

Many Indians were euphoric when the Right to Information (RTI) Act was passed in 2005. Yet this turned out to be quite short lived. It took just a few months for the government to make its first assault on RTI after it became a law.

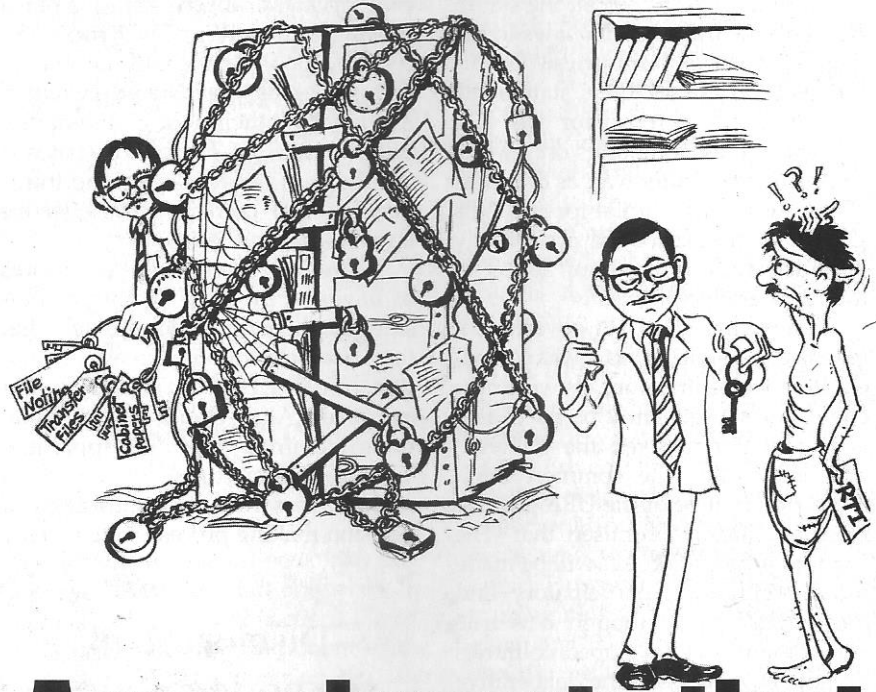
Those among people's movements and citizen groups who had thought that the task before them was to create awareness about the Act and help in its implementation got a rude shock. The Government of India started toying with the idea of amending the Act in order to significantly dilute it.

Cabinet's clearance to seven proposed amendments to the fledgling Act, the best known among them being the exclusion of a large number of file notings from the purview of the RTI, is going to greatly restrict access to even the remaining ones. Some of the other proposed amendments included withholding of the identities of all officers who "made inspection, observations, recommendations, or gave legal advice or opinion or (are) referred to in any minute..." and, indeed, exempting most information from disclosure, while a matter was under consideration.

Access to the cabinet note following cabinet decision was sought to be blocked. Information relating to suitability of officers for transfers, appointments, promotions and admission to courses was sought to be made discretionary privilege of the public information officer.

The secretive process

Interestingly, these amendments were put before the Cabinet for clearance in gross violation of section 4(1)(c) of the RTI Act. This very section specifies that every public authority shall (*suo moto*) "publish all relevant facts while formulating important policies or announcing the decisions which affect public" (emphasis added). Clearly, the least that was required was that the proposal to amend the RTI Act should have been put out in the public domain and comments invited before it was put to the cabinet. However, no such steps were taken and the one fine morning public woke up to learn through media that the Cabinet had approved the amendments. Even at this stage, the details were not given for many days since the Cabinet note



Amendments that can cripple RTI

Strangely, government thinks that the only responsibility of bureaucrats is to 'the government of the day'. In fact, the primary responsibility is to the people of India, to the Constitution of India and to the laws of the land, writes Shekhar Singh

regarding the Right to Information Act was 'secret'. Fortunately, some public minded political leaders shared the note "informally" with members of the public and it was then that the enormity of the proposed amendments, and how they would finish the RTI Act, dawned upon the people.

The proposed justifications

The significance of these amendments, especially for the poor and the deprived, who had just begun to feel empowered, has since been widely discussed and needs no repetition. However, even more outrageous than the proposed amendments were the reasons for these proposed amendments that the government thought fit

for the consumption of the people of India.

The first set was contained in a press statement, dated 26 July 2006, that the prime minister sent to the former Prime Minister V P Singh and activist Anna Hazare, in response to their letters opposing the amendments. The second set was in an unsigned and undated note circulated to some Members of Parliament, reportedly by the department of personnel.

