Public Authority and the RTI

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The definition of "public authority" is crucial for determining the purview of the Right to Information Act. In its substantive meaning, many institutions which are not necessarily fully publicly owned, but come under various jurisdictions of "public authority" can be rendered as under the purview of the RTI Act. In a more substantial sense, even private bodies engaged in "public works" can be brought under the Act.

A law is as good as its implementation. It is therefore imperative to find out to whom a particular law applies and against whom can it be exercised. Under the much talked about Right to Information Act, 2005 (in short, the RTI Act), the information can only be demanded from "public authorities". Public authorities are defined under Sec 2(h) of the RTI Act.

The definition of "public authority" under the RTI Act consists of two parts. The first part expressly specifies that bodies created by or under the writ of the Constitution as well as by laws made by the legislatures are public authorities. The RTI Act, therefore, covers all constitutional bodies such as the Union Public Service Commission (UPSC), the Parliament and state legislatures, the Supreme Court, high courts, the Election Commission, etc. In fact, the RTI Act is the only law that addresses the issue of accountability in judiciary considering that there is no immediate possibility of the Judges (Inquiry) Bill becoming an Act.

The above definition specifically makes a mention of institutions of self-governance such as rural and municipal local bodies even though they now enjoy a constitutional status under the 73rd and 74th amendments of the Constitution, respectively. Bodies constituted in pursuance of government notifications are construed as public authorities. Thus, under the Act all constitutional, statutory bodies, bodies created by government notifications and local self-government bodies are public authorities.

At times it is argued that societies and private companies are also public authorities as they are registered under legislations such as the Societies of Registration Act, 1860 and Companies Act, 1956, etc. However it has to be appreciated that the law referred to in Sec 2(h) is one that actually establishes or constitutes an institution and not a law that simply sets up a mechanism for recognising different forms of institutions.

The second part inclusively takes within its definition those bodies which are owned, controlled or *substantially financed* (emphasis mine) directly or indirectly by funds provided by the appropriate government (central or state governments). This takes care of public sector units. Finally non-governmental organisations substantially financed by the government are also within the definition of public authorities. It is a recognised canon of interpretation in jurisprudence that when the word "includes" is used in an interpretation clause, it is used to enlarge the meaning of the words and phrases occurring in the body of the statute.

Substantial Financing

The term "substantially financed" has not been defined. Ideally speaking the RTI Act should have either defined the term or at least contained illustrations on substantial financing. It is sad that the drafters ignored provisions of pre-existing state laws in the country. The Maharashtra Right to Information Act 2002 had made a specific mention of monetary concessions such as tax exemption and grant of land by government at concessional rates to constitute "aid". The Maharashtra Act extended to such bodies whose composition and administration was predominantly controlled by the government or where the functions of such bodies were of public nature or interest and whose office bearers were appointed by the government.

In the absence of statutory clarity, we need to look at the decisions of the Central Information Commission (hereinafter, the CIC). In an early case the CIC relied on the definition of the term "substantial financing" as contained in Section 14(1) of the CAG Act of 1971. It says that when the loan or grant by the government to a body/authority is not less than Rs 25 lakh and the amount of such loan or grant is not less than 75% of the total expenditure of that body/authority, then such body/authority shall be deemed to be substantially financed by such grants/loans.

Direct and Indirect Funding

It is not necessary that the funding should flow from the consolidated fund. The funding can be both direct and indirect. Direct funding could be by way of cash grants, reimbursement of expenses, etc, and indirect funding could be meeting

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the expenses indirectly or in kind. The government could provide the funds without specifying as to how the funds are to be utilised.

As early as November 2006, in the *Veeresh Malik vs International Olympic Association* (IOA) case, the CIC decided that the IOA is a public authority being substantially financed by government. It decided that out of the Rs 396 lakh corpus of IOA, Rs 320 lakh had been funded by the government and its accounts were subject to audit by the Comptroller and Auditor General (CAG). Additionally, massive infrastructure mainly in the form of stadiums built at huge cost by government and rented out to IOA on a token rent of Re 1 and the like was construed as a measure of indirect funding.

In another case in November 2006 (*Sarbajit Roy vs Delhi Electricity Regulatory*), the CIC held that the Delhi electricity distribution companies (DISCOM) – private power supply companies in Delhi – are public authorities because as per the agreement, they are created by government notifications and the government has a 49% equity stake in them. The CIC made a note of the fact that the government has accorded them various concessions (use of generation and transmission infrastructure built by the Delhi electricity supply undertaking over decades) and reserved to itself the final say in many matters concerning the DISCOMS. It has to be appreciated that the order of the CIC does not interfere with the status of these companies under the Companies Act; it merely provides that insofar as the RTI Act is concerned, these companies will be accountable to the citizens being public authorities.

In a recent case of August 2008, Mahanagar Gas was held to be within the purview of the RTI Act, as, besides other factors, the CIC was also mindful of the fact that the company was the recipient of concessions from the government as it was laying pipes beneath government land and property without any charges. Similarly the CIC has held that "Sanskrit", a prestigious public school at Delhi is a public authority. Though the school is not in receipt of any recurring grant, it did receive huge infrastructural support – including very expensive land – from the government, and its governing body is headed by the wife of the cabinet secretary and consists of wives of senior officers. All this was found sufficient to regard it as a body which is substantially financed by the appropriate government.

