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Right to Information Vis-A-Vis Privacy Right: Balancing of Interest

by
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I. INTRODUCTION

The Universal Declaration of Human Rights, 1948, through Article 19 articulates the rights to information as follows:¹

"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 12 of the same UDHR provides that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."*²

Freedom of expression has been universally recognised as a vital human right. The objectives behind the right are to allow the growth of individual personality and ensure the accountability of the institutions of State. Similarly, the right to privacy in essence seeks to protect and foster the growth of individual personality as well. Therefore, the achievement of the objectives of both these rights involves harmonising the rights especially in circumstances in which they are in conflict.

The extent of free speech is well defined in Indian law. Freedom of expression is not an absolute right. It is subject to reasonable restrictions that conform to the constitutional limitation prescribed. It must be noted that with the emergence of the right to privacy as fundamental right,



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privacy can no longer be merely seen as restriction on the independent right of free speech. Therefore, a balancing exercise needs to be carried out to protect the integrity of both rights. In this context, it is intended to study whether any balancing mechanism for two essential human rights, namely, the right to privacy and the right to information exists or not.

These rights display a conflicting nature. The Freedom of Information Act, 2000, enacted in England, employs a test for disclosure the analysis of how the information was collected initially, the effect on the person from whom the information was collected, whether consent to release the information was obtained, and evaluating the public interest in releasing the information.

In India, the Right to Information Act, 2005 incorporates provisions exempting the disclosure of certain categories of information allowing public authorities to do so if they are satisfied that the larger public interest justifies such disclosure. The underlying principle of the RTI Act is to rest with very citizen the right to seek information from a public authority and every public authority is bound to furnish the information sought for so long as it is not within the purview of the exemptions under Sections 8 and 9.

II.PRIVACY AND RTI: BALANCING INTERESTS

The modern information society accords the status of essential human rights to

privacy and the right to information alike. The RTI laws effectuate the fundamental rights of citizens to access information held by government bodies. Concurrently, the right to privacy grants individuals a fundamental right to control the collection, access and use of personal information about them held by government bodies. These rights are mainly conflicting but complementary too. Individuals' rights to protect their privacy co-exist with government accountability. Privacy laws can be used to obtain information in the absence of RTI laws and RTI can be used to enhance privacy by revealing abuses.³

The IT Revolution spurred the use of modern technology thereby facilitating the growing collection and sharing of personal information. This gave rise to breach of privacy in events of disclosure of sensitive personal data, such as DNA make-up, and public records. The conflicting and complementary nature of the two rights insist upon creating a balancing mechanism by virtue of which neither of the two equal human rights-privacy and access, take precedence.



INDIAN PERSPECTIVE

Right to privacy is implicit in Article 21 of the Indian Constitution which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Therefore, privacy is a fundamental right guaranteed under the Constitution. However, it is not considered an absolute right. It exists with safeguards that certain laws can override for the cause of larger public interest. The reasonable restrictions imposed are directed to achieve the ends mandated by the Directive Principles enshrined in the Constitution. In the present scenario, there is extension of the danger of information technology to the right to privacy and the insidious transmission of information to government bodies. This has made personal confidentiality a pliant tool in the hands of state to be exploited as per the sweet will in absence of a national privacy policy to protect individual rights in the automated information-communication age. In *S.P. Gupta v. Union of India*⁴ Justice Bhagwati echoed the same as such:—

"It is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only if people know how Government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge" said James Madison, will forever govern ignorance and a people who mean to be their governors must arm themselves with the power knowledge gives. A popular Government without popular information or the means of obtaining it is but a prologue to a farce or tragedy or perhaps both". The citizens' right, to know the facts, the true facts, about, the administration of the country is thus one of the pillars of a democratic state. And that is why the demand for openness in the Government is increasingly growing in different parts of the world."



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He further builds a nexus between open government and people's participation in the administration in the following excerpt:—

"The demand for openness in the Government is based principally on two reasons. It is now widely accepted that democracy, does not consist merely in people exercising their franchise once in five years to choose their rulers and, once the vote is cast, then retiring in passivity and not taking any interest in the Government. Today it is common ground that democracy has a more positive content and its orchestrations have to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the Government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of Government—an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is open government where there is full access to information in regard to the functioning of the Government.

