, 2005 and it is within the domain of the CPIO of each department or office to take a decision on the RTI applications received by him." **The CIC bench's ruling unnecessarily forces the CPIO to make a decision in this matter all over again.**

4) No guidance for the PIO on the tests to be applied before making a decision regards access:

Another lapse that must be pointed with utmost respect to the CIC bench, is that the crucial three pronged test laid down by the Delhi High Court for determining the public interest in disclosing personal information of public servants has not been reiterated in its ruling. In the matter of *CPIO, Supreme Court of India v S C Agarwal* the Delhi High Court laid down the following tests (for the text of the decision please click on: http://www.humanrightsinitiative.org/programs/ai/rti/india/national/2009/email_alerts/cpio_supreme_court_vs_sc_agarwal_delhi_high_court_2009.pdf)

- "1) Whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;
- 2) whether the information is deemed to comprise the individual's private details unrelated to his position in the organisation, and
- 3) whether the disclosure will furnish any information required to establish accountability or transparency in the use of public funds;"

As a large majority of the PIOs will not have easy access to this decision, reiterating this test would have been of great assistance to the CPIO in the instant case as well as to others. Nor did the CIC bench mention in its selections from the aforementioned judgement of the Delhi High Court, this crucial para about the nature of protection available for personal information of public officials: **"A private citizen's privacy right is undoubtedly of the same nature and character as that of a public servant. Therefore, it would be wrong to assume that the substantive rights of the two differ. Yet, inherent in the situation of the latter is the premise that he acts for the public good, in the discharge of his duties, and is accountable for them. The character of protection, therefore, afforded to the two classes – public servants and private individuals, is to be viewed from this perspective. The nature of restriction on the right to privacy is therefore of a different order; in the case of private individuals, the degree of protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake."**

Perhaps these matters will be dealt with differently when the issue comes back to the CIC in the same matter or in another case.

Please feel free to be critical of the reasoning provided in this analysis.

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