Broadly, three types of reasons were offered. The first was that other similar laws, in India or elsewhere, also curtailed access to notings. As evidence it was argued that the Freedom of Information Act (FOI) 2002, passed

by the NDA government, prohibited access to notings, as did all the states' Acts and the transparency laws in the most developed countries. Unfortunately, all these three statements were factually wrong, for the FOI restricted access to notings only while a decision was under way, as did most states' Acts. Many of the foreign Acts (25 out of the 32 looked at) actually provided various levels of access to the "deliberative process".

In any case, the UPA government repealed the FOI 2002 as it was considered too weak, therefore, its weakness could not subsequently be used as a justification to weaken the RTI Act, especially when the common minimum programme of the UPA government specifically promised that 'The Right to Information Act will be made more progressive, participatory and meaningful'. And though it is true that some of the developed countries do not allow access to the deliberative process (notably Australia, Japan, New Zealand and Norway), these countries have other well established systems for ensuring bureaucratic accountability which actually work — as evident from the minimal corruption in these countries.

The second justification was more in the form of an appeal, essentially that the UPA government is a great champion of transparency and has been responsible for most of the RTI Acts in India. It was not clarified how this had any bearing on the amendments at hand, except perhaps to plead for extra-rational — in good faith — acceptance of whatever the government proposed to do.

The most relevant was perhaps the third type of rationale where the problems that the government anticipated, if file notings are made public, were enumerated. These were again of four types. The first type of rationale included the problems that individual officers were likely to face, including threats to their safety or life (by mafia groups), trial by media, and unnecessary litigation against individual officers.

As far as threats go, there is already an exemption under section 8(1)(g) that exempts all information whose disclosure would endanger the life or physical safety of any person. Therefore, no further amendments were warranted.

Trial by media has plagued honest civil servants and politicians for years. As long as there was no RTI, these officers and politicians could not defend themselves as they were prevented from making their notings and advice public or known. Therefore, what was needed was not less but more transparency, and perhaps more effective laws of libel and tort.

Moreover, there have been scores of litigation by those (within or outside the government) who felt that they had been unfairly treated by the government and thereby felt aggrieved. A fair chunk of such litigations stemmed from misapprehensions and conjectures, for access to records, reasoning and intricacies of decision making process were usually

blocked, until requisitioned by a court of law amid litigation. However, as information starts becoming accessible, the disgruntled potential litigant could for the first time make an informed decision before taking a legal recourse. Considering litigation also costs the litigant's time, money and effort, the chances of going to court minimise once greater transparency is assured. Similarly, greater transparency would mean correct, timely and legally sound decisions on the part of the government and its functionaries.

The second type of rationale was that officers would not give free and frank opinions if these are accessible to the public, and consequently the quality of governance would suffer. Yet most often the reality is quite different. Officers are pressurised to record notings contrary to their convictions or opinions. Public interest or the law does suffer in such cases. Pressure does not come from public but by officers' superiors or politicians, or their henchmen and cronies. Superiors, whether bureaucratic or political, have access to file notings. They do not need the RTI Act to access them. On the contrary, disclosure of file notings would help ensure that officers are not pressurised into recording notes that are not in public interest. This would strengthen the hands of the honest, upright and conscientious officers and expose the dishonest and self serving ones.

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Photo courtesy: Kabir

Coming together for a cause

Disclosure of file notings will also improve the quality of decision making, for it would ensure that decisions are based on reasonable grounds and are not arbitrary or self-serving. It would ensure that the pressure to compromise, exerted by unscrupulous superiors (or by one's own greed or ambition) had a counter in the fear that the advice one tenders and the basis of one's decisions would be subject to public scrutiny. Such transparency would also deter unscrupulous administrative and/or political bosses from overruling their subordinates and taking decisions that have no basis in law or are against public interest.

The third type of rationale warned that access to file notings will be used by corrupt officers to realise the weaknesses in the case against them, and this would weaken the fight against corruption. However, section 8(1)(h) of the RTI Act specifically exempts information whose disclosure would impede the process of investigation or apprehension or prosecution of offenders. Therefore, it is fanciful to think that this law could be used to escape prosecution. On the other hand, it would help protect those honest officers who have been falsely (and perhaps maliciously) accused of corrupt practices, and there are numerous such officers. In such cases, it is clearly in public interest that the victims have access to the information that allows them to defend themselves.

