CHAPTER 1
INTRODUCTION

1.1 Right to information- An introduction

The free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to effective respect for human rights. In the absence of respect for the right to freedom of expression, which includes the right to seek, receive and impart information and ideas, it is not possible to exercise the right to vote, human rights abuses take place in secret, and there is no way to expose corrupt, inefficient government. Central to the guarantee in practice of a free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public. These bodies hold a vast wealth of information and, if this is held in secret, the right to freedom of expression, guaranteed under international law as well as most constitutions, is seriously undermined.1

Access to information is a crucial element in the effort to reduce corruption, increase accountability, and deepen trust among citizens and their governments. Public access to government-held information allows individuals to better understand the role of government and the decisions being made on their behalf. With an informed citizenry, governments can be held accountable for their policies, and citizens can more effectively choose their representatives. Equally important, access to information laws can be used to improve the lives of people as they request information relating to health care, education, and other public services.2

The importance of the right to access information held by public bodies, sometimes referred to as the right to know, has been recognised in Sweden for over two centuries. Importantly, however, over the last ten years, it has gained widespread recognition in all regions of the world.

A right of access to information held within government institutions is usually justified as an instrument for promoting political participation. It has been argued that access is necessary for the realization of the basic rights to freedom of opinion and expression that are guaranteed in the United Nations Declaration on Human Rights, subsequent human rights declarations, and many national constitutions. A related but stronger argument is that access

1 'Freedom of Information: A Comparative Legal Survey' by Toby Mandel, extract from foreword by Abdul Wahed Khan, Assistant Director-General for Communication and Information, UNESCO.
2 'Access to Information: A Key to Democracy' edited by Laura Neuman, extract from foreword by Jimmy Carter.
is essential for persons to realize their basic right to participate in the governing of their country and live under a system built on informed consent of the citizenry.\(^3\) In any state, and particularly in states where the policy-analysis capabilities of civil society are poorly developed, political participation rights cannot be exercised effectively without access to government information.\(^4\)

Knowledge is power, and transparency is the remedy to the darkness under which corruption and abuse thrive. Democracy depends on a knowledgeable citizenry whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice, and hold their public officials accountable. When the government and quasi-governmental agencies perform under a veil of secrecy, people are denied the right to know about public affairs, and the press led only to speculate and subsist on rumors.\(^5\)

Meaningful participation in democratic processes requires informed participants. Secrecy reduces the information available to the citizenry, hobbling their ability to participate meaningfully.\(^6\)

The freedom of information is gaining acceptance in many of the new constitutions adopted in countries undergoing democratic transition. The laws and policies are being promulgated to give practical effect to this right by a rapidly growing number of countries and international organisations.

A fundamental value underpinning the right to know is the principle of maximum disclosure, which establishes a presumption that all information held by public bodies should be subject to disclosure unless there is an overriding public interest justification for non-disclosure thereof. This principle also implies the introduction of effective mechanism through which the public can access information, including request-driven system as well as pro-active or *suo moto* publication and dissemination of key material by the custodians of such information.\(^7\)

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\(^3\) Articles 19 and 21 of the United Nations Declaration of Human Rights.

\(^4\) Access to government information: An overview of issues, paper by Dr. Alasdair Roberts (This paper was presented in The Carter Center’s Transparency for Growth Conference, May 1999).

\(^5\) Access to Information: A Key to Democracy edited by Laura Neuman published by Carter Centre, Chapter 1, page 5.


\(^7\) *Freedom of Information: A Comparative Legal Survey:* by Toby Mandel, extract from foreword by Abdul Waheed Khan, Assistant Director-General for Communication and Information, UNESCO.
A number of questions face those tasked with drafting or promoting legislation guaranteeing the right to know in accordance with the principle of maximum disclosure. How should the regime of exemptions be crafted so as to strike an appropriate balance between the right to know and the need for secrecy to protect certain key public and private interests? How extensive should be the obligation to publish and disseminate information and how can the law ensure that this obligation grows in tune with technological developments which significantly reduces publication cost? What procedures for requesting information can balance the need for timely, inexpensive access against the pressures and resource constraints facing civil servants? What remedy should flow to an individual when his request for information has been refused or inordinately delayed to defeat its purpose? Which positive measures need to be taken to change the culture of secrecy that pervades the public administration in so many countries, and to inform the public about this right?

The importance of the right to information or the right to know is an increasingly constant refrain in the mouth of development practitioners, civil society, academics, the media and even governments. Every country in the world needs adequate checks and balances on the exercise of public power, and the right to information is proving an effective tool in this direction. The right to information can be particularly effective in exposing corruption where there are few other safeguards, as grassroots experience in India with this right has amply demonstrated.

Disraeli\(^9\) stated that “as a rule, he or she who has the most information will have the greatest success in life. Success, if measured as the increase in transparency in government, and thus decrease in corruption, and the citizen’s capacity to exercise her rights, is achievable through the passage, implementation and enforcement of a strong access to information Act. Access to information is a cornerstone of democracy.”\(^10\)

To fully appreciate the importance of information, it would be worthwhile to go in for a theoretical analysis of information, its importance in human relationships and its treatment in the state or civil society. The argument is likely to be advanced that citizens have a right to expect more information from their government than is currently the case notwithstanding the initiatives taken recently by various governments. A well-drafted legislation can go a long

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\(^9\) *Freedom of Information: A Comparative Legal Survey* by Toby Mandel.

\(^10\) *Access to Information: A Key to Democracy* edited by Laura Neuman published by Carter centre, Chapter 1 page 6.
way to redressing the current imbalance. It can help to a large extent in creating a better-informed public and mark a beginning for fuller participation of individuals and groups in the governance. Claims and counterclaims about freedom of information are couched in terms of a theory of democracy by their respective proponents, often unwittingly. An attempt is being made here to unpack and analyse these claims. Our capacity as human beings to acquire, use and store information is essential for our survival. While information itself is important, our ability to discern the degree of the reliability of the information provided is essential in the exploitation of resources or relationships and in the exposure of sham for public good.\textsuperscript{11}

1.2 Concept of exemptions and right to information

The growth of governmental power, quite simply, necessitated greater safeguards against abuse. ‘Secrecy, being an instrument of conspiracy’, said Bentham, ‘ought never to be the system of a regular government’.\textsuperscript{12} His appeal is to a political morality to which government must adhere and which, for all Bentham’s apprehensions on extending the franchise,\textsuperscript{13} is sympathetic to representative democracy, and especially publicity ‘in matters of government’. ‘Without publicity, no good is permanent; under the auspices of publicity no evil can continue’. Secrecy is the climate in which, at worst, those placed in government would abuse the power which had been given to them. It protected misrule. Publicity, regular elections and a free press were needed to safeguard the electorate from their chosen governors – from the excesses of ‘bullies, blackguards and buffoons’. The risk that mistake or perversity in the electors choice would increase as the franchise was extended was the dilemma Bentham found. Much has been made of this dilemma in analysis by political theorists.\textsuperscript{14}

Bentham argued for three exceptions to a prohibition on government secrecy: where publicity would assist an enemy of the state, where it would harm the innocent, and where it would inflict unduly harsh punishment on convicted persons. We cannot envisage arguments which would establish and successfully support the need for no restriction on freedom of information. The difficulty lies in allowing government prerogative alone to call the tune.

\textsuperscript{11} Extract from \textit{Freedom of Information, The Law, the Practice and the Ideal} by Patrick Birkinshaw published by Cambridge University Press, pages 18 & 19.
\textsuperscript{13} Rosen, Jeremy Bentham, notes now the Code stipulated that no one could be a member of the legislature who had not been admitted and successfully examined in the system of education prescribed for judges and senior civil servants.
\textsuperscript{14} C. B. Macpherson, \textit{The Life and Times of Liberal Democracy} (1977).
The last note of caution on democracy and information concerns power groups that are not ostensibly governmental, but which may be private and professional or trade associations and unions, and which are often protected by oaths, duties, or a culture, of confidentiality. There are arguable reasons why confidentiality must be maintained or not maintained in various relationships.

These relate to individual respect and integrity. A problem arises when the private body in question exercises considerable influence in public life but insists on confidentiality in its operations to such an extent that it is effectively its own master. A lack of information facilitates a lack of accountability for the exercise of power and influence and the impact these forces have upon the public welfare where democratic controls are absent.15

Every access law identifies exemptions to the right of access - that is, provisions that permit institutions to withhold certain kinds of information. The need for exemptions is not disputed, and in some instances there is wide agreement about the appropriate definition of exemptions. However, there is no consensus about the definition of exemptions when information relates to important state interests.

The least contentious exemptions are also the most frequently used. These provisions balance access rights against the privacy rights of other individuals and the right to commercial confidentiality. For example, laws typically allow institutions to deny access to information about other persons if the release of that information would be an unreasonable invasion of their privacy. These laws recognize that there are circumstances in which personal information should be released despite the invasion of privacy, such as a threat to public health or safety. In such circumstances, other persons are given a right to appeal the institution’s decision to release their personal information. Similar arrangements are used where individuals request access to confidential information supplied to government by commercial organisations.

Greater controversy arises over exemptions designed to protect important state interests. Here, governments generally push for wide discretion to deny requests for information. Critics argue that these broadly-defined provisions allow governments to evade accountability and undermine citizens’ ability to exercise their political participation rights.

15 From 'Freedom of Information' by Patrick Birkinshaw, Chapter 1, page 26.
For example, access laws vary widely in their treatment of information relating to internal deliberations about policy or the management of public institutions. All laws give some kind of protection to this information, on the premise that secrecy is essential to ensure ‘open, frank discussions on policy matters’. But the degree of protection varies widely. U.S. law obliges institutions to show that disclosure would cause injury to the quality of government decision-making. However, the Canadian law protects these records even when there is no evidence that harm would be caused by disclosure, and precludes independent review of decisions to withhold certain Cabinet records.

The British law, proposed in 1999, takes a mixed approach, adopting a blanket exemption of all material relating to ‘the formulation or development of government policy’ without proof of harm, and also an exemption of information where disclosure would be likely to inhibit ‘the free and frank exchange of views’ or would ‘otherwise prejudice the effective conduct of public affairs’. The Australian law also allows Cabinet ministers to issue ‘conclusive certificates’ that limit the ability of tribunals to review their decisions to withhold this information.

Governments are also reluctant to disclose information relating to national security, defense, and international relations. The American approach requires institutions to show that disclosure of classified material would cause harm to national security. However, critics argue that this relatively narrow exemption is weakened in practice by the diffusion of authority to make classification decisions and a tendency to ‘over-classify’ records. The laws of Ireland and New Zealand require proof that harm will be caused by disclosure but allow ministers to issue certificates preventing review of their decisions to deny access. Australia permits non-disclosure without proof of harm and also allows ministers to issue certificates limiting review. The 1999 British proposal denies any right of access to information held by some security and intelligence agencies and allows ministers to issue certificates limiting review of decisions to withhold information relating to national security that is held by other agencies.

