



RIGHT TO INFORMATION ACT-2005

## TAMIL NADU INFORMATION COMMISSION

Kamadhenu Co-operative Super Market Building First Floor,  
New No.378, Anna Salai, Teynampet, Chennai – 600018. Phone: 2431 2841

### Case No,10552/Enquiry/2009

Date of Enquiry: 24<sup>th</sup> September 2009 at CHENNAI

**Present:** Thiru S. RAMAKRISHNAN, I.A.S.,(Retd.),  
State Chief Information Commissioner

Thiru G. RAMAKRISHNAN, I.A.S.,(Retd.),  
State Information Commissioner

**Petitioner:** Thiru V. Madhav, Flat 31, Block IV, Maan  
Sarovar Raja Apartments, 11-A, Arcot Road,  
Porur, Chennai – 600 118.

**Public Authority:** The Public Information Officer, Public Department  
Secretariat, Chennai – 600 009.

-----

Both the parties were present.

The petitioner had asked for a date to inspect five latest statements of assets disclosed in the immovable property returns filed by ten Secretaries to Government who are All India Service Officers vide his RTI petition dated 12-2-2009. He was given a reply on 16-5-2009 stating that the information asked for is excluded under Section 8(1)(j).

At the enquiry, the petitioner argued that the rejection is not in line with the provisions of the Right to Information Act and it should be supplied to him as asked for by him. However, the Public Information Officer, Public

Department, Secretariat, Chennai, who was present for the enquiry, stated that two sets of sealed covers are being received from the All India Service Officers every year, of which one sealed cover of each Officer is being sent to Personnel and Pensioners' Grievance Secretariat, Government of India, retaining one sealed cover in the Public Secretariat. The sealed covers in the custody of the Public Department are not at all opened except on a query from the Directorate of Vigilance and Anti-Corruption, Chennai, and are to be destroyed unopened when they cease to be public servants. Since the property details are in sealed covers not accessible, the public authority themselves do not know the details shown in the returns furnished by the officers, and hence they were not able to supply the information asked for by the petitioner.

The issue to be examined here are the information, whether it is available and whether Section 8(1)(j) would be applicable.

Regarding the first question, since the information is not available to the public authority, it cannot make it available to the petitioner. The law does not compel the doing of impossibilities and the public authority cannot be made to 'make available' what is not available to him. The question whether it can be made 'available' to him by authorizing opening of the envelopes, and whether it can be so ordered, will have to examine why it is so sequestered and what rights accrue to whom by its being held so sealed. Inevitably, this also harks back to Section 8(1)(j) and hence both of these are hereby considered together.

It is necessary to see how the 'information' asked for came to be sequestered so sealed in envelope. There were no requirements earlier that

public servants should provide an annual or periodical property return to their employer. But it came about when it was found that corruption could not be easily controlled by 'normal' methods. By necessity the interest of both parties to this nefarious activity means that it is done 'in camera' beyond the public eye as the act and its pay-off both are illegal. Hence direct evidence of such transactions were nearly impossible to get, except in cases where the bribe giver is an unwilling party who alert the Vigilance, who then can try to trap the parties in the 'act'. This being feasible only with a few cases, the public policy veered to taking advantage of an introduced legal presumption in the conduct rules, of "possession of disproportionate assets unexplained by declared sources of income" itself being full and sufficient ground for action against a public servant. As a corollary, it was found expedient to obtain periodical statement of assets of public servants, which would be primary evidence as datum against which the declared income can be evaluated and any discrepancy taken as a basis for the presumption as above. Hence this was introduced as a requirement.

It was however realized that the honest public servant's right to privacy cannot be invaded needlessly. Hence these returns were made in sealed covers, and opened and scrutinized only when there was a credible case of allegation of corruption and otherwise destroyed on the said officer demitting his office as public servant with the presumption of integrity in tact, so that the privacy of the civil servant of integrity was not invaded.

Hence, the *sine-qua-non* of disclosure of the hidden statement even to the government is a credible case of lack of integrity, which has to be first made out, before the appropriate authority can order opening of the envelopes.

In the instant case, the petition makes no such case. It is possible that the petitioner has his own suspicions, but such presumptions do not provide for a roving enquiry and a fishing expedition, particularly when there is a conflicting right intervening.

In this case, the right to privacy of the individual is such a conflicting right. Now the right to privacy, so eloquently articulated by Justice Brandeis in his dissenting judgment in *Olmstead v. United States*, 277, US 438 (1928) as the “right to be let alone .....the most comprehensive of rights and the right most valued by civilized men”, is not having many statutory safeguards in India, save in Section 8(1)(j) of Right to Information Act, and a slew of decisions of the Hon’ble Supreme Court of India, as in *Kharak Singh v. State of Uttar Pradesh* (1934) I SCR 332, *Gobind V. State of Madhya Pradesh* (1975) 2 SCCF 148, *R. Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632, and *District Registrar and Collector v. Canara Bank* (2005) 1 SCC 496, wherein it has been recognized as a fundamental right. Hence the right of privacy as enjoined in Section 8(1)(j) of Right to Information Act and implicitly recognized in the preamble to the RTI Act as “revelation of information in actual practice is likely to conflict with other public interest including ..... and the preservation of confidentiality of sensitive information.”