Their is also in every democracy a certain amount of public suspicion and distrust of Government, varying of course from time to time according to its performance, which prompts people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the Government must be actuated by public interest but even so we find cases, though not many, where Governmental action is taken not for public good but for personal gain or other extraneous considerations. Sometimes Governmental action is influenced by political and other motivations and pressures and at times, there are also instances of misuse or abuse of authority on the part of the executive. Now, if secrecy were to be observed in the functioning of Government and the process of Government were to be kept hidden from public scrutiny it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open Government with means of information available to the public, there would be greater exposure of the functioning of Government and it would help to assure the people a better and more efficient administration. There can be little doubt that exposure



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to public gaze and security is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government is clean government and a powerful safeguard against political and administrative aberration and inefficiency."

The RTI Act enacted in 2005 fills the loopholes as identified by Bhagwati J. The preamble of the RTI Act, 2005 enunciates that the citizens shall have to right to secure access to the information under the control of the public authorities, to promote transparency of information which are vital in the functioning of the public authorities, to contain corruption, to hold governments and their instrumentalities accountable to the governed and thereby develop the participatory governance.

In view of the prescribed safeguards, when a conflict between the privacy of an individual and the right to information of the citizens arises, the latter right

predominates as it serves the larger public interest. However, certain provisions have been incorporated in the Act exempting the disclosure of certain categories of information allowing public authorities to do so if they are satisfied that the larger public interest justifies such disclosure.

A public authority cannot merely reject a written request for disclosure of information on the premise that it relates to a third party. Section 11(1) of the Act provides that if a state public information officer (SPIO) intends to disclose any information or record or part thereof on a request made under the Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the SPIO, 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 SPIO 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.

In *Pritam Roj v. University of Calcutta*⁵, the Single Judge of Calcutta High Court while deciding on the issue of disclosure of answer-sheet to the applicant held that answer scripts could well be classified as information irrespective of whether or not the examinee was entitled to inspect the same under the R.T.I. Act. The Court observed that just as the examining authority



has the right to Judge the student's knowledge, the examinee also has the right to know the manner in which his script had been evaluated. The Court held that the right to information is the most basic empowerment of the individual - the right of an individual to the source of any knowledge required for him to educate himself in any area he may choose and that if inspection of answer scripts is denied to the examinee, the spirit of the Constitutional right to expression and information may be lost, therefore, directed that the Calcutta University should proceed immediately to offer inspection of the answer scripts that the petitioner sought for.

Right to information is a human right under Arts. 12 and 19 of the Universal Declaration of Human Rights deals with the privacy. Similarly, privacy is enunciated in Art. 14 of the International Covenant on Civil and Political Rights (ICCPR) which states:—

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any Judgment rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."⁶

In order to balance the aforementioned human rights, the RTI Act provides for

certain exemptions to disclosure of information pursuant to Sections 8 and 9.

III. PRIVACY EXCEPTION: SCOPE OF SECTION 8(1)(J) OF R.T.I. ACT

The realm of privacy vis-a-vis the RTI Act, 2005, is explained under section 8 of the Act which provides:

Sec. 8 Exemptions from disclosure of information:—



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(j) Information which relates to personal information the disclosure of which has not 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 State Public Information officer or the Appellate Authority, as the case may be, satisfied that the larger public interest justifies the disclosure of such information:

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

Thus, the information must be personal in nature insofar as it applied to an individual and not to an institution or a corporate. The disclosure of such personal information should not have a relationship to any public activity or interest. Public authorities while performing their functions routinely procure personal information from Citizens. This is considered to be within the domain of a "public activity". There do exist certain exceptions to this general rule relating to information obtained by a public authority while using extraordinary powers such as raids or telephone-tapping.