There is similar variation in the treatment of information relating to other state interests. In Ireland and New Zealand, ministers may issue certificates limiting access to

17 United Kingdom Freedom of Information Bills, Section 28.
19 United Kingdom Freedom of Information Bill, Sections 18 and 19.
information about law enforcement. The British government proposed to deny any right of access to certain law enforcement records; however, this approach has been criticized as unnecessarily restrictive. Some laws also exempt information if disclosure would undermine government’s capacity to manage the economy.

1.3 Exemptions and right to information- International perspective

The right to information had been internationally recognised as a fundamental human right. Very significantly an international court, the Inter-American Court of Human Rights, has specifically held that the general right to freedom of expression, as guaranteed under international law, encompasses the right to information.

Numerous international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental human right to access information held by public bodies, as well as the need for effective legislation to secure respect for that right in practice. These include the United Nations, regional human rights bodies and Organization of American States, the Council of Europe and the African Union, and other international bodies with a human rights mandate, such as the Commonwealth.

The right to information is as an aspect of the general guarantee of freedom of expression. There is a growing consensus that access to information is a human right, as well as a fundamental underpinning of democracy. This is reflected in the inclusion of the right to information among the rights and freedoms guaranteed by many modern constitutions, as well as the dramatic increase in the number of countries which have adopted legislation giving effect to this right in recent years.

The right to information has also been linked to the right to the environment, to information about human rights and to the right to take part in public affairs. A right to access information held by public bodies has also been linked to pragmatic social objectives, such as controlling corruption.

1.3.1 The United Nations on freedom of information

The notion of ‘freedom of information’ was recognised early on by the UN. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which stated:

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“Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated.”21

Although some of the early laws guaranteeing a right to access information held by public bodies were called freedom of information laws, it is clear from the context that, as used in the Resolution, the term referred in general to the free flow of information in society rather than the more specific idea of a right to access information held by public bodies.

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948,22 is generally considered to be the flagship statement of international human rights. The Universal Declaration of Human Rights binding on all States as a matter of customary international law,23 guarantees the right to freedom of expression and information in the following terms:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”24

The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 196625 and had been ratified by most of the States. The ICCPR guarantees the right to freedom of opinion and expression, in very similar terms to the UDHR.

These international human rights instruments did not specifically elaborate a right to information and their general guarantees of freedom of expression were not, at the time of adoption, understood as including a right to access information held by public bodies. However, the content of rights is not static. The European Court of Human Rights, for example, has held:

21 UN General Assembly Resolution 59(I), 14 December 1946.
22 UN General Assembly Resolution 217 A (III), 10 December 1948.
“The European Convention on Human Rights is a living instrument which … must be interpreted in the light of present-day conditions.”

Similarly, the Inter-American Court of Human Rights has held that

“international human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”

Those responsible for drafting international human rights treaties were farsighted in their framing of the right to freedom of expression, including within its ambit the right not only to impart but also to seek and receive information and ideas. They recognised the important social role of not just freedom to express oneself – freedom to speak – but also of the more profound notion of a free flow of information and ideas in society. They recognised the importance of protecting not only the speaker, but also the recipient of information. This recognition is now being understood as including the right to information in the sense of the right to request and be given access to information held by public bodies.

1.3.2 UN special rapporteur on freedom of opinion and expression

In 1993, the UN Commission on Human Rights established the office of the UN Special Rapporteur on Freedom of Opinion and Expression. Part of the Special Rapporteur’s mandate is to clarify the precise content of the right to freedom of opinion and expression. After receiving his initial statements on the subject in 1997, the Commission called on the Special Rapporteur to ‘develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications.’

In his 1998 Annual Report, the Special Rapporteur stated clearly that the right to freedom of expression includes the right to access information held by the State: “The right to seek, receive and impart information imposes a positive obligation on States to ensure access

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28 The Commission was established by the UN Economic and Social Council (ECOSOC) in 1946 to promote human rights and was, until 2006, when it was replaced by the Human Rights Council, the most authoritative UN human rights body. UN General Assembly Resolution 60/231, 3 April 2006, establishing the Council.
to information, particularly with regard to information held by Government in all types of storage and retrieval systems. His views were welcomed by the Commission.

The UN Special Rapporteur significantly expanded his commentary on the right to information in his 2000 Annual Report to the Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development. He also reiterated his “concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs”. Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content of the right to information. In his subsequent reports, the Special Rapporteur has focused more on implementation of the right to information than on further development of standards.

The UN Special Rapporteur has been supported in his views on the right to information by official mandates on freedom of expression established by other IGOs. In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of the human rights NGO, ARTICLE 19, Global Campaign for Free Expression. ARTICLE 19 is a London-based human rights organisation with a specific mandate and focus on the defence and promotion of freedom of expression and freedom of information worldwide founded in 1987. The organisation takes its name from Article 19 of the Universal Declaration of Human Rights. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

ARTICLE 19’s mission statement is: ARTICLE 19 will work to promote, protect and develop freedom of expression, including access to information and the means of communication. We will do this through advocacy, standard-setting, campaigns, research, litigation and the building of partnerships. We will engage global, regional and State institutions, as well as the private sector, in critical dialogue and hold them accountable for the implementation of international standards.

ARTICLE 19 seeks to achieve its mission by: strengthening the legal, institutional and policy frameworks for freedom of expression and access to information at the global, regional and national levels, including through the development of legal standards; increasing global, regional and national awareness and support for such initiatives; engaging with civil society actors to build global, regional and national capacities to monitor and shape the policies and actions of governments, corporate actors, professional groups and multilateral institutions with regard to freedom of expression and access to information; and promoting broader popular participation by all citizens in public affairs and decision-making at the global, regional and national levels through the promotion of free expression and access to information. ARTICLE 19 is a non-governmental, charitable organisation (UK Charity No. 327421).
Article 19 of the Universal Declaration of Human Rights. They adopted a Joint Declaration which included the following statement:

“Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”

The mandates now issue a Joint Declaration annually on different freedom of expression themes. In their 2004 Joint Declaration, they elaborated further on the right to information, stating:

“The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”

The statement went on to elaborate, in some detail, on the specific contents of the right.

1.3.3 Regional standards

All three main regional human rights systems – at the Organization of American States, the Council of Europe and the African Union – have formally recognised the right to information. The following section describes the development of these standards.

a) Organization of American States

Article 13 of the American Convention on Human Rights (ACHR), a legally binding treaty, guarantees freedom of expression in terms similar to, and even stronger than, the UN instruments. In 1994, the Inter-American Press Association, a regional NGO, organised the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles which elaborate on the guarantee of freedom of expression found at Article 13.
of the ACHR. The Declaration explicitly recognises the right to information as a fundamental right, which includes the right to access information held by public bodies:

“Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.

The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector.”

The Special Rapporteur, whose Office was established by the Inter-American Commission on Human Rights in 1997, has frequently recognised the right to information as a fundamental right, which includes the right to access information held by public bodies. In his 1999 Annual Report to the Commission he stated:

“The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.”

In October 2000, in an important development, the Commission approved the Inter-American Declaration of Principles on Freedom of Expression, which is the most comprehensive official document to date on freedom of expression in the Inter-American system. The Preamble reaffirms the aforementioned statements on the right to information:

“CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions;”

The principles unequivocally recognise the right to information as below:

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40 Hemisphere Conference at Mexico City, 11 March 1994.
“Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it...

Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”

The OAS General Assembly has followed up on the Principles by adopting resolutions on access to public information every year since 2003. These resolutions highlight Member States obligation to ‘respect and promote respect for everyone’s access to public information’, which is deemed to be ‘a requisite for the very exercise of democracy’. The resolutions also call on States to ‘promote the adoption of any necessary legislative or other types of provisions to ensure [the right’s] recognition and effective application’. 44

In the Declaration of Nueva León, adopted in 2004, the Heads of State of the Americas stated:

“Access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality is an indispensable condition for citizen participation and promotes effective respect for human rights. We are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens”. 45

b) Council of Europe

The Council of Europe (COE) is an inter-governmental organisation, currently composed of 47 member states, devoted to promoting human rights, education and culture. One of its foundational documents is the European Convention for the Protection of Human

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Rights and Fundamental Freedoms (ECHR), which guarantees freedom of expression and information as a fundamental human right, at Article 10. Article 10 differs slightly from guarantees found in Articles 19 of the UDHR and ICCPR, and Article 13 of the ACHR, in that it protects the right to ‘receive and impart’, but not the right to ‘seek’, information.

The political bodies of the Council of Europe have made important moves towards recognising the right to information as a fundamental human right. In 1981, the committee of ministers of the Council of Europe adopted recommendation on access to information held by public authorities which stated:

“Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities ...”

In 1994, the 4th European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers consider ‘preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities.’ Instead, the Committee of Ministers opted for a recommendation, which it adopted on 21 February 2002. The Recommendation includes the following provision:

“Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.”

In May 2005, the Committee of Ministers tasked a group of experts with ‘drafting a free-standing legally binding instrument establishing the principles on access to official documents.’ The Group of Specialists on Access to Official Documents (known by the acronym DH-S-AC), presented a draft European Convention on Access to Official Documents to the Council of Europe’s Steering Committee for Human Rights. The
Convention, once adopted, would be a formally binding instrument recognising an individual right of access to official documents.50

The Charter of Fundamental Rights of the European Union,51 adopted in 2000 by the (now) 27-member European Union, sets out the human rights to which the Union is committed. Article 42 of the Charter grants a right of access to documents held by European Union institutions in the following terms:

“Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.”

The Charter is based on the constitutional traditions of member states, so its recognition of the right to information suggests that this right has not only become ubiquitous, but is widely perceived as a fundamental right by European Union States.

e) African Union on access to information

Developments on the right to information at the African Union have been modest. However, the African Commission on Human and Peoples’ Rights adopted a Declaration of Principles on Freedom of Expression in Africa in October 2002.52 The Declaration is an authoritative elaboration of the guarantee of freedom of expression found at Article 9 of the African Charter on Human and Peoples’ Rights.53 The Declaration clearly endorses the right to access information held by public bodies, stating:

“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.”

The same principle goes on to further elaborate a number of key features of the right to information.

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53 Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 LL.M. 58 (1982), entered into force 21 October 1986. Article 9 is somewhat weaker in its formulation than its counterparts in other regional systems, but the African Commission has generally sought to provide positive interpretation of it.
1.3.4 The Commonwealth on access to information

The Commonwealth has taken important concrete steps to recognise human rights and democracy as a fundamental component of the system of shared values which underpin the organisation. In 1991, it adopted the Harare Commonwealth Declaration, which enshrined its fundamental political values, including respect for human rights and the individual’s inalienable democratic right to participate in framing his or her society.54

The importance of the right to information was recognised by the Commonwealth nearly three decades ago. As far back as 1980, the Law Ministers of the Commonwealth, meeting in Barbados, stated that “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information.”55

More recently, the Commonwealth has taken a series of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the right to information. The Expert Group adopted a document setting out a number of principles and guidelines on ‘freedom of information’, including the following:

“Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.”56

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. At the same time, the ministers also formulated a number of key principles governing the right to information.57 They called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

57 Communique, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
The Law Ministers’ Communique was considered by the committee on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government, stated:

“The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.”

