

Corporate Sector and the Right to Information: A Jurisprudential Analysis

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The importance of corporate governance lies in its contribution both to business prosperity and to accountability. In India the latter has preoccupied much public debate over the past few years. Public companies are now among the most accountable organisations in society. They publish trading results and audited accounts; and they are required to disclose much information about their operations, relationships, remuneration and governance arrangements. In recent years, corporate governance has received increased attention because of high-profile scandals involving abuse of corporate power and, in some cases, alleged criminal activity by corporate officers.

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1. INTRODUCTION:

The importance of corporate governance lies in its contribution both to business prosperity and to accountability. In India the latter has preoccupied much public debate over the past few years. Public companies are now among the most accountable organisations in society. They publish trading results and audited accounts; and they are required to disclose much information about their operations, relationships, remuneration and governance arrangements. In recent years, corporate governance has received increased attention because of high-profile scandals involving abuse of corporate power and, in some cases, alleged criminal activity by corporate officers. An integral part of an effective corporate governance regime includes provisions for civil or criminal prosecution of individuals who conduct unethical or illegal acts in the name of the enterprise. Accountability by contrast does require appropriate rules and regulations, in which disclosure is the most important element.

The Right to Information Act, 2005 has been successful in inducing transparency in the decision-making process of the government. "There is a need for the Right to Information (RTI) Act to be directly applicable to corporate houses," said former chief information commissioner (CIC) of India Wazahat Habibullah.¹ "That's because with the liberalisation of the economy, private companies are closely working with the governments." He had suggested different mechanisms for eliciting information from them. He said there was a possibility of the authority denying information related to corporate houses and other business concerns citing section 8(d) of the RTI Act. This section of

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the Act says that there shall be no obligation to give any citizen information, including commercial confidence trade secrets or intellectual property, the disclosure of which may harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information. He had also hinted plans to submit a proposal to bring corporate houses under the direct purview of the RTI Act.²

2. APPLICABILITY OF THE RIGHT TO INFORMATION ACT, 2005 TO COMPANIES

In this paper, main thrust will be given to ascertain the applicability of the Right to Information Act, 2005 to companies. The Right to Information Act, 2005 was enacted to promote transparency and accountability in the working of every public authority. The preamble of the Right to Information Act, 2005 provides:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto".

3. SALIENT FEATURES OF THE RIGHT TO INFORMATION ACT, 2005

3.1 Objectives of the right to information act, 2005

- a. To promote transparency and accountability in the working of every public authority, and
- b. To set up a practical regime for giving citizens access to information that is under the control of public authorities.

A hierarchy of authorities is created with the CIC, at the apex to decide disputes pertaining to information and disclosure.

3.2 Meaning of word "Information"

"information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force³.

Under the aforesaid definition, "right to information" means an information which is accessible under the Right to Information Act, 2005, and "which is held" by or under the control of any public authority. In other words, an Information relating to privately held companies, which is under the control of a public authority, may be obtained under the Right to Information Act, 2005.

3.3 Meaning of word "record"

"Record" includes—

- a. Any document, manuscript and file;
- b. Any microfilm, microfiche and facsimile copy of a document;
- c. Any reproduction of image of images embodied in such microfilm (whether enlarged or not); and
- d. Any other material produced by a computer or any other device⁴.

3.4 The Right to Information Act, 2005 provides that all citizens shall have right to information and mandates disclosure of all manner and type of information⁵, and it abolishes the concept of locus standi of the applicant or Information seeker, applicant making request for information is not required to give any reason or justification for requesting the information⁶.

3.5 The Right to Information Act, 2005 mandates disclosure is the rule and non-disclosure (exemptions) as exception. The Right to Information Act, 2005 provides for the following exemptions⁷:

- a. National security,
- b. contempt of court,
- c. Parliamentary privilege,
- d. Trade secrets,
- e. Fiduciary relationship,
- f. Foreign government,

- g. Safety of informer in law enforcement,
- h. Investigation,
- i. Cabinet papers,
- j. Privacy,
- k. Copyright⁸.

Exemptions under section 8 are discretionary, not mandatory. The Public Authority may make discretionary disclosures of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.