The Central Information Commission (CIC) has defined "Invasion of privacy" as "one, who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Thus, personal information does not cease to lose its "personal" nature once delivered to a public authority. Access to such information by third parties has the potential effects of causing harassment, mischief, intimidation and defamation. In light of section 8, personal domains may be allowed to be breached only for compelling reasons as satisfied by the authorities.

In *Rakesh Kumar Singh v. Harish Chander*², the ambit of section 8(1)(j) was defined as follows:—

"In so far as application of section 8(1)(j) to deny disclosure on the ground that personal information which has no public interest is concerned, it is necessary to explain the scope and ambit of this sub-section. This Section has to be read as whole. If done so, it would be apparent that "personal information" does not mean information relating to the information seeker, but about a third party. That is why, in the Section it is stated "Unwarranted invasion of the privacy of the individual." If one were to seek



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information about himself or his own case, the question of invasion of privacy of his own self does not arise. If one were to ask information about a third party and if it were to invade the privacy of the individual, the information-seeker can be denied the information on the ground that disclosure would invade the privacy of a third party.

Therefore, when a citizen seeks information about his own case and as long as the information sought is not exempt in terms of other provisions of section 8 of RTI Act, this section cannot be applied to deny the information."

In *Surupsingh Hrya Naik v. State of Maharashtra*⁸, the Bombay High Court prescribed procedural safeguards to be met before divulging third party information. In this case, the court probed into the question of true import of the proviso of section 8(1), which sets out that the information, which cannot be denied to Parliament or the State Legislature unless the person who opposes the release of information insists that such information is not available to Parliament or State Legislature under the Act. Therefore, the public authorities shall be under obligation to make all such information readily available for their disclosure to a citizen on demand under the Act.

In this case, petitioner was the MLA to whom the Supreme Court sentenced to one month's imprisonment for contempt of its orders during his tenure as minister in Maharashtra government. The petitioner spent twenty-one days of his jail term in a hospital in Mumbai various illnesses proclaimed. An individual citizen of civil society sought his medical reports of treatment, in order to ascertain that why he had spent most of the duration of his sentence in an air-conditioned hospital.

On such demand, the petitioner had objected to the disclosure of his medical reports claiming that such disclosure would cause invasion of his right to privacy. The matter escalated to the State Information Commission (SIC) which ordered to disclosure of the medical reports in the larger public interest. The petitioner challenged the order of State Information Commission of disclosure on the grounds of his right to privacy and the requirement of confidentiality of patient related information under the Indian Medical Council.

In this case, the honorable Court relied his judgment upon the single bench judgment in an earlier case relating to access to information under the Goa Right to Information Act, 1997 to hold that the proviso of Section 8(1) applied only to clause (j). The Court reasoned as follows:



"..... the next aspect of the matter is whether the proviso after Section 8(1)(j) applies in its entirety to Section 8(1)(a) to 8(1)(j) or only to Section 8(1)(j). Does therefore, the proviso apply to Section 8(1). Before answering the issue, we may refer to the judgment of a learned single judge of this Court in *Panaji Municipal Council v. Devidas J.S. Kakodkar*², to which attention was invited by the learned counsel for the petitioner. It was held that the proviso has been placed after Section 8(1)(j) and in this context it would have to be so interpreted. So reading the proviso applies only to Section 8(1)(j) and not to the other sub-sections of that section."

In that case a single judge bench of the court interpreted a similarly worded proviso under Section 5, Goa RTI Act titled "Restrictions on Right to Information" as being applicable only to clause (e) which restricted disclosure of information that would endanger the life or physical safety of a person or identify the source of information or source of assistance given in confidence for law enforcement or security purposes or in public interest.

The single judge bench sought to save the restriction relating to privacy of an individual from the operation of the proviso in the following words:—

"..... Section 5, Clause (b) brings about an object to protect a citizen's right of privacy as envisaged under Article 21 of the India Constitution. Therefore, if such a restriction is not there, the entire Act comes under the mischief of violation of Article 21 of the India Constitution. In order to avoid the calamity, the legislature thought it fit to incorporate such provision as contained in clauses (a), (b), (c) and (d). It is also to be noted that the class of information which is stated in clauses (a), (b), (c) and (d) and the class of information stated in Clause (e) is quite different...Therefore, if on an harmonious reading of the provisions in order to save the legislation from the vice of unconstitutionality, the court will always choose a path which can save the enactment by reading down the same in consistent with the provisions of the Constitution...."