The Commonwealth Secretariat has taken some concrete steps to promote the right to information in member countries. It has, for example, drafted model laws on the right to information and on privacy.

1.4 Concept of exemptions and right to information - The constitutional developments

Indian Constitution does not specifically provide for the right to information as a fundamental right though the constitutional philosophy amply supports it. The preamble of the Constitution constitutes India into a democracy and secures for its people, justice-social, economic and political, liberty of thought, expression and belief. This justifies the conclusion that the Indian Constitution is drawn upon the idea of open government. In the same manner, Article 19(a), freedom of thought and expression and Article 21, right to life and personal liberty would become redundant if information is not made freely available. Article 39(a), (b), (c) of the constitution makes provision for adequate means of livelihood, equitable distribution of material resources of the community to check concentration of wealth and means of production. Taking a clue from this constitutional philosophy, the Supreme Court of India found a habitat for freedom of information in Articles 19(a) and 21 of the Constitution. It is heartening to note that the highest court in India while recognizing the efficacy of the ‘right to know’ which is a sine qua non of a really effective participatory democracy raised the simple ‘right to know’ to the status of a fundamental right. In S.P. Gupta v. Union of India, the Supreme Court held that the ‘right to know’ is implicit in the right of free speech.
and expression guaranteed under the Constitution in Article 19(1) (a). The right to know is also implicit in Article 19(1) (a) as a corollary to a free press which is included in free speech and expression as a fundamental right. The Supreme Court decided that the right to free speech and expression includes: (i) right to propagate one’s views, ideas and their circulation; (ii) right to seek, receive and impart information and ideas; (iii) right to inform and be informed; (iv) right to know; (v) right to reply; and (vi) right to commercial speech and commercial information. Furthermore, by narrowly interpreting the privilege of the government to withhold documents under Section 123 of the Evidence Act, the court has widened the scope of getting information from government files. In the same manner, by narrowly interpreting the exclusionary rule of Article 72(2) of the Constitution, the court ruled that the material on which Cabinet advice to the President is based can be examined by the court. However, this judicial creativity is no substitute for a constitutional or a statutory right to information. The Official Secrets Act, 1923 in India makes all disclosures and use of official information a criminal offence unless expressly authorized. The harshness of this law has been mitigated to a limited extent by courts. The courts in India and England have rejected the concept of conclusive right of the government to withhold a document. But still there is too much of secrecy which is the main cause of administrative fault. Considering the gross arbitrary abuse to which this vaguely and widely-worded expression may be subjected, the Act may be regarded as violating the provisions of Article 19(1) (a) of the Constitution and hence, branded as unconstitutional. Against this backdrop, the provisions of the Official Secrets Act, 1923 suffer from the stigma of unconstitutionality.

Several decisions given by the Supreme Court from time to time have been actually responsible for the development of legal position with regard to the right to information in India. These decisions were not given specifically in the context of the right to information, but in the context of the right to freedom of speech and expression.

The landmark case in freedom of the press in India was Bennett Coleman & Co. v. Union of India in which the court struck down the newsprint control order saying that it
directly affected the petitioners’ right to freely publish and circulate their newspaper. In that, it violated their right to freedom of speech and expression. The judges also remarked:

“It is indisputable that by freedom of the press meant the right of all citizens to speak, publish and express their views and freedom of speech and expression includes within its compass the right of all citizens to read and be informed.”

The dissenting judgment of Justice K.K. Mathew also noted:

“The freedom of speech protects two kinds of interests. There is an individual interest, the need of men to express their opinion on matters vital to them and a social interest in the attainment of truth so that the country may not only accept the wisest course but carry it out in the wisest way. Now in the method of political government the point of ultimate interest is not in the words of the speakers but in the hearts of the hearers.”

In a series of judgments, the Supreme Court of India has held that the disclosure of information about government and the right to know about government flow from the guarantee of free speech and expression in Article 19(1) (a) of the Constitution of India.

On the emerging concept of an ‘open government’, about more than three decades ago, the Constitution Bench of the Supreme Court in the *State of Uttar Pradesh v. Raj Narain & Others* speaking through Justice Mathew held:

“The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security... To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired.”

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Another Constitution Bench in *S.P.Gupta & Others v. President of India and Others*, relying on the ratio in Raj Narain (supra) held:

“...The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest...”

It is, therefore, clear from the ratio in the above decisions of the Constitution Bench of the Supreme Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19(1) (a) of the Constitution. The said Act was, thus, enacted to consolidate the fundamental right of free speech.

This principle was even more clearly enunciated in a later case in *Indian Express Newspapers(Bombay) Pvt. Ltd., v. Union of India* where the court remarked:

““The basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people ‘right to know’. “

Again in *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. & Others* the Supreme Court recognised that the Right to Information is a fundamental right under Article 21 of the Constitution.

The Supreme Court speaking through Justice Sabyasachi Mukharji, as held:

“...We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and
democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.”

Hon’ble Justice Krishna Iyer of the Supreme Court of India once wrote to the then Prime Minister:

“...the right to know and the freedom of information are inalienable components of the freedom of expression and participation in public affairs, which Constitution confers on every citizen of the country. It is heartening that, in the very first broadcast to the nation you made as Prime Minister, you emphasized importance of the freedom of information and the annihilation of secrecy as a craft art of government. Accepting this postulate, some things require to be done immediately so that the credibility of the Indian community in the changed ethos of open government may be created. Currently, people have lost faith in the State making truthful disclosures of facts of critical relevance to the common wealth...

...May I, therefore, plead for two measures which your government may adopt forthwith? Firstly, it must declare that every citizen of India may demand of any public official exercising public power in the country to disclose every fact, which is not patently a security risk to the State or otherwise manifestly entitled to confidentiality on proper demand. Once this declaration is made, many consequences follow...

The second entreaty that I have to make to you is to take steps to repeal all provisions in Statute Book which obnoxiously obstruct revelation of information to the people – I call it Operation Scavenge. There is crowd of darkling provisions in the corpus juris requiring to be repealed if freedom of information about public affairs is to be regarded as people’s right.”


In Secretary, Ministry of Information & Broadcasting, Govt. of India and Others, v. Cricket Association of Bengal and Others, the Supreme Court also held that right to acquire information and to disseminate it is an intrinsic component of freedom of speech and expression.

A note of caution has been sounded by the Supreme Court in Dinesh Trivedi, M.P. & Others v. Union of India & Others where it has been held as follows:

"...Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realize that undue popular pressure brought to bear on decision makers in government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest."81

In People’s Union for Civil Liberties and Another v. Union of India and Others, the Supreme Court reiterated, relying on the aforesaid judgments, that right to information is a facet of the right to freedom of ‘speech and expression’ as contained in Article 19(1) (a) of the Constitution of India and also held that right to information is definitely a fundamental right. In coming to this conclusion, the Supreme Court traced the origin of the said right from the Universal Declaration of Human Rights, 1948 and also Article 19 of the International Covenant on Civil and Political Rights, which was ratified by India in 1978. The Supreme Court also found a similar enunciation of principle in the Declaration of European Convention for the Protection of Human Rights (1950) and found that the spirit of the Universal Declaration of 1948 is echoed in Article 19(1) (a) of the Constitution.83

The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence; the same is a part of the jurisprudence in all the countries which are governed

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82 Civil Liberties and Another v. Union of India and Others (2004) 2 SCC 476.
by rule of law with an independent judiciary. In this connection, if we may quote what Lord Acton said in one of his speeches: “Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.”

It is, therefore, clear that a society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative process of the government itself to the sunlight of public scrutiny.

Actually the concept of active liberty, which is structured on free speech, means sharing of a nation’s sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests intimate correlation between the functioning of the government and common man’s knowledge of such functioning.84

However, while considering the width and sweep of this right as well as its fundamental importance in a democratic republic, the Supreme Court also held that such a right is subject to reasonable restrictions under Article 19(2) of the Constitution.85

The expression ‘freedom of speech and expression’ in Article 19(1) (a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as, advertisement, movie, article or speech, etc. This freedom includes the freedom to communicate or circulate one’s opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.86

It has been recognized that the right to know, right to receive and disseminate the information is within the right to freedom of speech and expression. Using the best possible means to impart and receive the information has been recognized as a fundamental right of the citizen of India.87

1.5 Right to Information Act, 2005: An overview

The objective of the Right to Information Act is revolutionary in the Indian context as it has opened all public authorities across the country to public scrutiny. The Right to

84 Active Liberty by Stephen Breyer - page 15.
87 Mahendra P. Singh, Constitution of India, (11th Edn.), at page 130.
Information Act, 2005 is a landmark piece of legislation. After nearly a decade of hectic lobbying, the efforts of civil society for entrenching the right to information in India were finally rewarded on 15 June, 2005 with the President’s assent to the Right to Information Act, 2005. The greater challenge now is the actual implementation of the Act. It is a major step towards more accountable and transparent government. However, it is imperative to recognize that the road to implementation is a long one and there will be many hurdles and roadblocks yet. With proper governmental support and its willingness to adapt, it is a golden opportunity for India to end the culture of governmental secrecy and fulfill its potential as a truly great democracy.

In real terms, implementation poses a huge challenge to government - the new law covers all central, state and local government agencies. These authorities need to reorient their working to satisfy the key provisions of the Act and be ready to impart information to the public keeping in view the spirit of the Act.

It is being implemented both at the central level, for access to records of departments and agencies under control of the Union government; and independently by the State governments for their own departments and agencies. Not surprisingly, bureaucracies across the nation are ushering in the new era.

Right to Information Act was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right of information recognized under article 19 of the Constitution. The preamble to the Act declares the object sought to be achieved by the Right to Information Act.

The Act has six Chapters which includes 31 Sections and two Schedules.

Chapter I deals with preliminary matters, such as, short title, extent and commencement and definitions (Section 1 & 2 respectively). Chapter II (Sections 3 to 11) is core of Right to Information Act and provides for right to information and obligations of public authorities. In this chapter, right to information, obligations of public authorities,

88 "An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto."

Whereas the Constitution of India has established democratic Republic; And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed; And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information; And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal"
designated public information officers, request for obtaining information and disposal of request have been provided from Section 3 to 7. This chapter also deals with various exemption provisions, grounds for rejection to access to certain cases, severability and third party information from Section 8 to 11.

Chapter III and IV deals with various provisions relating to constitution of information commission, terms of office and conditions of service of information commissioner and removal of chief information commissioner or information commissioners. Chapter III (Section 12 to 14) deals with such matters pertaining to Central Information Commission and Chapter IV (Section 15 to 17) provides for such matters pertaining to State Information Commission.

Chapter V provides for powers and function of information commissions, appeal provisions and penalties (Section 18, 19 and 20 respectively).