As per the provisions of the Right to Information Act, 2005, public authorities are under obligation to publish various specified classes of information. The information provider or the concerned agency is obliged under the Right to Information Act, 2005 to decide the applications within prescribed time limits⁹.

It may be worthwhile to mention here that the Right to Information Act, 2005 is applicable where following essential ingredients are satisfied:

Firstly, the organisation is **Public Authority** as defined in the section 2(h) of the Right to Information Act, 2005, Secondly, the Public Authority has the **information** (section 3),

Thirdly, **any citizen apply** to the Public Authority in accordance with the Right to Information Act, 2005 (section 3).

Before going into the applicability of the Right to Information Act, 2005, it is required to understand the historical perspective of the reasons of legislating the Right to Information Act, 2005, the Hon'ble Supreme Court in a case¹⁰ decided that right to information is a valuable fundamental right of a citizen and it is included in Article 21 of the Constitution.

4. DEFINITIONS:

Further, under the Right to Information Act, 2005, a principle is adopted that all information are to be given unless specifically exempted. For the better understanding of Right to Information Act, 2005, it is required to consider the following definitions and expressions:

4.1 "Public Authority": The Right to Information Act, 2005 define Public Authority as:

Public Authority¹¹ means any authority or body or institution of self government established or constituted -

- (a) By or under the Constitution;
- (b) By any other law made by parliament;
- (c) By any other law made by State Legislature;

- (d) By notification issued or order made by the appropriate Government, and includes any—
- (i) Body owned, controlled or substantially financed;
 - (ii) Non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.

4.2 "Non-government" organization is that it is independent of government control in its affairs, and is not connected with it. High Court of Delhi further concluded that the requirement for an organization, which is not established by statute, or under the Constitution, but is a non- government organization, need not be constituted by or under a notification, due to the extended meaning of the expression "public authority" in terms of Section 2(h) of the Right to Information Act, 2005.

4.3 "Substantially financed", the term substantially financed has not been defined under the Right to Information Act, 2005. The word finance and substantially has been described as under the different dictionaries

- i. **The Lexicon Webster Dictionary** - Vol. I at page 365 defines "financing" as follows:

Financial, a money payment, < finire, to pay a fine, < L. finis.] The management of pecuniary affairs, esp. in the fields of government, corporations, banking, and investment; the system of public revenue and expenditure; pl. income or resources of corporations, governments, or individuals.-v.t.-financed, financing. To supply with finances or money; provide capital.

- ii. **Black's Law Dictionary**¹³, - Page 706

Finance: As a verb, to supply with funds, through the payment of cash or issuance of stocks, bonds, notes, or mortgages, to provide with capital or loan money as needed to carry on business.

Finance is concerned with the value of the assets of the business system and the acquisition and allocation of the financial resources of the system.

- iii. **Chamber Law Dictionary** - (at page 627) says that "finance" is:

Money affairs or revenue, esp. of a ruler or state; money, esp. public money; the art of managing or administering public money; (in pl) money resources - v. to manage financially; to provide or support with

money - vi to engage in money business. - adj. financial (-shal) pertaining to finance. - n financier (-si ar; US fin-an-ser.) - adv financially.

- iv. According to the **Legal Glossary**¹⁴ - the term means: Finance:

1. The pecuniary resources of a government or a company.
2. To provide with necessary funds.

- v. **Oxford's Shorter English Dictionary** defines the term "substantial" as follows:

Substantial....An adjective....
Constituting or involving an essential point or feature; essential, material....

- 4.4 "Includes"** The Supreme Court of India has interpreted the expression "includes" in the following manner:

*Includes is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation*¹⁵.

Reference in this connection can be made to **G. P. Singh's "Principles of Statutory Interpretation"**¹⁶ the learned author formulated that when the word defined is declared to "include" such and such, "the definition is prima facie extensive".

- 4.5 "State"** as defined under Article 12 of the Constitution has four components:

- i. **The Government and Parliament of India:** Government means any department or institution of department. Parliament shall consist of the President, the House of People and Council of States
- ii. **The Government and Legislature of each State:** State Legislatures of each State consist of the Governor, Legislative Council and Legislative Assembly or any of them.
- iii. **Local Authorities within the territory of India:** Authority means:
 - Power to make rules, bye- laws, regulations, notifications and statutory orders.
 - Power to enforce them.
 - Local Authority means Municipal Boards, Panchayats, Body of Port Commissioners and others legally entitled to or entrusted by the government, municipal or local fund.

iv. **Other Authorities:**

Authorities other than local authorities working

(a) Within the territory of India or;

(b) Outside the territory of India.