Looking from different point of view, this proviso makes the legislature and an ordinary person on par in seeking information. What information a



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legislature is entitled to, such information the citizens are also entitled to receive. That gives a general guidance to both the legislator and the seeker. The proviso only seeks to further explain the section. But it is very important to note that a legislature is also not entitled to get information if it relates to the subject, enumerated in sub-clause under Section 5 of the Act. Viewing in this prospective also the appellate order is liable to be set aside."

The ratio of the Court in *Panaji Municipal Council v. Devidas J.S. Kakodkar*¹⁰, was applied mechanically without regard to the reasoning that informed it, therefore the Court's reading of the import and application of the proviso underlying Section 8(1)(j), RTI Act deserved to be reviewed.

The two-Judge Bench of the Supreme Court, in *Girish Ramchandra Deshpande v. Central Information Commr.*¹¹ referred and interpreted the scope and interpretation to clauses (e), (g) and (j) of Section 8(1), RTI Act. In the instant case, details of the petitioner's service career were stated in his income-tax returns. These details were considered to be within the sweep of "personal information" and exempt from disclosure unless larger public interest justifies disclosure. The question arising in this case was whether the Chief Information Commissioner was justified in denying information regarding third respondents personal matter pertaining to his service career and details of his assets and liabilities on the ground that the information sought for was qualified to be within the sweep of personal information, as defined under Section 8(1)(j) of the Act. The Supreme Court observed that performance of an employee or officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders would be passed but the same cannot be claimed as a matter of right. Similarly, the details disclosed by a person in his income-tax returns are "personal information" which stand exempted from disclosure under clause (j) of section 8(1), RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information.

In *Girish Ramchandra Deshpande v. Central Information Commr.*¹² Petitioner sought details of the Respondent's movable and immovable properties and also the details of investments, lending and borrowing from Banks and other financial institutions. He has also sought for the details of gifts stated to have accepted by the Respondent, his family members and friends and relatives at the marriage of his son. The information sought for finds a place in the income tax returns of the Respondent. The Supreme Court had to consider whether the information sought for qualifies to be "personal information" as defined in clause (j) of S. 8(1) of the RTI Act. The Supreme Court held that:

The details disclosed by a person in his income tax returns are "personal information" which stands exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless it involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information. On facts, as the Petitioner has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.

As for as the right to privacy is concerned, the Indian legal jurisprudence provide immunity to medical records. However, this right to privacy is qualified by the exception in the hands of courts, where non-disclosure may potentially endanger the lives of other beings.

In '*X*' (1) v. *Hospital 'Z'*¹³, The Supreme Court of India was required to discuss the scope of a blood donor's right to privacy of his medical records. The respondent hospital had disclosed the record without the permission of the donor, that the blood donor was diagnosed as being a HIV patient. Due to such disclosure by the hospital, the lady who was to have been married to the blood donor had broken off her engagement, thereby subjecting the donor to social ostracism. Discussing the issue of privacy of medical records, the Supreme Court ruled that while medical records are considered to be private, doctors and hospitals could make exceptions in certain cases where the non-disclosure of medical information could endanger the lives of other citizens. Therefore, the alleged intrusion was justified in law for the right to health of another person.

In *Suresh Kumar Koushal v. Naz Foundation*¹⁴, the Delhi High Court decriminalises Section 377 of Indian Penal Code, 1860 to a class of sexual relations between consenting adults. The critical arguments accepted by the

Court in this case was that the right to privacy of citizen's sexual relations are protected under Article 21 and could be intruded into by the State only if the State was able to establish a compelling interest for such interference. Since the State was unable to prove a compelling interest to interfere in the sexual relations of its citizens, the provision was read down to decriminalise all consensual sexual relations.

