

Introduction

“...Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Government and their instrumentality accountable to the governed” (Preamble, RTI Act 2005).

Today, we gather here to review and dwell into a significant move made a decade ago towards participatory democracy. The Right to Information (RTI) Act was made in response to the spirit of the times that demanded openness in the functioning of the government and greater transparency in its various transactions. The global experience of the times favoured openness and transparency. The enactment and implementation of Right to Information in India was an idea whose time had arrived. Once enacted, there cannot be a looking back on this, except to review and make amends for the better. Technological advancements are fast paced and these are facilitating the process to keep up with times. Besides, as all would know, the enactment in India has had its implications for other countries in the neighbourhood. Its proper implementation is thus, a matter of great interest to one and all.

A decade is long time to test the effectiveness of a law and a reality check would be worth the time we are going to spare. We enacted, implemented and witnessed the RTI Act unfold, through its varied applications. We are privy to empowerment of citizens and the shift towards greater disclosure in government. There is no ambiguity in admitting that RTI Act has facilitated transparency and accountability in government and how?

From a citizen's point of view, the Act heralded active participation and significant involvement in matters of government and a concomitant shrinking of space between the two. From the Public Authorities' point of view, it meant that public service related matters were in line with law and policy, its transactions were on record, and the records were available for possible scrutiny. Against this backdrop, I hazard a review of the implementation of the Act, its implications, current trends and the requirements for future.

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Let us begin with the basic premise of enactment of the Act. The RTI Act, 2005 was envisaged to increase people's participation by providing power to people.

- RTI gave a right to citizens to access 'government held' information.
- It mandated Public Authorities' conform to disclosure *suo motu*.
- Disclosure of information and placing it in the public domain opens the same to a possible scrutiny.
- It made public institutions accountable and responsible for all of its actions and importantly, inactions.
- The Act has provided for a strong and independent Information Commission, as an appellate authority, both at the Central and State levels.
- It authorized Information Commissioners to impose penalties, including a fine for each day of delay in providing information.
- It also envisaged fines and departmental action for other offences like giving false data and the destruction of information.
- In keeping with the sensitivity of some of the Government held information, RTI Act has exempted sensitive information from disclosure in Public Authorities dealing with security and sovereignty of the country.
- It has left enough room for access to information related to corruption or violations of human rights.
- A progressive public interest override in the Act specifies that even exempted information can be released if the public interest in disclosing it outweighs any possible harm.

As per assessments made² on the implementation of RTI in the country, we have had mixed responses. While the positive aspects include; citizen empowerment, faster decision making, improvement in record management, and a boost for honest officers. The not so positive aspects include; increase in misuse, vexatious and frivolous applications, little effect on the decision-making process etc. Let's dwell on the developments in some detail.

Citizen empowerment

One of the significant developments of the enactment of RTI is the empowerment of citizens to engage with the government like never before. Citizens and their representatives have been

² RAAG- Samya, CHRI and studies by other institutions and individuals

able to mobilise the government and access very critical information that have been crucial in unearthing corruption as well as exposing the maladies in the processes and the decision making within government.

Vibrant Civil Society: The enactment has provided a facilitative role to Civil Society Organisations (CSOs) and more often than not, civil society has played a key role in accessing information from the government. Issues like utilisation of public resources for their intended purpose, processes followed in engaging with people in large projects, list of beneficiaries of large and small schemes, formats and criteria for beneficiary selection and general laxity in delivery of public services have been highlighted in CSO works.

Civil society has engaged with Public Authorities at different levels and at scale. It is important to add here, that in the absence of the whistleblower protection law, citizens and CSOs have accessed information through RTI at considerable risk to life and property.

Grievance redress mechanism: Citizens and more so employees, in Government and the private sector, have been using RTI to get their grievances redressed. As per a sample study estimate³, 16 % of RTI requests are aimed at expressing grievances and many more are ‘disguised’ versions of various grievances. For instance, people in rural Karnataka combined campaigns for the Right to Information and the Right to Food to fight hunger. In Uttar Pradesh, over 14,000 residents in a cluster of eight villages, 60 km from Banda, used RTI to fight for their right to have roads, bridges and electricity⁴.