Chapter VI deals with other miscellaneous matters, such as, protection of action taken in good faith, overriding effect of the Act, bar of jurisdiction of courts, non-applicability of the Act to certain organisations, monitoring and reporting, preparing programmes by appropriate government, power to make rules by appropriate government, power to make rules by competent authority, laying of rules, power to remove difficulties and repeal of the Freedom of Information Act, 2002 (Section 21 to 31).

The First Schedule contains form of oath or affirmation to be made by the Chief Information Commissioner/ Information Commissioner/ State Chief Information Commissioner/the State Information Commissioner. The Second Schedule contains intelligence and security organisation established by the central Government, which are exempted organisations from the provisions of the Act.

“...Right to information jure gentium has to be understood on the communis opinio, that is the evidence of what the law is, on the basis of how courts have interpreted the right under Article 19 of the Constitution. As the said Act is of recent vintage, the principle of contemporanea expositio is not available for the opinion of the Central Information Commission, to the extent of its understanding...”

89 Pritam Rooj v. University of Calcutta and Others, AIR 2008 Cal 118, para 17.
Citizen identifies the concerned public authority and sends application to the PIO/APIO alone with application fee. [Sec. 6(1)] No fee for BPL. [Sec. 7(5)]

PIO has 30 days* from date of receipt to give information on payment of fee, if any, or reject the request for reasons given in Sec. 8 and 9 of the Act [Sec. 7(1)] (*48 hours, if information sought for concerns life or liberty of a person)

RTI Application Accepted

PIO to inform applicant reasons for rejection, period within which appeal can be made and particulars of the Departmental Appellate Authority. [Sec. 7(8)]

FIRST APPEAL to Departmental Appellate Authority (AA) within 30 days if aggrieved by the decision of PIO or no decision communicated within stipulated time. [Sec. 19(1)]

Departmental Appellate Authority (AA) to dispose appeal within 30-45 days. [Sec. 19(6)]

CIC/SIC asks Public authority PIO to give information. Can also penalize PIO.

CIC/SIC asks Public authority PIO to give information. Can also penalize PIO.

Second Appeal to CIC/SIC within 90 days. [Sec. 19(3)]

Citizen has a right to appeal to High Court/Supreme Court

Yes

No

Appeal Accepted

AA directs PIO to give information

Yes

No

Appeal Accepted

Figure - 1.1 Flow chart describing the application & appeal process
PROCEDURE FOR DISPERAL OF REQUEST BY PUBLIC INFORMATION OFFICER

Request received open file

CITIZEN

No obligation to give information

Inform applicant to pay fee before considering application

Transfer to relevant PA within 5 days

Inform applicant

Third party involved

No obligation to give information

Inform applicant to pay fee

Yes

Yes

Yes

Yes

Further fee to be paid for giving information (Sec. 7(3))

Fee paid (HPL) exempted from fee

Application to appropriate public authority (PA)

Yes

Information exempted from disclosure (Sec. 8(5))

Third party involved

Yes

Part information to be supplied

Give reasons for the decision to applicant [Sec. 10(3)]

If third party has any objection, to represent within 10 days [Sec. 11(2)]

Part information can be given [Sec.10(1)]

Inform third party within 5 days from the receipt of request if

1) Information relates to supplied by third party,
and
2) Whether third party has treated the information as confidential and
3) PIO intends to disclose [Sec. 11(1)]

If third party has any objection, to represent within 10 days [Sec. 11(2)]

Part information to be supplied

Give reasons for the decision to applicant [Sec. 10(3)]

If third party has any objection, to represent within 10 days [Sec. 11(2)]

Third party has right to appeal under Section 19 [Sec. 11(5)]

Further fee to be paid (time limit clock starts after payment)

Intimate further fee (time limit clock to give information stops after intimation)

Give information to applicant

No obligation to give information

Inform applicant to pay fee

Further fee to be paid for giving information (Sec. 7(3))

Further fee to be paid (time limit clock starts after payment)

Inform third party within 5 days from the receipt of request if

1) Information relates to supplied by third party,
and
2) Whether third party has treated the information as confidential and
3) PIO intends to disclose [Sec. 11(1)]

If third party has any objection, to represent within 10 days [Sec. 11(2)]

Third party has right to appeal under Section 19 [Sec. 11(5)]

Figure 1.2 Procedure for dispersal of request by public information officer
1.6 Exemptions and Right to Information Act, 2005 – Legislative developments:

The Right to Information Act has been enacted by the parliament for setting out the practical regime of right to information with a view to creating environment of transparency and sharing of information and provides every Indian citizen the basic constitutional and democratic right to gain access to certain information that may be held by public authorities. It primarily seeks to encourage and enhance transparency and accountability while intending to curb corruption. It is well known that corruption thrives on secrecy. Transparency may lead to its eradication and right to information, in its undiluted form, would be an essential tool to prevent corruption. The long title of the Right to Information Act emphasizes the need for transparency and accountability in the working of every public authority to keep the citizenry informed and to make the government and their instrumentalities accountable to the governed. While transparent governance is essential to restore accountability and increase efficiency, accountability of the governors to the governed is an essential feature of good governance. It, however, needs to be borne in mind that while all confidential information pertaining to efficient and smooth functioning of the government and matters of national security cannot be divulged to the masses, the Right to Information Act seeks to identify and classify such information that may be made readily available to the public and to which common Indian citizen has a right to ready access in order to preserve the true worth of the country’s democratic ideals.

Section 3 of Right to Information Act provides that subject to the provisions of this Act all citizens shall have the right to information. The term ‘right to information’ is defined in Section 2(j) as the right to information accessible under the Act which is held by or under the control of any public authority. Having regard to Section 3, the citizens have the right to access to all information held by or under the control of any public authority except those excluded or exempted under the Act. The object of the Right to Information Act is to empower the citizens to fight against corruption and hold the government and their instrumentalities accountable to the citizens, by providing them access to information regarding functioning of every public authority. As per Section 3 of the Act, citizen’s right to access information under the Act is absolute, subject only to limitations prescribed under the Act. This Section forms the core of the Act and is a crisp, unambiguous declaration of the

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aims and objectives of the Act. To make this right meaningful and effective, the citizens are not required to give any justification for seeking information.\footnote{Mangla Ram Jat v. Banaras Hindu University, CIC/OK/A/2008/00860/SG/0809}

The Right to Information Act, 2005 provides to all citizens the right to information but this right is subject to the exemptions provided in this Act. The object behind exemptions is that the revelation of information shall not conflict with other public interest for efficient operation of the government, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The Act provides for exclusions by way of exemptions and exceptions with regard to the information held by public authorities. As such the rights of the citizens to access information held by any public authority should be in harmony with the exclusions/ exemptions in the Right to Information Act, 2005.

The right to information is integral to fundamental right of freedom. The fountainhead of the Right to Information Act is Article 19(1) (a) of the Constitution of India. This means that right to information is a fundamental right and can be curtailed only in terms of the restrictions contained in Article 19(2) of the Constitution of India. Article 19(2) says that the right to freedom of speech and expression can be restricted by ‘imposing reasonable restrictions in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement of an offence.’ The exemptions on access to information in Right to Information Act, 2005 go far beyond the limits prescribed by the Constitution and take into consideration factors which are extraneous to the reasonable restrictions envisaged in the Constitution. The government or public authorities take decisions on matters affecting the public interests, hence public has a right to know what these public authorities are doing and in what manner. Too wide interpretation of exemptions may go against the spirit of the Right to Information Act. There are various kinds of exemptions provided under the Right to Information Act.

It will be useful to refer to a few decisions of the Supreme Court which considered the importance and scope of the right to information. In \textit{State of Uttar Pradesh v. Raj Narain},\footnote{Union of India v. CIC & P.D. Khandelwal & Others, (1975) 4 SCC 428 (SCC page 453, para 74)} the Supreme Court observed:

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be few secrets. The people of
this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.”

In *Dinesh Trivedi v. Union of India*, the Supreme Court while recognising limitations in the right to know observed as under:

“In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute...Implicit in this assertion is the proposition that in transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated...

To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest.”

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In another case of People’s Union for Civil Liberties v. Union of India, the Supreme Court held that

“....right of information is a facet of the freedom of ‘speech and expression’ as contained in Article 19(1) (a) of the Constitution of India and such a right is subject to any reasonable restriction in the interest of the security of the state and subject to exemptions and exceptions…”

The Supreme Court in a recent judgment Central Board of Secondary Education and Another v. Aditya Bandopadhyay and Others observed as under:

“Certain safeguards have been built into the Act so that the revelation of information will not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The Right to Information Act provides access to information held by or under the control of public authorities and not in regard to information held by any private person. The Act provides the following exclusions by way of exemptions and exceptions (under Sections 8, 9 and 24) in regard to information held by public authorities:

(i) Exclusion of the Act in entirety under Section 24 to intelligence and security organizations specified in the Second Schedule even though they may be ‘public authorities’ (except in regard to information with reference to allegations of corruption and human rights violations).

(ii) Exemption of the several categories of information enumerated in Section 8(1) of the Act which no public authority is under an obligation to give to any citizen, notwithstanding anything contained in the Act [however, in regard to the information exempted under clauses (d) and (e), the competent authority, and in regard to the information excluded under clause (j), central public information officer/state public information officer/the appellate authority, may direct disclosure of information, if larger public interest warrants or justifies the disclosure].

94 People’s Union for Civil Liberties v. Union of India, (2004) 2 SCC 476.
93 Central Board of Secondary Education and Another v. Aditya Bandopadhyay and Others, (2011) 8 SCC 497.
(iii) If any request for providing access to information involves an infringement of a copyright subsisting in a person other than the State, the central/state public information officer may reject the request under Section 9 of Right to Information Act.

Having regard to the scheme of the Right to Information Act, the right of the citizens to access any information held or under the control of any public authority, should be read in harmony with the exclusions/exemptions in the Act.96

The preamble outlines the grounds that may necessitate withholding of the information from the citizens saying-

"...AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;"

One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability. But achieving this object does not mean that other equally important public interests including efficient functioning of the governments and public authorities, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information, etc. are to be ignored or sacrificed. The object of Right to Information Act is to harmonize the conflicting public interests, that is, ensuring transparency to bring in accountability and containing corruption on the one hand, and at the same time ensuring that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum use

96 CBSE v. Aditya Bandopadhyay and Others, (2011) 3 SCC 497 (Paras 24&25)

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of limited fiscal resources and preservation of confidentiality of sensitive information, on the other hand. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. 97

Another Constitution Bench in S.P. Gupta & Others v. President of India and Others (AIR 1982 SC 149) relying on the ratio in Raj Narain (supra) held:

“...The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest…”

“Whatsoever be its activity, the government is still the government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the government must be in public interest; the government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated.” 98

1.7 Exemption from disclosure of information

Following are the provisions under the Right to Information Act, dealing with exemption from disclosure of information:

a) Section 8 - Exemption from disclosure of information

b) Section 9 - Grounds for rejection to access in certain cases

c) Section 24 – Act not to apply to certain organisations.