The CIC has made it clear that the control by the government need not always be financial – administrative and functional control also is good enough. Holding the National and Jaipur Stock Exchanges to be public authorities (June 2007), the CIC said that it was so decided because stock exchanges are quasi-government bodies exercising statutory powers conferred under the SEBI Act and Security Contracts (Regulations) Act. It also considered the position that the government can suspend the business and supersede the governing body of an exchange even when it does not have its director on their board and no audit has been conducted by the CAG.

Commercial Ventures

The CIC as of now is unclear regarding the status of commercial ventures created by public authorities without any money flowing directly or indirectly from the government. In the case of *R Balwani vs Industrial Finance Corporation of India* (IFCI) (May 2007), the IFCI was held to be a public authority even when there was no direct shareholding by the government whilst the Life Insurance Corporation (LIC) was holding 23.53% of the shares. Subsequently in the case of *M K Kamra vs International Leasing & Financial Services* (IL&FS) (February 2008), the CIC was dealing with the issue as to whether IL&FS is a public authority, considering that 43% of the shares of IL&FS are held by public authorities such as LIC, the State Bank of India (SBI), the Central Bank of India (CBI) and the Unit Trust of India (UTI) and of the 15 directors, two are from LIC and one each of SBI, CBI and UTI. Holding that IL&FS is not a public authority, CIC ruled that the source of fund, whether direct or indirect, which results in the creation of a body owned, controlled or substantially financed must "directly" emanate from an "appropriate government" and not from a public authority created by such appropriate government. The key element, or as the information commissioner says, the prime mover in the second part of the definition is the presence of "appropriate government".

This view, however, is not endorsed in the latest order in September 2008 in the case of *Vijay Trambak Gokhale vs UTI Asset Management Company*, in which it was held that where the entire share capital was held by public authorities though there was no government finance or control, transparency in the functioning of any institution in which public money is deployed requires the body to be brought under the purview of the RTI Act and it makes no difference if the shareholding of the public authorities was to come down to 51% from 100% in the near future.

It seems that the CIC is wavering between its proposition that there has to be the presence of appropriate government in a body to be classified as public authority, and its attempt to include all those connected directly or indirectly with the government under the overall objective of infusing transparency and accountability.

However, in cases where the holding company is a public authority, the CIC has made it loud and clear that either the holding and/or subsidiary company, at the option of the holding company, has to set up the RTI mechanism (*Satish Mohan Lal Ghiya vs HAL, Bhartiya Reserve Bank Note Mudran)* (September 2007).

'State' and Public Authorities

The CIC has also struck a relationship between "State" as defined under Article 12 of the Constitution for the purpose of protection of fundamental rights, and public authority under the RTI Act. It has held that all those who are categorised as organs of the "State" have to be a public authority. The logic is that the right to information is a derivative of the fundamental right to freedom of speech and expression. If the fundamental rights on freedom of speech and expression are enforced against an agency that happens to be a "State" institution, the agency has to be a public authority as well since the right to information is subsumed in the freedom of speech and expression. Thus it can be said that all those who qualify to be categorised under the label of "State" are public authorities though the converse need not be true always.

Public Functions Performed by Private Entities

The courts have taken a view that institutions engaged in matters of high public interest or performing public functions have to be considered as part of the "State" for enforcing fundamental rights. In the *Ramana Dayaram Shetty vs International Airport Authority of India* case as early as 1979 the Supreme Court observed that

> ...if the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government.

The Bombay High Court, in the case *Flamingo Duty-Free Shop vs Union of India & ors* in 2007, declared that even though the Mumbai International Airport is registered as a private body, it is constituted as part of the "State" as defined by the Constitution, since it performs a public function.

The CIC in *Lalit Mohan Gupta vs Director of Education, Delhi* (September 2008), has no hesitation in holding that all educational institutions, especially those which obtain land from the government at a subsidised rate, enjoy recognition by the government, follow the guidelines for offer of various educational programmes, and receive affiliation with bodies like the Central Board of Secondary Education (CBSE), are essentially performing a public function. There is, therefore, no justification why they should not be covered under the provisions of the RTI Act to ensure transparency and accountability in their functioning. In *Kewal Semlani vs Mahangar Gas*, the CIC held that where a particular entity has monopolistic position and the nature of the function being performed by it is of a public nature, it is a public authority. It declared Mahanagar Gas to be so.

In September 2008, National Agriculture Cooperative Marketing Federation of India (NAFED) and National Consumer Cooperative Federation (NCCF) were held to be public authorities as the central government not only has an important role in the functioning of these multi-state cooperative societies through the registrar under the Multi-State Cooperative Societies Act, it also exercises overall control over the formation, functioning, auditing, winding up and supercession of multi-state cooperative societies. The CIC also made a special mention of the fact that NAFED is a "nodal agency" of the central government in matters of administering, procuring of oilseeds and pulses and providing price support schemes, besides being employed by government for the purchase of horticultural and agricultural commodities under "market intervention schemes".