“And whereas it is necessary to harmonise these conflicting interests..... has to be given due consideration.”

Now it is a settled fact by the Constitution Bench of the Supreme Court that an individual does not forfeit his fundamental rights, by becoming a public servant in O.K. Ghosh v. E.X. Joseph AIR 1963 SC 812 and in Kameshwar Prasad v. State of Bihar 1962 AIR 1166. Further, the universal Declaration of Human Rights speaks of Right to Information in Article 19 and also declared in Article 12 the right to privacy in “no one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the laws against such interference or attacks.”

It is also important to note the significant observations made by the Delhi High Court in “CPI0, Supreme Court v. Subash Chandra Agarwal,” in the land-mark case of declaration of assets by the Supreme Court Judges that “there can be no doubt that the Act (Right to Information Act) is premised on disclosure, being the norm, and refusal, the exception. As noticed, besides the exemptions, non-disclosure is also mandated in respect of Second Schedule Institutions. Though, by Section 22, the Act overrides other laws, the opening non-obstante clause in Section 8 (Notwithstanding anything contained in the Act) confers primacy to the exemptions enacted under Section 8.”

Section 8(1)(j) of the Act excludes provision of information concerning a third party, (i.e. one other than information-seeker and information provider). Unless a public interest in disclosure is shown, information would not

be given; information may also be refused on the ground that disclosure may result in unwanted intrusion of privacy of the individual significantly. The enactment makes no distinction between a private individual third party and a public servant or public official third party.”

“The scheme of the Act, visualizes certain exemptions from information disclosure. Section 8 of the Act lists these exemptions and opens with a non-obstante clause, signifying that irrespective of the rights of the information seeker, in regard to matters listed under that provision, the information providers can justifiably withhold access to information-seeker, the record, information, or queries sought by him. Section 8(1)(j) says that disclosure may be refused if the request pertains 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.”

If, however, the information applicant can show sufficient public interest in disclosure, the bar (preventing disclosure) is lifted and after duly notifying the third party (i.e. the individual who is concerned with the information or whose records are sought and after considering his views), the authority can disclose it.”

“It could arguably be said that privacy rights by virtue of Section 8(1)(j) whenever asserted would prevail. However, that is not always the case, since the public interest element, seeps through the provision. Thus, when a member of the public requests personal information about a public servant –

such as assets declaration made by him – a distinction must be made between the personal data inherent on the position and those that are not, and therefore affect only his / her private life. The balancing task appears to be easy, but is in practice, not so, having regard to the dynamics inherent in the conflict”..... The balancing exercise, necessarily dependent and evolving on a case by case basis would take into account many factors which would require examination, having regard to the circumstances of each case. These may include:

- (i) Whether the disclosure of the personal information is with the aim of providing knowledge of the duties and tasks assigned to the public servant in any specific case.
- (ii) Whether the information is deemed to comprise individual’s private details, unrelated to his position in the organization; and
- (iii) Whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources.

This balancing of conflicting values is also succinctly put by Lord Denning in “What is next in Law?”. “Laws should recognize a right to privacy.....It should also recognize a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance, it is a balancing exercise.”

Thus, the crux in this case is whether there is an overwhelming case of public interest in disclosure. Nothing has been asserted in the RTI petition. The onus of showing that the disclosure should be made in public interest is on the one asserting it. *“He cannot merely say that as the information relates to a public official, there is a public interest element.”* Adopting such a simplistic argument would defeat the objective of Section 8(1)(j), Parliamentary intention in carving out an exception from the normal rule requiring no “*LOCUS*” by virtue of Section 6 (2) in the case of exemptions is explicit through the non-obstante clause.” (CPIO, Supreme Court v. Subash Chandra Agarwal. Delhi High Court).