Digitisation of records:

Government has focussed its attention on digitisation of records and their management. The various mission mode initiatives, e-enablement of all the functions of the government, digitisation and online transactions at all levels, are efforts to minimize face to face interactions and maximise are citizen centric service and development delivery at the door step. Digitisation enables real time information disclosure, minimising the time to be spent for retrieval of information and enables efficient service delivery and rational management of public resources.

³ RAAG-Samya study, 2014

⁴ <http://www.thehindu.com/todays-paper/tp-national/rti-now-a-common-mans-tool/article1356517.ece>

While there are strides made on the asserting the right, there have been undesirable and unintended consequences which need to be discussed as these are possible hurdles for total implementation of the Act.

Policy and Practice mismatch on the supply side

We all know that implementation of RTI is directly linked to the understanding of the provisions of the Act and the exercise of its right by the public, and concomitantly, availability of information and the capability of the supplier to do the needful in a timely manner. The RTI Act provided the practical regime to guide through its implementation for both sides.

Emphasizing transparency as an overarching value, many countries have adopted a 'push model' of Freedom of Information (FOI) legislation that prioritises proactive disclosure of government information. This is different from a 'pull model' that stresses citizen-initiated access or reactive disclosure. The RTI Act has through Section 4(1) (b) represents a clear move to a 'push' model, requiring government to *suo motu* part with information, and periodically publicize information. The emphasis is on having a bias in favour of disclosure. It recognizes that information held by government is a public resource and should be made available to the public as a matter of course unless of course, to do so would be contravention to serving the public interest.

While Section 4(1)(b) guides through the pointers for disclosure, these are generally presumed to be the only items of disclosure which is not the case. Further fresh guidelines have been issued (by DoPT on 15/4/2013), to include other more contentious items that need to be in the public domain⁵. Hence the dilemma is not in what information to be disclosed but about what ought to, must and shall be disclosed. This brings us to the next question what are the parameters for withholding certain information and on what 'stated grounds' are we permitted to do so?

Non-adherence to specified timelines: The Act has specified the timelines for ensuring readiness and adherence to set timeframe for compliance with the provisions of the Act.

⁵ OM dated 15th April 2013 f the Department of Personnel and Training, Government of India

Despite the rider of ‘undue diversion of resources’, there is much more that can be done at the government level.

One Act and diverse rules⁶:

The Central Act is enacted and the States have formulated their own rules which vary across the states. An estimate mentions that there are 118 rules emerging from the States, Courts, and Information Commissions interpretation of the Act. This has led to ambiguity in interpretation and the concomitant confusion in its uniform implementation. Some instances are⁷: variation in fee, limitation in number of words in an application, type of valid identity etc.

- **Variation in Fee⁸:** The rules dictate varied fees, application format, limitation in number of words in an RTI application, type of identity proof required and mode of payment complicating the process of seeking information. For instance 34 states and UTs have prescribed application fee of Rs 10. But cost of pursuing an RTI application could range between Rs 50 to Rs 100 excluding cost of information. Haryana charges Rs 50 for all RTI applications while Arunachal Pradesh charges Rs 50 for most applications but Rs 500 for information related to bids, tenders or business contracts. Andhra Pradesh has cut down on the fees — Rs 10 for cities, free of cost for village level and Rs 5 for sub-district level. Sikkim charges Rs 100 for both first and second appeal, while filing a first appeal in Madhya Pradesh costs Rs 50 and a second appeal Rs 100. While the central government has mandated Rs 2 per photocopy, Chhatisgarh has limited the number to 50 pages while Arunachal charges Rs 10.
- **Fee for inspection of records:** To complicate things further, inspection of documents is allowed free of cost by some states for the first hour and then charges of Rs 5 are levied in Tamil Nadu, Tripura, Sikkim and Uttarakhand. The cost of inspection of documents in Daman and Diu is Rs 100 a day for a maximum of 3 hours and if the information sought is older by a decade or more, the public authority can charge an additional Rs 25 an hour.
- **Format of Application⁹:** States have also placed odd restrictions on the format of the application. In Karnataka, Bihar, Chhattisgarh and Maharashtra the length of the RTI application cannot exceed more than 150 words while the Centre has mandated a 500

⁶ <http://timesofindia.indiatimes.com/india/One-RTI-Act-but-118-complications/articleshow/44787785.cms>

⁷ RAAG-Samya study, 2014

⁸ ibid

⁹ Ibid

word limit. There are similar inconsistencies in rules related to proof of identity required by public authorities. While the RTI act does not mandate any proof of identity Section 3 does say that only Indian citizens can use the law. This has led to states like Goa, Gujarat, Odisha, Sikkim insisting on identity proof of the applicant.