For further analysis, the Section 2(h) could be divided into two parts for analysis. The first three categories of this section are fairly clear, those established under the Constitution or any enactment, Parliamentary, or State, are public authorities.

The fourth category deals with the institution or body which is set up under notification issued by the appropriate government¹⁷, body owned, controlled or substantially financed and Non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.

5. JURISPRUDENTIAL ANALYSIS

To understand the scope and ambit of the term Public Authority and Substantially Finance, it is required to understand judicial interpretation of the expressions and words used in the section 2(h) of the Right to Information Act, 2005:

5.1 The High Court of Delhi in **Indian Olympic Association Vs Veeresh Malik**¹⁸ while deciding on the scope and ambit of word "Substantially Finance" held as under:

To discover the meaning of the expression, since it is undefined, the common parlance test, as well as the contextual setting (of the term), having regard to objects of the Act, are to be examined. There is no yardstick, in this context to determine what is meant by "financing". the expression has wide import. It is not inhibited by considerations such as "revenue" or "capital" funding. An organization may be infused with public funds, the character of which is such that the vital functioning of the institution depends on it. It may be also the recipient of special attention, together with funds, which is otherwise unavailable to organizations or institutions of a similar class. Likewise, the fact that financing is by way of a loan, is immaterial, if the conditions for such advance are not available to others or organizations involved in the same activity. The quantitative test may not be appropriate. The High Court concludes that what amounts to "substantial" financing cannot be straight-jacketed into rigid formulae, of universal application. Of necessity, each case would have to be examined on its own facts. That the percentage of funding is not "majority" financing, or that the body is an impermanent one, are not material. Equally, that the institution or organization is not controlled, and is autonomous is irrelevant; indeed, the concept of non-government organization means that it is

independent of any manner of government control in its establishment, or management. That the organization does not perform - or pre-dominantly perform - "public" duties too, may not be material, as long as the object for funding is achieving a felt need of a section of the public, or to secure larger societal goals. To the extent of such funding, indeed, the organization may be a tool, or vehicle for the executive government's policy fulfilment plan.

5.2 The High Court of Madras in **Tamil Nadu Road Development Co. Ltd v. Tamil Nadu Information Commission and Anr**¹⁹, while interpreting "Public authority" under the Right to Information Act, 2005 observed as under:

The definition of bodies referred to in Section 2(h) (d) (i) of the RTI Act would receive a liberal interpretation, and here the words which fall for interpretation are the words "controlled or substantially financed directly or indirectly by funds provided by the appropriate Government. We are here concerned with the interpretation of the definition clause in the RTI Act. The Act has been enacted "in order to promote transparency and accountability in the working of every public authority". In the Preamble to the Act, it is made clear that "democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed". The RTI Act thus attempts to inculcate openness in our democratic republic. It has to be accepted that one of the salience of openness in democracy is an access to information about the functioning of the public authorities. Act must receive a purposive interpretation to further the purpose of the Act. So any interpretation which frustrates the purpose of RTI Act must be eschewed.

The Hon'ble High Court has analysed the ambit and scope of Section 2(h) of the RTI Act and has held that Tamil Nadu Road Development Company Ltd which was jointly promoted by IL&FS and Tamil Nadu Industrial Development Corporation (TIDCO) to be a Public Authority within the meaning of Section 2(h) of the RTI Act. In this case, the Hon'ble Court has also analysed the shareholding pattern of IL&FS and have found that a little less than 50% are held by the PSU and statutory corporations like LIC etc. The High Court has also examined the composition of the Board of Directors of Tamil Nadu Road Company and come to the finding that the Managing Director of the appellant company is the nominee of IL&FS and that there are three directors who are nominated by TIDCO along with other directors to be nominated by IL&FS. The High Court

found that there is only one director who is not nominated by IL&FS or by TIDCO.