Exemptions provided in Section 8 of the Right to Information Act are intended to protect information relating to a particular public or private interest. These exemptions, when added to the categories of excluded organizations and records outlined in various Sections of the Act, provide the only basis for refusing access by a public authority, the information requested under the Right to Information Act, 2005. Section 8 of the Right to Information Act provides as under:

Section 8- Exemption from disclosure of information:

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,

(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;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign government;
(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this Section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the central public information officer or the state public information officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that section:
Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the central Government shall be final, subject to the usual appeals provided for in this Act.

While the Right to Information Act, 2005 gives the public the right to access information, like all freedom of information legislations, it also restricts disclosure of certain kinds of information. Clauses (1) (a) to (1) (j) of Section 8(1) of the Act provide a list of ten categories of information that are exempt from disclosure. However, under Section 8(2), all these exemptions can be waived if a public authority decides that public interest in disclosure outweighs the harm to the protected interests. Once particular information is covered under any of the exemption outlined in Section 8(1) then only the public interest override test is to be applied. This public interest override test is for disclosure of information if public interest in disclosure outweighs the harm to the protected interests. The disclosure of information is the rule and denial of information is an exception.

These exemptions provided in Section 8(1) of the Right to Information Act, 2005 are largely consistent with those found in other right to information laws. Although there are some exemptions which are peculiar to the Right to Information Act, 2005, such as, information, the disclosure of which would incite to an offence and information available to a person in his fiduciary relationship. At the same time, the list of exemptions does not include a general exemption in favour of the internal deliberations of public bodies, as is found in many overseas jurisdictions. This exemption although can be important but has been roundly abused in many countries. It may be noted that some of the exemptions include express or implied harm tests although, significantly, the exemption relating to cabinet papers does not. The same is true of the exemption regarding information received in confidence from a foreign government. The standard of harm has not been stated, except that the harm would in fact occur as a result of disclosure of the information. Normally in the overseas jurisdiction it is qualified by the words such as ‘substantial harm’; ‘in all probabilities would cause harm’ etc. i.e. gravity of injury is specified with the harm.

Therefore when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals. Therefore in dealing with information not falling under Section 4(1) (b)
and (c), the competent authorities under the Right to Information Act will not read the exemptions in Section 8 in a restrictive manner but in a practical manner so that the other public interests are preserved and the Right to Information Act attains a fine balance between its goal of attaining transparency of information and safeguarding the other public interests.  

Among the ten categories of information which are exempted from disclosure under Section 8 of Right to Information Act, six categories which are described in clauses (a), (b), (c), (f), (g) and (h) carry absolute exemption. Information enumerated in clauses (d), (e) and (j) on the other hand get only conditional exemption i.e. the exemption is subject to the overriding power of the competent authority under the Right to Information Act in larger public interest, to direct disclosure of such information. The information referred to in clause (i) relates to an exemption for a specific period, with an obligation to make the said information public after such period. The information relating to intellectual property and the information available to persons in their fiduciary relationship, referred to in clauses (d) and (e) of Section 8(1) do not enjoy absolute exemption. Though exempted, if the competent authority under the Act is satisfied that larger public interest warrants disclosure of such information, such information will have to be disclosed. It is needless to say that the competent authority will have to record reasons for holding that exempted information should be disclosed in larger public interest.

**Information older than 20 years**

Seven out of ten exemptions listed in Section 8(1) are not valid after 20 years under Section 8(3).

Section 8(3) nowhere provides that records or information have to be maintained for a period of twenty years. The period for which any particular record or information has to be maintained would depend upon the relevant statutory rule or regulation of the public authority relating to the preservation of records.  

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*Although the Supreme Court used the word ‘absolute exemptions’ for clauses (a), (b), (c), (f), (g) and (h) of Section 8(1) but the same are subject to public interest override/ harm test, accordingly cannot be termed as absolute exemptions. Rather it would be appropriate to use the word unconditional exemptions in place of ‘absolute exemptions’. The distinction between conditional and unconditional exemptions lies in the fact whether the exemption is subject to the larger public interest or not. The exemptions which are not subject to larger public interest test can be treated as unconditional exemptions and the exemptions which are subject to the larger public interest can be treated as conditional exemptions. It should be noted that both conditional and unconditional exemptions provided in Section 8(1) are subject to public interest override test/ harm test as provided in Section 8(2).*

100 CBSE and another v. Aditya Bandopadhyay and Others, (2011) 8 SCC 497 (Para 56)
The power of the Information Commission under Section 19(8) of the Right to Information Act to require a public authority to take any such steps as may be necessary to secure compliance of the provision of the Act, does not include power to direct the public authority to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority.\footnote{CBSE and another v. Aditya Bandopadhayay and Others, (2011)\textit{8} SCC 497 (Para 55)}

Section 8(3) provides that any protection against disclosure that may be available, under Sections 8(1) (b), (d) to (h) and (j) ceases to be available after twenty years in regard to records which are required to be preserved for more than twenty years. Where any record or information is required to be destroyed under the rules and regulations of a public authority prior to twenty years, Section 8(3) will not prevent its destruction in accordance with the rules. Section 8(3) of the Right to Information Act is not, therefore, a provision requiring all ‘information’ to be a preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority.\footnote{\textit{Ibid} (Para 58)}

1.7.1 Grounds for rejection to access in certain cases

This Section gives protection to the copyright holder whose information is with the public authority or under the control of the public authority. Throughout the world, original literary and artistic works are protected by copyright. Copyright protection applies to the expression of ideas resulting in original works, but not to the ideas. Such protection is now broadly recognized as important to promoting human creativity through the production of all types of original works. It provides creators with incentives in the form of recognition and the possibility to derive fair economic rewards for their works. It also encourages broad dissemination by helping to assure that creative works can be made available to the public with legal protection against unauthorized copying or redistribution. Section 9 of Right to Information Act provides as under:

Section 9 - Grounds for rejection to access in certain cases

Without prejudice to the provisions of Section 8, a central public information officer or a state public information officer, as the case may be, may reject a request for information where such a request for providing access would

\footnote{\textit{CBSE and another v. Aditya Bandopadhayay and Others, (2011)\textit{8} SCC 497 (Para 55)}
\textit{Ibid} (Para 58).}
involve an infringement of copyright subsisting in a person other than the state.

Request for information may be rejected where it involves an infringement of copyright subsisting in a person other than the state. This is the only absolute exemption and the public information officer is not to apply public interest override test. In addition to exemptions from disclosure of information provided in Section 8 a request for information may be rejected by public information officer where following two conditions are met with: where it involves an infringement of copyright and such copyright is subsisting in a person other than the State.

Section 9 of the Right to Information Act came for discussion before the High Court of Delhi in UPSC v. CIC & Others. The court observed that under Section 9, the CPIO is empowered to reject a request for information where such a request for providing access to information would involve an infringement of copyright subsisting in a person. The power of the CPIO does not extend to rejecting such a request if the infringement of copyright involved belongs to the state.103

1.7.2 Act not to apply to certain organisations-excluded organisation out of purview of the Right to Information Act

Certain organisations have been deliberately kept out of the purview of the Act due to the nature of the work performed by them. Provisions of Section 24 provide as under:

Section 24- Act not to apply to certain organisation

(1) Nothing contained in this Act shall apply to the intelligence and security organizations specified in the Second Schedule, being organizations established by the central Government or any information furnished by such organizations to that government:

Provided that the information pertaining to the allegations of corruption and violation of human rights shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the central information commission, and

103 UPSC v. CIC & Others, WP(C) No. 17583/2006.
notwithstanding anything contained in Section 7 such information shall be provided within forty-five days from the date of the receipt of request.

(2) The central government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organization established by that government or omitting therefrom any organization already specified therein and on the publication of such notification, such organization shall be deemed to be included in or, as the case may be, omitted from the Schedule.

(3) Every notification issued under Section (2) shall be laid before each House of Parliament.

(4) Nothing contained in this Act shall apply to such intelligence and security organizations, being organizations established by the State Government, as that government may, from time to time, by notification in the Official Gazette, specify:

Provided that the information pertaining to the allegations of corruption and violation of human rights shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(5) Every notification issued under sub-section (4) shall be laid before the State Legislature.

So far following intelligence and security organisations have been specified in the Second Schedule.

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
7. Aviation Research Centre.
8. Special Frontier Force.
15. Sashtra Seema Bal.¹⁰⁴
17. National Technical Research Organisation¹⁰⁶
18. Financial Intelligence Unit, India¹⁰⁷
19. Special Protection Group.¹⁰⁸
20. Defence Research and Development Organization.¹⁰⁹
21. Border Road Development Board.¹¹⁰
22. National Security Council Secretariat.¹¹¹,¹¹²
23. Central Bureau of Investigation (CBI)¹¹³

¹⁰⁴ Substituted by G.S.R. 347, dated 28th September, 2005, for S.No.15. S.No. 15 before substitution stood as: '15. Special Service Bureau.
¹⁰⁵ Substituted vide GSR 235(E) dated 27 March 2008 S.No. 16 before substitution stood as: Special Branch (CID) Andaman and Nicobar.
¹⁰⁷ Substituted vide GSR 235(E) dated 27 March 2008 S.No. 18 before substitution stood as: Special Branch, Lakshadweep Police.
¹¹¹ Vide GSR 235(E) dated 27 March 2008 S.No. 22 Financial Intelligence Unit was omitted same has been mentioned at S.No 18 by substituting for Special branch Lakshadweep Police, making number of exempted organisations at 21.
¹¹² National Security Council Secretariat was added vide no. GSR 726 (E) dated 8 October 2008.
24. National Investigation Agency (NIA)\textsuperscript{114}

25. National Information Grid (NIG)\textsuperscript{115}

From the perusal of above list, it is evident that the organizations covered under the aforesaid section are intelligence and security organizations. However, police department as such has not been mentioned in the above list. In case of intelligence and security organizations established by the state governments, no list has been given and it is left to the respective state governments to notify intelligence and security organizations for the exclusion from the purview of the Right to Information Act.

Under Section 24, the central government has also been given the powers to amend the schedule by including therein any other intelligence or security organizations or omitting there from any organization. This exclusion or inclusion can be done only in case the organization belongs to intelligence or security category. Not only the intelligence and security organizations have been kept out of the purview of the Right to Information Act but also any information furnished by such organizations to the government is kept out of the purview of this Act.

This exclusion of intelligence and security organisations is absolute except the information pertaining to allegations of corruption and violation of human rights. Atleast some partial relief is available in respect of these organisations in the cases of information pertaining to the allegations of corruption and violation of human rights. The intention of legislature is to take enough safeguards in the matters of corruption and violation of human rights and this kind of information has not been excluded from the purview of the Right to Information Act.

In case of intelligence or security organizations established by the state governments is to be taken out of purview of the Right to Information Act, a notification has to be issued in the Official Gazette by the respective governments.

Although, specifically information furnished by such intelligence or security organizations established by the state government furnished to the state government has not been excluded as has been done in case of intelligence or security organizations established by the central government. But by implication it also seems to have been excluded from the

\textsuperscript{114} Added vide notification no. GSR 442(E) dated 9th June, 2011.