As the drafters of the RTI Act have missed the opportunity of demystifying the term "substantially financed", a good number of the decisions of the CIC, including the one on Delhi DISCOM and stock exchanges, are currently under stay by various high courts. In the month of November 2008, the Delhi High Court stayed the order of the CIC declaring air force schools (non-public funded schools, administered and managed by independent societies) as public authorities on the basis of the submission of the government of India that unaided schools should not be brought under the purview of the RTI Act. Recently the Madras High Court in May 2008, while holding Tamil Nadu Road Development Co (TNRDC) as a public authority under the RTI Act, was of the view that the expression "public authority" under Section 2(h)(d)(i) should be construed liberally. TNRDC was set up as a joint venture company between Tamil Nadu Industries & Development Corporation and IL&FS. It is expected that in the near future the courts will lay down some norms on substantial financing in plethora of cases before them and hopefully that will settle the issue.

Private entities are also in the loop, though indirectly. The general perception is that information can only be obtained from governmental bodies and government financed and controlled organisations, but in reality the RTI Act moves a step ahead and provides that it can apply to any information relating to any private body which can be accessed by a public authority under *any other law* (emphasis added) for the time being in force. In simple terms, if a public authority can take some information from a private body under any law other than the RTI Act, then the public authority has to access that information for the requester. For example, a group housing society is not a public authority in its own right and a requester cannot apply to it for a RTI request. However the society is registered under the Societies of Registration Act, 1860 and the Registrar of Cooperative Societies (RCS) is undoubtedly a public authority. Hence, it is the RCS who remains under obligation to collect such information as he/she can access about the society under the Societies of Registration Act only, and give it to the applicant. Information which the RCS cannot obtain under the Societies of Registration Act, 1860 cannot be demanded by the RCS on behalf of any requester.

As majority of the RTI applications in a metropolitan city relates to group housing societies, the RCS of some of the corresponding states have passed orders declaring group housing societies as public authorities so that the requester can approach them directly, and they are spared from answering questions on behalf of these societies and appearing before information commissions in case of default. Some high courts have stayed these blanket orders, and rightly so, as unless a society can be said to be substantially financed, it cannot be termed as a public authority. The CIC in *Pradeep Gupta vs Servants of the People Society* (May 2007) advised that for a society to be determined as a public authority or not under the RTI Act, the following will require to be ascertained by RCS: (a) Whether the accounts of the society are under audit of the CAG, (b) whether the society is under the control of a department, and (c) whether the society is in possession of land gifted by government.

MPs and RTI Act

The recent debate on expanding the definition of public authorities extends to the demand made in a case before CIC to declare individual members of parliament (MPS) as public authorities insofar as government funded MPLAD funds at their disposal are concerned. The CIC has asked for comments of MPS and others concerned. If it happens, public authorities would move from stereotype of legal bodies to human bodies in flesh and blood. It remains to be seen whether such an interpretation is possible as the RTI Act, while defining public authorities, has only used

expressions such as "authority", "body", "institutions of self-government" and "non-governmental organisations".

In fact, there is a strong reason to consider including private entities under the definition of public authority in certain situations. With the opening of economy and consequent liberalisation, the government is withdrawing from its conventional and even sovereign functions, and the private sector is increasingly assuming important public functions such as electricity supply, communication and public transport. Why should a citizen be denied his or her fundamental right to information just because it is the private sector which is supplying public utilities such as electricity or transport? Why should the rights of citizens of one city be extinguished because public functions in their city stand transferred to private enterprises?

The recent global meltdown has again demonstrated how highly paid and educated chief executive officers (CEOs) have mismanaged the funds of their depositors because of greed and propensity to indulge in "kite flying operations" at the cost of someone else's money. They have destroyed both funds as well as the faith of the common people. Since they handle public money, why should private banks enjoy immunity from the gaze of the access law?

Conclusions

The only country in the world where information can be accessed from private bodies, if the same is required for protection of rights, is South Africa. The inclusion of private bodies, even for the limited purpose of enforcement of people's rights, in the domain of information regime, is primarily because of the historical reasons that though the political power has moved to the black majority, the economic power is still retained by the white minority. In recent times, the Bangladesh Ordinance 2008 has made an elaborate definition of public authorities covering non-government bodies or bodies administered with public finance, or conducting public work on behalf of the government, or under contract with any body of the government. The ordinance takes under its ambit any company, corporation, trust, firm, society, cooperative society, private body, association, organisation registered under any existent law of Bangladesh. The proposed Nigerian law also includes private companies performing public functions, reflecting the emerging school of thought about what good access legislation should be.

If it is to remain contemporary and relevant in a globalised world, and retain its present glory of being hailed worldwide as one of the most progressive access legislations, then the RTI Act of India should necessarily extend to private bodies performing public functions, or dealing with public money and trust. What India does today will be followed elsewhere tomorrow – at least in Asia. We have to do it sooner rather than later.