On the basis of these findings, the Hon'ble Court has come to the conclusion that the composition of the Board of Directors of the appellant company shows that it is a body which is controlled by Appropriate Government. The High Court, therefore, did not make a distinction between the control exercised directly by Appropriate Government or by one of the PSU owned and created by it. The High Court has given particular emphasis on the inclusive definition of "Public Authority" as defined under Section 2(h) of the RTI Act and has observed that under the well-known covenants of construction of purposive interpretation, the term "Public Authority" under Section 2(h)(d)(i) must be given a liberal interpretation so that the authorities like the appellant company who are owned, controlled and substantially financed directly or indirectly by the Government come within the purview of the RTI Act.

5.3 The High Court of Madras in Tamil Nadu Newsprint and Papers Ltd. v. State Information Commission²⁰ observed as under:

One of the objectives to this right to information is eradication of ineffective governance and corrupt governance. Corruption is now recognised as violation of human rights. Good transparency practices are essential for good governance and it includes maximum disclosure ; obligation to publish ; promotion of open Government ; limited scope of exceptions ; minimum costs ; processes that facilitate access ; open meetings ; precedence of disclosure ; and protection of whistle-blowers. The civil society must be unrelenting in its efforts to ensure that the Government at all levels reaches a reasonable standard in affording public information to the citizens. Sometimes even harmless information is not made available. When what is asked for is just ordinary data, data that any interested tax-paying citizen has a right to know-a human right, even no national secrets that threaten public interest are asked for-it is not furnished. This access to information is more vitally important in developing countries. It is very necessary that the ordinary person is able to participate in the processes that effect daily life and he has empowered with the information to play an effective role in policy-making and legislative decision-making. To promote broader political participation, there should be accountability and transparency of Government, to prevent the criminalisation of policy, there should be free flow of information. These are the reasons why the Act came into force. The Government should have the will to make the shift from being niggardly in providing access to

information. Transparency is essential for a healthy democracy and robust economy....

5.4 The Central Information Commission in Shri Nisar Ahmed Shaikh and Ors v. LIC Housing Finance Limited²¹ held that Companies²² having PSU shareholding upto 45.91% of the paid up capital as "Public Authorities" under the Right to Information Act, 2005.

5.5 The Hon'ble Karnataka High Court in Bangalore International Airport Limited vs. Karnataka Information Commission²³

"It is obvious that as per Section 2(h)(i) "body...substantially financed" would be a body where the ownership may not lie with the Government, nor the control. Hence, clearly the wording 'substantially financed' would have to be given meaning at less than 50% holding. The company law gives significant rights to those who own 26% of the shares in a company. Perhaps this could be taken to define the criterion of 'substantial finance'. The finance could be as equity or subsidies in land or concession in taxation".

Further it may be pertinent to mention that on the basis of ownership of the Government, companies may be classified broadly into following categories:

- Government Companies, and
- Other Companies.

As per Section 617 of the Companies Act, 1956 a Government Company means any company in which not less than 51% of the paid-up capital is held by the Central Government, or by any State Government or partly by the Central Government and partly by one or more State Governments. It also includes a company which is a subsidiary of a Government company as defined hereinabove. It may be pertinent to mention here that Government Companies are covered under the definition of "State" as provided under Article 12 of the Constitution of India and as clarified by the Supreme Court in its judgement in the matter of **Central Inland Water Transport Corporation Ltd. and Anr. Etc. V. Brojo Nath Ganguly and Anr²⁴**. Hence, the Right to Information Act, 2005 is applicable on all Government Companies.

6. CONCLUSIONS

Now coming back to the moot question regarding other companies which are owned by private parties or wherein the shareholding of the Government in such companies is less than 51%. It is worthwhile to mention that, keeping in view the abovementioned ruling of various courts and authorities, it may be concluded that where the Government has financed any company directly or indirectly, shareholding upto 26% of equity, any concession by way of grant or aid may be held to a Public Authority.