Delays in Appointment of Information Commissioners:

- Considerable delays were witnessed in appointing Information Commissioners in various states owing to which the pendency has gone up.
- Lack of specified time frame for the ICs to dispose of cases is one issue that needs attention
- Most disposals have been by way of issuing show cause notices to PIOs that have not been followed up with,

Frivolous and vexatious applications:

A frivolous application is when repetitive applications are put up on the same subject. In one instance, the applicant had filed around 130 RTI applications, mostly on the similar subject, i.e., non-payment of pension to him, for which he is not entitled as per rules and this was suggested in the information already provided. In cases where an applicant wishes to know the why or how of an issue, the PIO is not obliged to explain the stand of the PA. Similarly in one case the Hon. Information Commissioner has averred that when the information is disclosed and put up in the public domain, it is no longer 'information held by the Public Authority'. The applicant can access information from the public domain.

A vexatious request (not the requestor) is one that is: "*a manifestly unjustified, inappropriate or improper use of FOIA*"¹⁰. These can be determined by checking

- i. the likely burden on the public authority and its staff;
- ii. the motive of the requester; (a point to ponder, as the reason for asking information is not in the purview of the PIO)
- iii. the value or serious purpose of the request, and
- iv. any harassment or distress of and likely to be caused to staff.

¹⁰ Verdict of Judge Wikeley in the United Kingdom Upper Tribunal

There may be applications that are made to annoy and harass the officer (PIO) in the Public Authority either with malafide intentions or to compel to part with information which may have private vested interests and would not serve any public interest.

Going by the repeated nature of some RTI applications, the CIC has decided the following:

- a) The citizen has no right to repeat the same or similar or slightly altered information request under RTI Act, 2005, for which they already got a response.
- b) Once an RTI application is answered, the appellants shall refrain themselves from filing another RTI application against the public authority as once information is received and held by them or posted in public domain, as such information is deemed to have ceased to be 'held' by the public authority.
- c) Such repetition of information request may be considered as reasonable ground for refusal under the RTI Act.
- d) An applicant or appellant repeating the RTI application or appeal either once or multiple times, suppressing the fact of earlier application and receipt of the answer, the CPIO of public authority may reject it forthwith after intimating it along with reasons. Appeals can be rejected
- e) The First Appellate Authority and Commission may be right and reasonable to consider this as a ground for rejecting the first or second appeal, respectively among other reasons if any.

The RAAG study however negates this causation claiming that such applications are minimal in the total quantum of RTI applications made. The study found that less than 0.6% of the applications were vexatious or frivolous, or sought to infringe privacy. Only 2% required voluminous responses, and 1% sought information that covered a long time span (over 10 years). The contention hence misuse of the Act, is very low and may not be a ground to dilute or write off the Act.

Ambiguity over Public and Private:

In the past decade the cautious strides towards the goal of maximum disclosure with public good as the yardstick, and minimum invasion of individual privacy had been the endeavour. Rulings given by the various Information Commissions and the Hon. State and Supreme Courts have contributed to guiding and deciphering the Act for its various nuances and implications. The Supreme Court is deliberating on Right to Privacy and we will know their inferences on that and the limitations to RTI as well soon.

Public Interest verses Protected Interests

The issue of public interest verses individual privacy and protected interests of third party have come to the fore on several occasions. Several rulings of the various Information Commissions have pronounced and the Courts have affirmed it: “*When the public interest outweighs private interest, the former shall prevail*”. This is the thumb rule and an impregnable dictum. But one might ask, what are the justifiable parameters for indulgence in weighing public and private interests in obtaining a piece of information? Who is the authorised competent person in a Public Authority to make that decision and who states it?