\textsuperscript{115} Added vide notification no. GSR 442(E) dated 9th June, 2011.
The provisions relating to allegations of corruption and violation of human rights are the same as are applicable to intelligence or security organizations established by central government.

1.7.3 **Doctrine of severability (partial disclosure) exempted and non-exempted information from disclosure:**

Section 10 of the Right to Information Act contains a very important provision based on the doctrine of severability. If the information requested for is exempted from disclosure under the provisions of the Act, it may be seen whether it can be partly saved from exemption. When the information requested for can be severed in parts and if part of the information satisfies the test of severability as provided for in Section 10 of the Right to Information Act, then the saved part of the information can be given to the applicant. This section is partial exception to Sections 8 and 9 and provides for somewhat respite to put aside the request for information from the stringency of the exemptions mentioned in Section 8 and grounds for rejection mentioned in Section 9. Provision for severability is an excellent one and universally followed. Section 10 of Right to Information Act provided as under:

**Section 10-Severability**

(1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

Records of information, such as documents, may contain both exempt and non-exempt information. Section 10 of the Right to Information Act provides that where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, access may be provided to that part of the record ‘which does not contain any information which is exempt from disclosure under the Act’ and ‘which can reasonably be severed from any part that contains exempt information.’ For example, minutes of a meeting of a public authority may contain personal details relating to a specific individual. Those details may constitute ‘personal data’ and therefore may be exempt under Section 8(1) (j). However, the information in the rest of the minutes may not fall within the...
scope of the Act’s exemptions. In such a situation, the public authority is required to ‘redact’ those parts of the minutes which are exempt from disclosure and communicate the non-exempt information to the applicant.

(2) Where access is granted to a part of the record, the public information officer shall give a notice to the applicant under Section 10(2), informing-

(a) that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;

(b) the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;

(c) the name and designation of the person giving the decision;

(d) the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and

(e) his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided, including the particulars of the appellate officer or the information commission, time limit, process and any other form of access.

1.7.4 Disclosure of third party’s confidential information or record

There are various kinds of information or record with the public authorities which either relate to a third party or have been supplied by a third party and such information or record if treated confidential by third party, then for taking decision whether this information or record or part thereof be disclosed or not, certain procedural requirements are specified in Section 11, which are to be mandatorily followed. Under this Section, third parties have a right to be heard in respect of applications and appeals dealing with information submitted by them to the public authority in confidence. Section 11 of the Right of Information Act provides as under:

Section-11 Third party information

(1) Where a central public information officer or the state public information officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or
has been supplied by a third party and has been treated as confidential by that third party, the central public information officer or state public information officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the central public information officer or state public information officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the central public information officer or state public information officer, 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.

(3) Notwithstanding anything contained in Section 7, the central public information officer or state public information officer, as the case may be, shall, within forty days after receipt of the request under Section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under Section 19 against the decision.

“Apparently this clause has noble intentions. It is intended at safeguarding privacy rights of individuals, but activists who have been extensively using their own state laws on Right to Information seriously apprehend that objections would be raised by third parties even to disclosure of any kind of information, thus blatantly going against the spirit of
transparency in public interest. They fear that the public information officers, instead of
taking a firm decision in favour of disclosure which they are empowered to would rather play
safe and deny the information, forcing the requisitioner thus to go in for appeals. This anxiety
is not entirely misplaced. However, a series of rulings by the information commission, during
the practical use of the law should greatly minimise any possible damage by this
 provision.  \textsuperscript{116}

An extraordinary feature of the Act is the right to seek information relating to private
parties also, which may be a person or organization. Such other person or organization is
referred to as ‘third party’ under the Act. The application to obtain information about third
party has to be filed with the public information officer of the authority/office which either
possesses the information or which can obtain the same from the third party under any law of
the land.

Third party information is not easy to obtain. The Right to Information Act fully
protects the interest of third parties. When the third party treats the information as
confidential, then it is the duty of the public information officer to give an opportunity to the
third party before giving the information to the applicant. The third party gets ten days to
reply to the notice of the public information officer. It can send its reply in writing or orally
represent its point personally in meeting with the public information officer. If the third party
has no objection to the information being given to applicant or does not respond within ten
days the public information officer can give the information. If the third party objects to
supply of the information the public information officer has to take the objections into
consideration while deciding the matter. If the public information officer still decides to
supply the information, the third party has the right to file appeal. Till the appeal is finalized,
the public information officer cannot supply the information.

There may be confidential information which relates to or has been supplied by a third
party, such as, financial, commercial, scientific or technical information and has been treated
as confidential by that third party. For applicability of Section 11, such confidential
information supplied by a third party or relating to third party should be treated consistently
in a confidential manner by the third party.

This exemption is intended to protect information of a confidential nature provided by
a business or other commercial interest to the public authority, regardless whether it was

\textsuperscript{116} Right to Information Law-Policy-Practice by Rodney D Ryder, page 390.
provided pursuant to a statutory obligation or on a voluntary basis. Its purpose is to ensure that the obligation of the government to maintain this information on a confidential basis will continue. Except in the case of trade or commercial secrets protected by law under the Right to Information Act, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interest of such third party.

The concept of ‘confidential information’ as used in this Section is a legal one which has been developed in anglo-Indian case law relating to actions for breach of confidence. It applies to information which is of value to the possessor of the information and which has been entrusted to another person in circumstances which create an obligation on that person to maintain the information in confidence. This obligation may be based in contract, expressed or implied, or may arise by virtue of the relationship of the parties and the circumstances under which the person to whom the information was provided learned the information.

It should be noted that this concept would certainly cover information which is a trade secret or commercial secret. But trade or commercial secrets cannot be disclosed as these are legally protected records and hence, their disclosure is out of the purview of the Section 11. However, it is a broader notion than a trade secret in that the information need not be capable of industrial or commercial application or use. The only requirement in respect of the secrecy of confidential information is that the information is not in the public domain i.e. not being generally known or be available for the asking.

The difference between the type of information in Section 8(1) (d) and third party information in Section 11 should be clearly understood. In Section 8(1) (d) the information is the one disclosure of which would harm the competitive position of the third party. It may or may not relate to that third party whose interest would be harmed on disclosure. If it relates to third party or has been supplied by third party and has been treated as confidential by that third party and on its disclosure harm would cause to the competitive position of the third party then both Section 8(1) (d) and Section 11 would be applicable. If information does not relate to third party or not supplied by the third party but disclosure of information would harm the competitive position of the third party and the information has been supplied by or relates to some other third party then Section 8(1) (d) would be applicable in respect of third party whose interest would be harmed on disclosure. Such disclosure of information is protected under Section 8(1) (d) unless the competent authority is satisfied that larger public
interest warrants the disclosure of such information. On satisfaction of competent authority that larger public interest warrants the disclosure of information under Section 8(1) (d) information including commercial, trade or intellectual property may also be disclosed. Here in Section 8(1) (d) it is not necessary that information is to have been supplied by third party or relates to third party. It may be any information under the possession of public authority which on disclosure would harm the competitive position of third party.

An objective test must be applied in determining whether information provided to the public authority by a third party is confidential information for purposes of Section 11(1). Information must be determined to be confidential by some objective standard rather than on the basis of the subjective considerations of the third party. A two-fold objective test may be applied. Three requirements for information to qualify as confidential - Justice MacKay elaborated on the Maislin objective test in identifying these three requirements: the information must not be available from sources otherwise accessible by the public nor obtainable by observation or independent study by a member of the public acting on his own; the information must originate and be communicated in circumstances giving rise to a reasonable expectation of confidence that it will not be disclosed; and the information, whether required by law or supplied gratuitously, must be communicated in the context of a relationship which is either fiduciary or not contrary to the public interest and which will be fostered ‘for public benefit by confidential communication’. However, the three requirements may be identified as indicators, and not conditions, which help determine the confidential nature of information.

Section 11 contains the procedural provisions which have to be complied with by the public information officer/appellant authority when they are required to apply the said test and give a finding whether information should be disclosed or not disclosed. If the said aspect is kept in mind, we feel there would be no difficulty in interpreting Section 11(1) and the so called difficulties or impartibility as pointed out by the appellant will evaporate and lose significance. This will be also in consonance with the primary rule of interpretation that the legislative intent is to be gathered from language employed in a statute which is normally the determining factor. The presumption is that the legislature has stated what it intended to state

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117 In the decision of Air Atonabee, c.o.b. under the firm name and style of City Express v. Minister of Transport, (1989), 27 FTR 194 Canadian case.

118 The court in Information Commissioner v. Minister of External Affairs (McKinnon), (1990) 35 FTR 177.
and has made no mistake\textsuperscript{119} and several judgments of Supreme Court cited in \textit{B. Premanand and Others v. Mohan Koikal and Others}\textsuperscript{120}

What is stipulated by Section 11(1) is that when an information seeker files an application which relates to or has been supplied by third party, the PIO has to examine whether the said information is treated as confidential or can be treated as confidential by the third party. If the answer is in the possible sphere of affirmative or ‘may be yes’, then the procedure prescribed in Section 11 has to be followed for determining whether the larger public interest requires such disclosure. When information \textit{per se or ex facie} cannot be regarded as confidential, then the procedure under Section 11 is not to be followed. All information relating to or furnished by a third party need not be confidential for various reasons including the factum that it is already in public domain or in circulation, right of third party is not affected or by law is required to be disclosed etc. The aforesaid interpretation takes care of the difficulties visualised by the appellant like marks obtained in an examination, list of BPL families, etc. In such cases, normally plea of privacy or confidentiality does not arise as the said list has either been made public, available in the public domain or has been already circulated to various third parties. On the other hand, in case the word ‘or’ is read as ‘and’ which may lead to difficulties and problems including invasion of right of privacy/confidentiality of a third party. For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person. Such examples can be multiplied.

Furthermore, the difficulties and anomalies pointed out can even arise when the word ‘or’ is read as ‘and’ in cases where the information is furnished by the third party. For example, for being enrolled as a BPL family, information may have been furnished by the third party who is in the list of BPL families. Therefore, the reasonable and proper manner of interpreting Section 11(1) is to keep in mind the test stipulated by the proviso. It has to be examined whether information can be treated and regarded as being of confidential nature, if it relates to a third party or has been furnished by a third party. Read in this manner, when information relates to a third party and can be prima facie regarded and treated as


\textsuperscript{120} B. Premanand and Others v. Mohan Koikal and Others, (2011) 4 SCC 266
confidential, the procedure under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and has been *prima facie* treated by the said third party as confidential, again the procedure prescribed under Section 11(1) has to be followed.\textsuperscript{121}

Section 11 also ensures that the principles of natural justice are complied with. Information which is confidential relating to a third party or furnished by a third party, is not furnished to the information seeker without notice or without hearing the third party’s point of view. A third party may have reasons, grounds and explanation as to why the information should not be furnished, which may not be in the knowledge of the PIO/appellate authorities or available in the records. The information seeker is not required to give any reason why he has made an application for information. There may be facts, causes or reasons unknown to the PIO or the appellant authority which may justify and require denial of information. Fair and just decision is the essence of natural justice. Issuance of notice and giving an opportunity to the third party serves a salutary purpose and ensures that there is a fair and just decision. In fact issue of notice to a third party may in cases curtail litigation and complications that may arise if information is furnished without hearing the third party concerned. Section 11 prescribes a fairly strict time schedule to ensure that the proceedings are not delayed. Thus, Section 11(1) postulates two circumstances when the procedure has to be followed. First, when the information relates to a third party and can be *prima facie* regarded as confidential as it affects the right of privacy of the third party. The second situation is when information is provided and given by a third party to a public authority and *prima facie* the third party who has provided information has treated and regarded the said information as confidential. The procedure given in Section 11(1) applies to both cases.\textsuperscript{122}

\textsuperscript{121} \textit{Arvind Kejriwal v. Central Public Information} (2011) 105 CLA 67 (Delhi), para 12 & 13.
\textsuperscript{122} \textit{Ibid} para 15 & 16.
CITIZEN (REQUESTER) SUBMITS VALID APPLICATION WHICH INVOLVES THIRD PARTY

Does the PIO intend to disclose the information?