The Supreme Court, however, reversed the High Court decision in view of the fact

that Section 377 of Indian Penal Code is an anti-sodomy law and it is constitutionally valid. The court rejected the reliance placed by the High Court on foreign decisions.

IV. POSITION IN THE U.K.

The Data Protection Act, 1984 was adopted by the U.K. in response to the council of Europe's convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹⁵ The Data Protection Register so created by the Act was replaced in 1998 by the Data Protection Commission.¹⁶ The Freedom of Information Act (FOIA) was adopted in 2000 enjoining the formation of an information commission. Personal Data was defined by the FOIA as:—

"Data which relates to a living individual who can be identified from that data or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

The data protection principles set out for processing of personal information required that the processing is fair and lawful, that the data are adequate and relevant for the purpose for which they are collected, that accuracy of the data is maintained, that they are not retained unless necessary, that they are kept secure and not transferred to third countries.

In the event of a request for personal information by an individual about himself, he is governed by the Data Protection Act. This Act provides an individual with weaker rights to demand access as opposed to the FOIA. On the denial of access, an individual is bereft of the power to appeal to the information commissioner and must apply in court.



The FOIA prescribes absolute exemption for personal information relating to third parties. Disclosure of personal data is thus subject to the data protection principles and will be permitted in cases it is in consonance with the principles. The test for disclosure is the analysis of how the information was collected initially, the effect on the person from whom the information was collected, whether consent to release the information was obtained, and evaluating the public interest in releasing the information.

V. CONCLUSION

The underlying principle of the RTI Act is to vest with every citizen's right to seek information from a public authority and every public authority is bound to furnish the information sought for so long as it is not within the purview of the exemptions under Sections 8 and 9. Personal information so provided to a public authority will lead to breach of confidence if a third party secures access to such information. The sanctity of the private domain is inviolate. Thus, applicant seeking information about its own case does not attract section 8(1)(j), but the applicability of this section is restricted to third party information giving rise to breach of individual's privacy.

The right to privacy and access to information, though placed on an equal footing as human rights, are complementary to each-other insofar as attaining the common goal of government accountability. However, in the event of conflicts, balancing the concurrent rights proves to be a Herculean task. The onus of resolving conflicts rests on governments to unambiguously enact legislations and guidelines. While doing so, the government must ensure that there exist compatible definitions of "personnel

information in laws governing access to information and data protection laws. Thus, no right should be overweight than another. Which rights should be enforced, must be decided on a case-by-case basis emphasising on the requirement of public interest because no single parameter can be used to decide all cases on same ratio.

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¹ P.K. Das, International Law Documents, p. 36.

² P.K. Das, International Law Documents, p. 35.

³ David Banisar, "The Right to Information and Privacy", World Bank Institute, cited in Privacy Law, Rishika Taneja & Sidhant Kumar p. 96.

⁴ 1981 Supp SCC 87 : AIR 1982 SC 149.

⁵ 2008 SCC OnLine Cal 231 : AIR 2008 Cal 118, cited in Privacy Law, Rishika Taneja & Sidhant Kumar, p. 98.

⁶ P.K. Das, International Law Documents, p. 135.

⁷ 2007 SCC OnLine CIC 1171 : 2007 CIC 1171. Cited in Privacy Law, Rishika Taneja & Sidhant Kumar, p. 101.

⁸ 2007 SCC OnLine Bom 264 : AIR 2007 Bom 121.

⁹ 2000 SCC OnLine Bom 664 : 2001 Supp (2) Bom CR 544, cited in Privacy Law, Rishika Taneja & Sidhant Kumar, p. 102.

¹⁰ 2000 SCC OnLine Bom 664 : 2001 Supp (2) Bom CR 544.

¹¹ (2013) 1 SCC 212.

¹² (2013) 1 SCC 212.

¹³ (1998) 8 SCC 296.

¹⁴ (2014) 1 SCC 1.

¹⁵ Treaty No. 108, 1981, available at <http://conventions.coe.int/treaty/en/treaties/Html/108.htm>, accessed on 13.3.2016.

¹⁶ Pursuant to the EU Data Protection Directive 95/46/EC.

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