When transparency is mandated for the functioning of the Government it forces public officials to be transparent to the citizens, raises questions about what information should be disclosed for the greater good. High Court of Delhi in *UPSC vs R.K.Jain* held that merely because information that may be personal to a third party is held by a public authority, an applicant does not become entitled to access it, unless the said personal information has a relationship to a public activity of the third person (to whom it relates), or to public interest. If it is private information (i.e. it is personal information which impinges on the privacy of the third party), its disclosure would not be made unless larger public interest dictates it.

Individuals have a right of access to the information held about them. But when a person other than the individual whom it is about, seek such information, sub-clause (j) of Section 8(1) comes into play. This is a qualified exemption. The PIO or the appellate authority can disclose information if they are satisfied that the larger public interest justifies such disclosure. But there are some restrictions on disclosure of information regarding victims of sexual offences and juveniles.

Exemptions

By now it is understood that ‘disclosure is the rule and exemption is an exception’. The categories of information enumerated as exempted from disclosure under Sec. 8, 9, 24 and Official Secrets Act (which is almost redundant by doctrine of eclipse), can be disclosed if public interest in disclosure outweighs the harm to protected interests.

An overview of the RTI Act, especially sections 6 to 8 seem to give an impression that the legislature has tried to balance and harmonize conflicting public and private rights and interests by building sufficient safeguards and exceptions to the general principles of

disclosure under the Act (*Public Information Officer v. Andhra Pradesh Information Commission, 2009 (76) AIC 854 (AP)*).

The exemptions that are sought to protect the sovereignty and security of the country, is harmful to the secular mosaic of the country, would be detrimental to the agreed protected commercial interest of the parties etc give enough indications on what not to be disclosed. Not only do we have pointers to that, we are also guided by the Act and the rulings on the conditions for non-disclosure. The observations of the Hon'ble Supreme Court¹¹ that information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability may be the guiding principle for demand based disclosure.

Public - Private Sector Partnerships and RTI

These are times of liberalisation and the partnerships posed by the state with the private sector in large public infrastructure projects, is the order of the day. It has its inherent benefits in minimising the cost, manpower burden and time of the state. However it has repercussions for the government's accountability to people on the nature and mode of engagement with the private sector and the financial resources at stake. Under these circumstances, public must know how projects are planned to be executed, due diligence to be followed, and transparency and accountability in public transactions.

In the landmark decision of *Sarbajit Roy v. Delhi Electricity Regulatory Commission*, the Central Information Commission reaffirmed that privatized public utility companies continue to be within the RTI Act, notwithstanding their privatization. Private entities are covered under the RTI Act irrespective of whether they are substantially aided or funded by the Government. With PSUs, corporations, state and central government agencies increasingly opting for Public Private Partnerships (PPP), all such projects¹² are now open to public scrutiny. In private-public partnerships one can get access to public documents by putting a query to the 'public partner'. However, balancing the right to know and commercial confidentiality is more relevant for private sector information, as compared to the government due to high sensitivity of information. Similarly, information pertaining to

¹¹ Supreme Court in Civil Appeal No.6454 of 2011, arising out of SLP [C] No.7526/2009 in the case of CBSE & Anr Vs Aditya Bandopadhyay & Ors

¹² OM of Department of Personnel and Training (DoPT) on April 15, 2013

private entities can be obtained from government department or government regulator with which the private entity is registered or is being controlled or monitored.

Roadmap to RTI Implementation

The roadmap to RTI implementation requires removal of inconsistencies in laws that need to be addressed and repealed. Proactive steps need to be taken to involve and indulge in capacitating the official machinery to submit to the requirements of the Act and to leverage technology to do the same.