Furthermore, as per the provision of the Right to Information Act, 2005, if the information sought for is not covered by the exemption²⁵, then the public authority is bound to disclose the information sought for by any citizen. The argument that if, companies will be directly imposed with obligations to release information would be shaped with several difficulties does not sound good. The Act currently applies to information that is "held by or under the control of any public authority". Hence, companies in the private sector are not bound to release any information under the Act. It appears that any change to this position, as proposed, would require legislative amendment. The parliament has to construct a mechanism to balance the interest of both the governing body as well as the public interested in information as private information may not be subject to misuse to the prejudice of corporate governance. Concluding it is evident that there are several regulating bodies to impose good corporate governance viz. Companies Act as well as the securities regulation (comprised in the SEBI Act, Securities Contract (Regulation) Act and the various regulations and guidelines issued under them, as well as the listing agreement with the stock exchanges) that establish a regime for release of information by companies, with careful regard for some of the sensitivities involved in corporate information. But the public which has blind faith on the governance of corporate sector should have also right to information where the direct interests of the public are hampered.

References:

¹ CIC says RTI should be directly applicable to corporate houses As reported by Dilip Bisoi in [financialexpress.com](http://www.financialexpress.com) on 27 March 2009, available on <http://www.rtiindia.org/forum/16997-cic-says-rti-should-directly-applicable-corporate-houses.html> last visited on 10th Dec.2011.

² *ibid*

³ Section 2 (f) of the Right to Information Act, 2005

⁴ Section 2 (i) of the Right to Information Act, 2005

⁵ Section 3 of the Right of Information Act, 2005

⁶ Section 6(2) of the Right to Information Act,2005

⁷ Section 8 of the Right to Information Act, 2005

⁸ Section 9 of the Right to Information Act, 2005

⁹ Section 4 of the Right to information Act, 2005,

Section 4 (1) Every public authority shall—(a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated; (b) publish within one hundred and twenty days from the enactment of this Act,— (i)

the particulars of its organisation, functions and duties; (ii) the powers and duties of its officers and employees; (iii) the procedure followed in the decision making process, including channels of supervision and accountability; (iv) the norms set by it for the discharge of its functions; (v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; (vi) a statement of the categories of documents that are held by it or under its control; (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof; (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public; (ix) a directory of its officers and employees; (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made; (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes; (xiii) particulars of recipients of concessions, permits or authorisations granted by it;(xiv) details in respect of the information, available to or held by it, reduced in an electronic form; (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use; (xvi) the names, designations and other particulars of the Public Information Officers; (xvii) such other information as may be prescribed and thereafter update these publications every year; (c) publish all relevant facts while formulating important policies or announcing the decisions which affect public; (d) provide reasons for its administrative or quasi-judicial decisions to affected persons. (2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information *suomotu* to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information. (3) For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public. (4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the

information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority.

¹⁰ State of UP vs Rajnarain, AIR 1975 SC 865, Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, 166(2010)DLT305.

¹¹ Section 2(h) of the Right to Information Act, 2005

¹² Indian Olympic Association Vs Veeresh Malik and Ors, MANU/DE/0108/2010, W.P. (C) Nos. 876/2007, 1212/2007 and 1161/2008, **Decided On: 07.01.2010**

¹³ Black's law Dictionary, 9th Edition, (Thomson Reuters)

¹⁴ Published by the Govt. of India(1992)

¹⁵ Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corporation Ltd (2007) 3 SCC 607 and Karnataka Power Transmission Corporation v. Ashok Iron Works (P) Ltd. (2009) 3 SCC 240

¹⁶ G. P. Singh's "Principles of Statutory Interpretation, 10th Edition, LexisNexis Butterworth's, Nagpur, p. 175,

¹⁷ Section 2(a) of the Right to Information Act, 2005 define Appropriate Government as Under:

Appropriate Government" means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly—

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government;

¹⁸ , MANU/DE/0108/2010, W.P. (C) Nos. 876/2007, 1212/2007 and 1161/2008, **Decided On: 07.01.2010**

¹⁹ [2008]145CompCas248(Mad)

²⁰ [2008] CDJ MHC 1871

²¹ Decided on 28.10.2009

²² LIC Housing Finance Limited (LICHFL), LIC Mutual Fund Asset Management Co. Limited (LICMF AMC) and GIC Housing Finance Limited (GIC HFL) all these companies were held as "Public Authority" by Central Information Commission.

²³ MANU/KA/0292/2010, decided on: 09.02.2010

²⁴ 1986 AIR 1571

²⁵ As provided under Section 8, Section 9 and Section 24 of the Right to Information Act, 2005