Also, the regime of secrecy that is sought to be brought back has resulted in numerous corrupt officers escaping prosecution because of lack of administrative and political sanction. Access to file notings will help pressurise the government to speedily dispose of requests for permission to prosecute such officers and also pressurise investigating agencies to not dilly dally over higher ups or VIPs' prosecution.

The last of the rationale offered is perhaps the most peculiar. It is sought to be argued that "In the constitutional scheme of governance adopted by us, it is the government of the day and not the individual officers, who is responsible to the people for its actions/decisions. Bureaucrats, in turn are responsible to the government of the day".

Clearly, access to notings does not seek to make an individual officer

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responsible for the actions of the government of the day, but only accountable for his or her own actions. This is irrespective of the government of the day. Besides, it is amazing that the government thinks that the only or primary responsibility of bureaucrats is to "the government of the day". Surely, their primary responsibility is to the people of India, to the Constitution of India and to the laws of the land. It is the bureaucrat's pri-

mary responsibility to advise the government of the day on what is legal, what is constitutional and what is in public interest. Whereas the final decision might often be that of the "government of the day", the responsibility for the advice given always remains that of the individual officer who gave that advice. And the people of democratic India have a right to know what advice the officer gave, and if it was disregarded, why was it disregarded. This is a fundamental right in a democracy.

What the future holds

This time the attack was thwarted because of a concerted effort by people's movements, by progressive political parties, by the media and by senior political leaders and civil servants who were sympathetic to the cause. However, it would be foolish to imagine that the bureaucracy has given up. New, and perhaps more deadly, attacks are in the offing. Already we are told that various institutions including the armed forces, various police organisations, the central vigilance commission and even the Delhi Metro have asked that they be taken out of the purview of the RTI Act. Each has its own justifi-



cation howsoever genuine or otherwise. We are also told that the higher judiciary wants certain changes in the Act and in the rules.

Actually, despite all this, the enthusiasm with which the people of India have embraced this Act and have started putting it to use, discovering new and innovative ways in which to use it to get what is rightfully theirs, makes it progressively more difficult for the government or any other institution to succeed in diluting the right to information. Though accurate statistics are not yet available, it is estimated that over a hundred thousand applications were filed across the country in the first year, and that a significant proportion of these were in small towns and

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in rural areas. And every day more and more people are learning about the Act and hearing the story of someone who has used the act to make their life a little better. This momentum cannot now be stopped.

Perhaps the government needs to internalise the spirit of the RTI Act and come back to the people in case it has some genuine problems in implementing some specific sections of the Act. They need to honestly share with the people the problems, if any, since the people have fought long and hard to activate their fundamental right to information which they would not like to be crippled so easily.

The writer is former convener, NCPRI

Right Voices

"Having made this law with great difficulty, it was a matter of regret that those who wanted to hide their wrong doings had conspired to take a step backward."

Former Prime Minister VP Singh, *The Hindu*, 15/08/06

"It is often argued that making file notings public will deter officials from giving their honest comments. But if an official is honest why should he/she be afraid from laying bare the file?"

Former Police Commissioner Julio Rebeiro

"The RTI Act, besides the NREGS was one of the two good things that the UPA has far done in its tenure. But I do not know why they want to undo their good work now."

CPI-M General Secretary Prakash Karat, *The Times of India*, 15/08/06

"Notings are an integral part of a file, and access to them is crucial. For instance, to make the process of awarding contracts and procurement procedures in public departments and agencies transparent and accountable, the important questions are: Who are all the people who have applied in respect to a tender? On what basis was a tender awarded? How much time was

taken? Who recommended what to whom in a file noting, who diluted it, who overruled it, why did a minister or bureaucrat hold on to a file for six months?"

Planning Commission Member BN Yugandhar, *Outlook*, 28/08/06

"Removing file notings from the ambit of the Act would take away the life of the Act, as well as weaken it. I am concerned that the government did not even find it necessary to consult the guardians of the RTI Act, not just at the Centre, but in the states before taking such a step to restrict access."

Central Information Commissioner OP Kejriwal, *The Indian Express*, 28/7/06

"The Manual of Official Procedure was prepared when the RTI Act was not in existence. These provisions are in violation of the Act and need to be brought in conformity with the Act. Files and file notings *per se* are not confidential and should be accessible to the public unless exempted under Section 8(1) of the Right to Information Act."

Second Administrative Reforms Commission Head M Veerappa Moily, *The Times of India*, 18/08/06