Inconsistent laws and their repeal: Some of the statutory provisions that must be repealed to facilitate increased space for openness in information are-

- a. Sec. 15 of THE CENSUS ACT, 1948 (Act No. 37 of 1948, as amended in 1994)
Records of census not open to inspection nor admissible in evidence.
- b. Sec.57 of The Competition Act 2002.Restriction on disclosure of information: No information relating to any enterprise, being an information which has been obtained by or on behalf of [the Commission or the Appellate Tribunal] for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.
- c. Sec.30 of The Bureau of Indian Standard Act, 1986-Any information obtained by an inspecting officer or the Bureau from any statement made or information supplied or any evidence given or from inspection made under the provisions of this Act shall be treated as confidential.
- d. Sec. 280 of the Income Tax Act, 1961 which provide that if a public servant furnishes any information or produces any record in contravention of the provisions of section 138(2) of the Income Tax Act, 1961, he or she will be punishable with imprisonment which may extend up to six months and shall be liable to a fine.

There is a need for bringing in complimentary legislations to RTI such as the Whistleblower Bill (Public Interest Disclosure and Protection for Persons Making the Disclosure Bill, 2010) in place so that safeguards are in place for information seekers that seek to protect public, community and social interests.

Digitisation and Record keeping

The required level of proactive disclosure is not possible without appropriate record keeping, and this aspect needs focused attention. Record keeping practises may have to be reviewed from the point of view of comprehensive proactive disclosure requirements, especially through digital means.

What information should be mandatory to be digitally published? All information should be pro-actively disclosed unless there is a compelling and legal justification to the contrary.

There is an urgent need for

- cataloguing and computerising all records to disclose all or maximum information and periodic updating of dynamic information,
- publication of service delivery standards and performance and grievance redressal mechanism.

Efforts at making all information available digitally in the public domain in conveniently accessible forms should be complemented by developing information kiosks at village/ ward levels where everyone can access digitally available information directly, or in an assisted manner.

Audit of *suo motu* disclosure:

Unless monitoring and enforcement is effective, no amount of guidelines on proactive disclosure will be useful. Although there is no penal provision under the Act for non-compliance, the Information Commissions have clear *suo motu* powers and responsibilities under the Act. The comprehensive oversight and advocacy role of the Information Commissions include investigation of complaints about RTI administration, review of access denial decisions, publication of RTI guidelines, and providing advice to government on information policy. Sec.18 (2) & (3) of the RTI Act provide that the Information Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, in deciding on all matters.

Appropriate directions for time-bound compliance should be issued against the concerned public authority and information audits by third party should be promoted, as a separate specialised process anchored by the Information Commissions.

Learning from one another

A Committee was constituted by Central Information Commission to identify the major obstacles in flow of information and to outline ways and measures for removing them, to evolve mechanism for effective cooperation and coordination of the activities of Central and State Information Commissions, to develop a system for the effective documentation and dissemination of best practices in India and abroad and creation of an e-enabled common portal for Information Commissions, to review rules and executive orders issued under the Act, to promote scientific management of all records in all offices in the government and public authorities, and to suggest arrangements for better information delivery at the grass root level. The Committee had made several recommendations.

The next level of recommendations is required to be made that call for an institutionalised mechanism for continued dialogue between Central and the various State ICs. Cross learning and coordination for better implementation of the RTI in the country in the changing times would be its mandate.

Capacity issues

Training officers on systems and procedures for both on-demand requests and *suo motu* disclosure and compliance with Section 4.1 will go a long way in oiling the system to function smoothly. Toolkits have been developed for undertaking audit of *suo motu* disclosure and these may be customised to undertake review and evaluation of the quality of disclosure. It remains to be seen however, how proactively Public Authorities divulge public information that they are mandated to do. Strengthening the institutional and human capacities to undertake the enormous task ahead is a clear mandate of the present. Adaptation of technology to address the ways and means of making information accessible at the click of a button or a quick swipe has to be the task ahead.

At this juncture we also need to find answers to some questions.

- (i) Whether Section 11 gives a third party an unrestrained veto to refuse disclosing information or it only gives the third party an opportunity to voice its objections to disclosing information.
- (ii) Whether a third party can seek an interim non-disclosure order before the IC?
- (iii) Whether there is a need to provide for remedy for cause of action against improper disclosure under the Act?

- (iv) If information that is subjudice is permitted to be disclosed if larger public good is served by such disclosure?

There are matters that need to be cleared of confusion and ambiguity as we go along and this august gathering would do well to decipher the same in due course.