“This Court cannot be unmindful of the fact that several categories of public servants..... are required by service rules to declare their assets periodically ..... The disclosure of a wide spectrum of information held by each public authority..... is overridden by Section 8..... This means that such personal information – regarding assets disclosures, need not be made public, unless public interest considerations dictate it, under Section 8(1)(j). Any other interpretation would rob this clause of its vitality as the value of privacy would be completely eroded, and the information would be disseminated without following the procedure prescribed “ (ibid)

.....that the public servant has to make disclosures is a part of the system’s endeavour to apprise itself of potential asset acquisitions, which may have to be explained properly. However, such acquisitions can be made legitimately; no law bars public servant from acquiring properties, or investing

their income. The obligation to disclose these investments and assets is to check the propensity to abuse a public office for private gain. If the information-applicant is able to demonstrate what Section 8(1)(j) enjoins the information seeker to . . . (ie.) that “the larger public interest justifies the disclosure of such information”, the authority deciding the application can proceed to the next step after recording the prima-facie satisfaction to issue notice to the “third party” (i.e.) the public servant who is the information subject as to why the information should not be disclosed. After considering all these views and materials, the Public Information Officer can pass appropriate orders, including directing disclosures. The order is appealable.” (ibid) (224).

The same judgment goes to add significantly

“Section 8(1) in the opinion of the Court, confers substantial rights even while engrafting procedural safeguards because of the following elements:

(1) Personal information and privacy rights being recognized by Section 8(1)(j) as the substantive rights of third parties;

Due satisfaction of the Central Public Information Officer or the State Public Information Officer, that disclosure of such personal information is necessary and in the public interest – which is to be arrived at on the basis of objective materials: (emphasis not in original). The satisfaction being recorded after hearing or considering the views of the third party whose information is in issue, in accordance with procedure prescribed under Section 11;

(2) The satisfaction being recorded in writing through an order under Section 11(3);

(3) The order, if adverse to the third party, is appealable (Section 11(4)).

“In the Court’s opinion, Section 8(1)(j) is both a check on the power requiring information dissemination (having regard to its potential impact on individual’s privacy rights,) as well as a mechanism whereby individuals have limited control over whether personal details can be made public. *This safeguard is made in public interest in favour of all public officials and public servants* ..... Therefore, as regards contents of the declaration (of assets), information applicants would have to, whenever they approach authorities under the Act, satisfy them under Section 8(1)(j) and cross the threshold of revealing “the larger public interest” for disclosure (ibid).

In the instant case, not only that the petition makes no such case, there is not even a whisper of allegation against those whose rights are being sought to be violated, and what is more, the request is made of the holders of a dozen public offices over five years, notwithstanding the fact that during this period many public servants would have passed through those offices, and all of them cannot be tarnished by the same brush!

The parallel cited by the petitioner with regard to the parliamentary electoral candidates declaring their assets, and these being made available in a public web-site is also erroneous in the opinion of the Commission. The declaration made by the candidate for election is done with a different purpose, not that of assessing acquisition of property in excess of known sources of income derived as a public servant. For, in that case, the declaration need be got from the successful candidate – post election – Getting it from all candidates

all but one of whom are sure to lose the elections is unwarranted. The real purpose therein is what the Supreme Court so well observed in the Association of Democratic Reforms case .....that in a democracy the little man – voter – has overwhelming importance in not being hijacked from the free and fair elections by subtle perversion of discretion of casting votes; that in a periodic election process, the voter does a social audit of his candidate and for such audit, he must be well-informed about the past of his candidate ..... The members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this will include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for, then it would strengthen the voters in taking appropriate decision in casting their votes..... Hence in the case of parliamentary candidates, the purpose is different and there is absolutely no doubt that the declaration will straightaway be put in public domain and is made with this clear knowledge. On the other hand, the declaration in a sealed cover is made by a public servant with the clear knowledge that unless there is a credible *prima facie* case of lack of integrity, this shall for ever remain in confidence and destroyed unopened and unseen by any person with his privacy in tact. Hence any disclosure of these are not on par and need to pass through the filter of procedures outlined in Sections 8(1)(j), 11(2), 11(3) and 11(4) as well as Section 19(4) as well.

While this Commission has consistently ruled in favour of transparency and has always been in favour of revelation of ‘assets declaration’

as open documents, in the present case, the orders of Public Information Officer and the Appellate Authority under Section 8(1)(j) has to be upheld as the law currently stands, and cannot be faulted as the petitioner has made no case of “overwhelming public purpose”, and unlike in other cases, When the Commission itself has ordered in favour of disclosure where the information was ‘available’ in public records, and when *prima-facie* allegation has been credibly made of a valid public purpose. unlike now when it is still ‘un-available’, and no credible case of public purpose is made out.

STATE INFORMATION COMMISSION

Orders approved on 26<sup>th</sup> October 2009  
Under orders of the Commission

(S. MOHANA DHAS)  
ASSISTANT REGISTRAR

**Case No,10552/Enquiry/2009**  
The Public Information Officer,  
Public Department, Secretariat  
Chennai – 600 009.

**Case No,10552/Enquiry/2009**  
Thiru V. Madhav,  
Flat 31, Block IV,  
Maan Sarovar Raja Apartments,  
11-A, Arcot Road,  
Porur, Chennai – 600 118.