- Yes
  - Does the information relate to or was it supplied by a third party?
    - Yes
      - Has the information been treated as confidential by the third party?
        - Yes
          - PIO to contact the third party within 5 days of receipt of the request and give them 10 days to make a submission regarding whether the information should be disclosed [Sec. 11(2)].
        - No
          - PIO to issue a rejection notice to the requester [Sec. 11(3)].
    - No
      - PIO does not need to consult the third party.
  - No
    - The PIO must make a decision regarding disclosure within 40 days of receipt of the application [Sec. 11(3)].

- Third party objects to disclosure
  - PIO to decide whether disclosure to be made
    - Yes
      - PIO decides in FAVOUR of disclosure
    - No
      - PIO decides AGAINST disclosure

- Third party makes no response or does not object to disclosure
  - PIO to decide whether disclosure to be made
    - Yes
      - PIO decides in FAVOUR of disclosure
    - No
      - PIO decides AGAINST disclosure

The PIO to decide in FAVOUR of disclosure: The party can make an appeal to the departmental appellate authority within 30 days from the date of the PIO’s order [Sec 19(2)] and/or Information Commission within 90 days [Sec. 19(3)].

Requester can make an appeal to the departmental appellate authority [Sec. 19(2)] and/or Information Commission within 90 days.

Third party has a right to make representation to the appellate body and Information Commission [Sec 19(1)]

Second appeal to Information Commission to be decided by Information Commission.

Figure - 1.3 Procedure when Third Party is Involved
1.8 **Classification of exemptions in the Right to Information Act, 2005**

In the Right to Information Act, 2005, the exceptions to the disclosure of information can be grouped in two broad categories:

1. **Absolute exemptions:**

The absolute exemptions are those exemptions from disclosure of information which are not subject to public interest override test/harm test as prescribed in Section 8(2) of the Act. The exemption and exclusion of information mentioned in Section 9 and Section 24 can be covered in this category. For the sake of brevity these can be further bifurcated in two categories:

a) **Mandatory exemptions:**

These are exemptions which are mandated by the Act and public information officers are obligated to reject a request for information. When information requested under the Act falls within a mandatory exemption, public authorities must refuse to disclose the record and this is not subject to public interest override. Section 9 of the Right to Information Act, 2005 falls in this category, which provides as under:

“Section-9-Grounds for rejection to access in certain cases

Without prejudice to the provisions of Section 8, a central public information officer or a state public information officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.”

b) **Compulsory exemption:**

Certain organisations are kept out of the purview of this Act due to the nature of the work performed by them and this is the compulsory exemption granted to excluded security and intelligence organisations except the information pertaining to the corruption and violation of human rights. Not only intelligence and security organizations have been kept out of the purview of the Act but also any information furnished by such organisations to the government.
As provided in Section 24, the provision of Right to Information Act is not applicable to certain organisations. Nothing contained in this Act shall apply to the intelligence and security organizations of the central government specified in the Second Schedule or any information furnished by such organizations to that government except that the information pertaining to the allegations of corruption and human rights violations shall not be excluded. Similarly, nothing contained in this Act shall apply to notified intelligence and security organizations, established by the state government except that the information pertaining to the allegations of corruption and human rights violations shall not be excluded.

2. **Qualified/ discretionary exemptions:**

The qualified exemptions are those exemptions from disclosure of information which are subject to public interest override test/harm test as prescribed in Section 8(2) of the Act. The exemptions mentioned in Section 8(1) are covered in this category as all these exemptions are subject to public interest override test/harm test as prescribed in Section 8(2) of the Act. Qualified or discretionary exemptions provide public authority with an option to disclose the information where it is felt that no injury will result from the disclosure or where it is of the opinion that the public interest in disclosing the information outweighs any injury which could result from disclosure.

The majority of exemption provisions are discretionary subject to public interest override.

These exemptions can further be divided into two categories:

a) **Prejudice based exemptions**

Disclosure of the information must reasonably be expected to prove harmful or damaging to the specific public or private interest covered by the exemption in order to access of information to be refused. These can further be subdivided into two categories: Unconditional prejudice based exemptions and Conditional prejudice based exemptions. The distinction between conditional and unconditional exemptions lies in the fact whether the exemption is subject to the larger public interest test or not. The exemptions which are not subject to larger public interest test can be treated as unconditional exemptions and the exemptions which are subject to the larger public interest can be treated as conditional exemptions. It should be noted that both
conditional and unconditional exemptions provided in Section 8(1) are subject to public interest override test/harm test as provided in Section 8(2)

i) **Unconditional prejudice based exemptions** - Not subject to larger public interest test – The exemptions provided in Section 8(1) (a) & 8(1) (h) are covered in this category.

“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;

“8(1) (h) information which would impede the process of investigation or apprehension or prosecution of offenders;”

ii) **Conditional prejudice based exemptions** - Subject to larger public interest test –
The exemptions provided in Section 8(1) (d) & 8(1) (j) are covered in this category.

“8(1) (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;”

“8(1) (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the central public information officer or the state public information officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:”

b) **Class based exemptions** -
Objectively describes the categories or class of information or documents to which an exemption can be applied. While injury underlies class based exemptions as well, these exemptions describe classes of information which, in the wisdom of Parliament, are sufficiently sensitive that disclosure of any information in the class could have a detrimental effect. Thus, under the class based exemptions, where a public authority is
satisfied that information falls within the class specified, this is a sufficient basis for it to refuse access to the information. There is no requirement that an injury be proved.

i) **Conditional class based exemptions** - Subject to larger public interest test – The exemptions provided in Section 8(1) (a) & 8(1) (h) are covered in this category.

“8(1) (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;”

ii) **Unconditional class based exemptions** - Not Subject to larger public interest test – The exemptions provided in Section 8(1) (b) & 8(1) (c), 8(1) (f), 8(1) (g), 8(1) (i) are covered in this category.

“8(1) (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;”

“8(1) (c) information the disclosure of which would cause a breach of privilege of parliament or the State Legislature;”

“8(1) (f) information received in confidence from foreign government;”

“8(1) (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;”

“8(1) (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:”

There are three different kinds of larger public interest tests provided in the Act; larger public interest warranting disclosure of specific information as in Section 8 (1) (b) and 8 (1) (e); larger public interest justifying the disclosure of information such as Section 8 (1) (j); disclosure may be allowed if the public interest in the disclosure outweighs in importance any possible harm or injury to the interest of third parties (proviso to section 11(1)). Legislature has used different languages in these larger public interest requirements for disclosing information.
EXEMPTIONS IN RIGHT TO INFORMATION ACT, 2005

**Absolute Exemptions**

The absolute exemptions are those exemptions from disclosure of information which are not subject to public interest override test or harm test as prescribed in section 8(2) of the Act. The exemption and exclusion of information mentioned in section 9 and section 24 can be covered. For the sake of brevity can be further bifurcated in two categories:

**Discretionary/qualified Exemptions**

Discretionary exemptions provide Public Authority with an option to disclose the information where it is felt that no injury will result from the disclosure or where it is of the opinion that the interest in disclosing the information outweighs any injury which could result from disclosure. The majority of exemption provisions are discretionary. Subject to Public Interest Override.

**Compulsory Exemptions**

Certain organisations are kept out of the purview of this act due to the nature of the work performed by them and this is the compulsory exemption granted to excluded security and intelligence organisations except the information pertaining to the corruption and violation of human rights. Not only intelligence and security organisations have been kept out of the purview of the Act but also any information furnished by such organisations to the government.

**Mandatory Exemptions**

When information requested under the Act falls within a mandatory exemption, public authorities must refuse to disclose the record. NOT Subject to Public Interest Override.

**Section-24 Act not apply to certain organisation**

Nothing contained in this Act shall apply to the intelligence and security organisations of the Central Government specified in the Second Schedule or any information furnished by such organisations to that Government except that the information pertaining to the allegations of corruption and human rights violations shall not be excluded. Similarly, nothing contained in this Act shall apply to notified intelligence and security organisations established by the State Government except that the information pertaining to the allegations of corruption and human rights violations shall not be excluded.

**Section-8. Exemption from Disclosure of Information**

- Disclosure which would affect security, economic interests, and relationship with foreign state
- Disclosure which is forbidden by court/tribunal
- Disclosure which would cause breach of privilege of parliament/state legislature
- Disclosure which would harm competitive position of third party
- Disclosure of information available in fiduciary relationship
- Disclosure of information received in confidence from foreign government
- Disclosure of information which impedes the process of investigation or apprehension or prosecution of offenders
- Disclosure of which would endanger life/physical safety or physical safety of any person assistance given in confidence for law enforcement or security purposes
- Disclosure of Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers
- Disclosure of personal information the disclosure of which has no relationship to any public activity or interest

**Section-9. Grounds for rejection to access in certain cases**

Without prejudice to the provisions of section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

**Figure 1.4 Exemptions provisions**

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Prejudice based exemptions
Disclosure of the information must reasonably be expected to prove harmful or damaging to the specific public or private interest covered by the exemption in order for access to be refused.

Class based exemptions
Objectively describes the categories of information or documents to which an exemption can be applied. While injury underlies class based exemptions as well, these exemptions describe classes of information which, in the judgment of Parliament, are sufficiently sensitive that disclosure of any information in the class could have a detrimental effect. Thus, under the class based exemptions, where a public authority is satisfied that information falls within the class specified, this is a sufficient basis for it to refuse access to the information. There is no requirement that an injury be proved.

Not subject to larger public interest test
8(1)(a) & 8(1)(b)

Subject to larger public interest test
8(1)(c) & 8(1)(d)

8(1)(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

8(1)(f) information the disclosure of which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

8(1)(g) information the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

8(1)(h) information received in confidence from foreign government;

8(1)(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers.

Figure 1.5 Exemptions from Disclosure of Information Section 8(1) Exemptions subject to public interest override test

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1.9 Problem profile

India adopted Right to Information Act, 2005 in June 2005, after a long campaign by civil society and others. In doing so, it joined the rapidly growing community of nations which have adopted right to information laws, giving individuals a right to access information held by public authorities. This law is a profound one in terms of its potential to strengthen the democracy in India. In particular, it aims to reverse the historic practice of treating most information as secret by default, and to create an environment where information is made public with only limited information being kept out of public gaze.

The adoption of right to information legislation is a crucial step in the process of undertaking the transformation noted above. But it is only the first step, and a comparatively small step. Putting the law into effect, and implementing it, is the next step and, as experience in countries all over the world demonstrates, this is a much larger and more challenging step.

Right to Information Act, 2005 is the main legal underpinning for the right to information in India. This law is the key driver behind the push towards open government as it places obligations on all public authorities both to provide information to the public on a proactive basis and respond to requests for information.

The law provides a right to all citizens to access information subject to the provisions of the Act i.e. provides for disclosure of information as a rule and withholding of information as exemptions. The law provides as what should be exempt from disclosure for purposes of protection of various overriding public and private interests. Exceptions are regulated primarily through the principles of consequential harm and by balancing the public interest for and against disclosure.

At the implementation level, many challenges remain. A key issue here is how to apply the consequential harm test properly, as well as assessing the public interest in disclosure. These are challenges in all countries that have right to information laws, but they are particularly challenging in countries like India which have adopted such laws recently. In these countries, not only, there is no established track record of applying exemptions, and of learning what sorts of disclosures will and will not cause harm, there is also generally the problem of overcoming the culture of secrecy, according to which most officials have an exaggerated sense of what should be kept secret, and a correspondingly underdeveloped sense of the benefits of openness.
An examination of information disputes which have been handled by the central Information Commission (CIC) demonstrates that public authorities are still struggling to apply the consequential harm and public interest tests properly. This difficulty is reflected in the many cases.

The regime of exemptions is at the heart of any system for the right to information because it represents the dividing line between openness and secrecy. It is also one of the most difficult parts of the right to information system to develop, because of the inherent complexity of interpreting and applying exemptions. There is a need to provide greater clarity on the scope of exemptions.

1.10 Research hypothesis

The freedom of information legislations in various jurisdictions require decision-makers to weigh the public interest in maintaining exemptions and the public interest in disclosing the information where the exemptions are not expressed in absolute terms. It is the decision-makers’ responsibility to assess these competing public interests and weigh them against each other in making his or her determination.

Questions of public interest (including whether release will or will not benefit that interest) are determined by a consideration of the specific subject matter and not by reference to the class or category to which the document or information may belong, not by purely theoretical or asserted detriments. None of the right to information legislation defines the concept of ‘the public interest’—intentionally, so that determinations must be made with regard to the specifics of each request.

The exemptions are subject to the public interest override test, which is balancing exercise between public interest in disclosure and harm to the protected interests. The protected interests have specifically been provided in exemptions itself, which would be harmed in case of disclosure of information. Decision-makers should give significant consideration to the public interest test when applying exemptions for which it is required, and identify in every case the specific public interest in releasing the particular information.

The Right to Information Act does not provide the public interest factors favouring disclosure of information or public interest factors against disclosure of information. A list of suggestive public interest factors should have been included for proper understanding of exemptions and public interest override.
Case summaries should be read with care and an eye to distilling relevant principles because it is inherent in the public interest test that the application of the relevant principles will vary from case to case. However, the cases including overseas jurisdictions are essential references for decision-makers because they are examples of how the balancing of public interest considerations and the interests protected by an exemption can be weighed.

Following are the research hypothesis:-

1. The understanding of regime of exemptions remains weak in India in context of the Right to Information Act, 2005. The denial of the requested information can only be in terms of exemptions, provided in the Right to Information Act, although experience shows that adjudicating authorities have imported new exemptions other than those that have been provided under the Act and thereby denied the information. There is no scope to adjudicating authorities to import new exemptions other than those that have been provided in the Act.

2. Exemptions provided in the Act, under Section 8 (1) are subject to public interest override test. The ‘public interest test override test’ has to be applied mandatorily to these exemptions for making a determination, whether finally the requested information is exempted or not.

3. Right to Information Act does not define public interest. Perhaps, this is intentional to give flexibility in interpreting the terms public interest in right to information context. The public interest is an amorphous concept and the questions involved in identifying the ‘public interest’ are complex and perhaps inevitably rather subjective.

4. The Right to Information Act has not prescribed any procedure for applying public interest test. There is a need to evolve a model for conducting public interest override test in context of Right to Information Act for making good assessment of risk of harm in disclosure of information, identifying public interest factors in favour of disclosure, carrying out balancing exercise properly and making a reasoned decision which is otherwise mandatory requirement of Act.

5. For carrying out larger public interest test and public interest override test there is need to determine irrelevant factors which needs to be discarded and relevant public
interest factors in favour of disclosure of information and relevant factors in favour of non-disclosure of information.

1.11 Research methodology

This research was conducted primarily though comparative legal research. The starting point for this is the exemptions to the right to information. In order to understand how exemptions work in practice, the research analyses decisions of the central information commission, state information commissions and courts in India. This process demonstrates how the central Information Commission has approached disputes arising from exemptions to the right to information as applied by public authorities. The research also canvasses international standards and comparative practice in other countries in applying exemptions. Specifically, the research analyses a range of laws, practices and case laws from several different common law countries, including Australia Commonwealth, Canada: Federal, Ireland, New Zealand and United Kingdom. The experience of these jurisdictions and concrete examples from their case law are essential reference points for decision-makers in countries sharing a Westminster-style heritage, such as India.

To supplement the analysis of relevant legislation and decisions of the central Information Commission, and to ensure a proper understanding of India’s domestic framework, in-depth interviews were conducted with various public information officers, appellate authorities, information commissioners. Interviews were also conducted with other relevant officials at several public authorities to find out how they have been interpreting the exemptions and to assess their perceptions on why information should be exempt. Interviews were also conducted with various NGOs to assess their perspectives on the interpretation of exemptions to the right of access. In this research although the details of interviews have not been included but their perceptions have been reflected in drawing conclusion and suggestion about exemptions and applying public interest override test.

The research work is based on documentary and analytical methods. The data have been collected from the primary as well as secondary sources. Regarding the primary sources, the relevant data collected from the statutes, files, reports, judicial decisions, decisions given by the central information commission and various state information commissions. As regards the secondary sources, information collected from the books, journals, articles, newspapers, magazines, web sites and other internet resources and the reports and proceedings of the various seminars/conferences. The provisions of some of the codes
relating to access to information have also been examined and the efforts made to find out the gray areas in the actual working of the Right to Information Act.

It is part of methodology to review and analyze public interest overrides in Westminster-style jurisdictions. The ’public interest test’ was studied and analyzed in the access to information legislations in the Australia Commonwealth, Canada: Federal, Ireland, New Zealand and United Kingdom. The experience of these jurisdictions and concrete examples from their case law are essential reference points for the decision-makers in countries sharing a Westminster-style heritage such as India.

In this study, efforts have been made to study each jurisdiction’s legislative framework, identify the department with policy responsibility for the legislation, describe its enforcement mechanism, and review the most important public interest test cases. Where available, government guidance on the application of the test has also been included. Web addresses for government departments, Information Commissioners, ombudsmen, courts, and tribunals in each country was accessed to enable to pursue this research. Many of the cases are available from public archives; where a case’s full text is available at no charge. Australia and Canada have both federal and state or provincial level freedom of information legislations. This study has not covered to consider the application of the public interest test in these states or provinces except Australia Queensland. For a variety of reasons, a particularly strong Freedom of Information jurisprudence developed in the body of decisions of the Queensland Information Commissioner beginning in 1993. The discussion of the public interest in one early Queensland decision, Eccleston, has been especially influential; it was analyzed in detail.

1.12 Objective of the study

This research attempts to address the difficulties faced by public authorities in interpreting the exemptions to disclosure by presenting research on theoretical and practical approaches to applying exemptions, both within India and internationally. In doing so, it aims to provide a framework to assist public information officers (PIOs) and other officials in applying exemptions properly. The research also aims to provide guidance to decision-makers by giving them a framework for their own work in drawing up guidelines and procedures on how the exemptions in the law should be applied. Finally, it aims to provide assistance to oversight bodies - including the information commissions and courts- in assessing the legitimate scope of exemptions. This study is not intended to convey legal
advice in any specific context. Instead, its goal is to provide analysis and concrete examples of public interest test considerations. The aim of this study is two-fold:

- to analyse the various aspects of the public interest as understood in a right to information or freedom of information context in numerous common law jurisdictions in general and in context with right to information legislation in India specifically;

- to assist Right to Information decision-makers such as public information officers, appellate authorities and information commissioners to apply the public interest test in considering exemption provisions in legislation which incorporates that test in one form or another.

In order to meet these objectives, this research: (1) provides an indepth interpretation and analysis of the exemptions in the Right to Information Act and; (2) analyses how public authorities in India have applied these exemptions in practice, (3) analyses the process by which exemptions are applied in other countries, (4) provides a detailed analysis of both national and international experience in applying exemptions; and (5) provides recommendations on how exemptions to information disclosure should be applied in India.

The purpose of this study is also to review irrelevant factors that a decision-maker should not take into account when applying the public interest test, including public curiosity; the fact that the applicant or the public may misunderstand the information; and the class of information requested.

There are various types of exemptions provided under the Right to Information Act and these exemptions are subject to public interest test if public interest in disclosure outweighs the harm to the protected interests. There are some exemptions which are also subject to larger public interest test. The purpose of study may be summarized as under:

- The concept of public interest while applying exemptions under Right to Information Act;

- Factors which should not be taken into account by a public authority in the weighing exercise;

- Relevant factors to be considered by a public authority while applying public interest test;

- Factors in favour of the disclosure of information;

- Factors against the disclosure of information;
• Overview of public interest issues favouring disclosure;

• Practical guidelines for weighing the public interest; and

• Evolving a model for conducting public interest test.

1.13 Format of the research

This research consists of six substantive chapters, including this introductory chapter i.e. Introduction. In this chapter exemptions and right to information has been discussed both from international and national perspective. Chapter II provides an overview of the ‘Exemptions within right to information legislations in international perspective: a comparative study’ examines international standards on exemptions to the right to information, provides a comparative study of exemptions in various common law jurisdictions including Australia Commonwealth, Canada: Federal, Ireland, New Zealand and United Kingdom. Chapter III the most detailed chapter, analyses ‘Exemptions’ in the Right To Information Act, 2005’. It also provides detailed guidance to officials on the practical matters of applying exemptions, and the steps that need to be gone through to this end. Chapter IV provides an overview of ‘Exemptions and ‘public interest override’ in overseas jurisdictions: judicial approach’. Chapter V ‘Exemptions and Doctrine of Public Interest under the Right To Information Act in India’. A final chapter, Chapter VI, then provides Conclusions & Suggestions for how to improve both policy and practice regarding exemptions to the right to information in India.

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