



Who is a Public Authority under the Right to Information Act, 2005?

Introduction

The definition of ‘public authorities’ under the Right to Information Act, 2005 (“RTI Act”) has been an extremely contentious issue since the RTI came into force. However, in the wake of an order of the Central Information Commission (“CIC”) declaring political parties as public authorities under the RTI Act¹, the issue has taken centre stage in public debates. The Central Government sought to undo the CIC decision by proposing to amend the definition of Public Authorities to exclude political parties. This amendment has now been referred to a Parliamentary standing committee.² This development affords an important opportunity to examine the definition of public authorities, and controversies arising from its interpretation. The specific focus of this brief is on a sample of cases that were brought to the High Courts.

The RTI Act empowers citizens with the right to access information under the control of ‘public authorities’.³ Accordingly, RTI Act creates a legal framework to make good this right by defining public authorities,⁴ allowing citizens to ask public authorities for information,⁵ and imposing penalties on officials of public authorities for failing to disclose ‘information’ defined in Section 2(f). The RTI Act also mandates that “every public authority shall pro-actively disclose information pertaining to it, and maintain its documents and records to facilitate the right to information under the Act”.⁶

Therefore the question of “who is a public authority?” is critical one because it sets the boundaries of the scope of the RTI Act specifically and the transparency regime in the country, more generally. In the last seven years, a wide variety of entities otherwise considered to be private entities (such as schools, colleges and sports associations) have been declared public authorities, and have had to comply with the requirements of the RTI Act. A perusal of

¹CIC order No. CIC/SM/C/001386, dated June 3, 2013.

²J Balaji, *Reprieve for RTI as bill to insulate parties is deferred*, The Hindu, September 6, 2013, available at: <http://www.thehindu.com/news/national/rti-amendment-bill-referred-to-standing-committee-for-elaborate-study/article5096990.ece>.

³Preamble to the RTI Act.

⁴Section 2(h), RTI Act.

⁵Section 6, RTI Act.

⁶Section 4, RTI Act.

judgments of High Courts and the CIC reveals a diverse and at times, conflicting jurisprudence regarding the ambit of ‘public authorities’ under the RTI Act.

Part I

Definition of “public authority”

“Public authority” is defined in Section 2(h) of the RTI Act. It states:

“public authority” 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;

The Act thus defines public authorities in two parts. The first part of the definition (clauses 2(h)(a) to (d))clearly delineate bodies created by the Constitution of India (Union and state executives, Election Commission, etc.), by laws made by Parliament and state legislatures (Central and state universities, regulators such as RBI, SEBI, TRAI etc.), and by government orders or notifications (Planning Commission) as public authorities.

The second part broadens the scope of the definition of a public authority to include any body owned, controlled or substantially financed, and any non-governmental body substantially financed by the appropriate government. This second part of the definition has been the subject of much controversy largely because it leaves the question of what constitutes (a) ownership, (b) control or/and (c) substantial financing open to interpretation. Unsurprisingly therefore, most of the case law related to the question of public authorities is linked to this aspect of the definition.

Entities clearly treated as “public authorities”

Based on the discussion above, certain entities are clearly “public authorities”. These are all the entities falling within clause (a) to (d) of Section 2(h), namely:

- (a) Constitutional authorities such as the Union and state executives, Union and state Council of Ministers, the President and Governors, Parliament and state legislatures, Election Commission, Comptroller and Auditor General of India, etc.
- (b) Bodies created by law made by Parliament or state legislatures, such as regulatory bodies (SEBI, RBI etc.), high courts, educational institutions created by law, etc.

- (c) Bodies created by notification or order of the appropriate government, such as Planning Commission, UIDAI, etc.

One area of controversy that has emerged in relation to the first part of the definition – i.e. bodies created by law – was regarding whether entities registered under various laws become public authorities merely by reason of their incorporation or registration. The Delhi High Court has decided this issue, and unambiguously stated that the mere establishment of a body under a statute will not automatically render it a public authority for the purposes of the RTI Act.⁷ Therefore, companies incorporated under the Companies Act, 1956, societies and trusts registered under laws providing for their creation and registration do not become public authorities merely by virtue of Section 2(h)(d) of the RTI Act.

Part II

This part highlights issues with regard to the interpretation of public authorities by High Courts. Some of these issues pertain to the way in which the definition has to be interpreted. Other issues that have come up pertain specifically to the interpretation of the second part of the definition i.e. what constitutes ownership, control, substantial financing, etc. The main issues and judicial responses emerging from our analysis of the case law are listed below:

Manner of interpretation of the definition

Form v. Function. While Section 2(h) appears to emphasise the form of an entity (how it was constituted, who owns, controls and finances it), as crucial to determining its status as Public Authorities, some decisions of the CIC⁸ and the Delhi High Court⁹ have used case-law to state that an entity's activities are also important. This is an interesting broadening of the definition as the definition in the Act does not explicitly state that the nature of the functions performed by a body ought to be a criteria in determining whether or not it can be defined as a public authority.¹⁰

Broad v. Narrow interpretation. There have also been controversies over whether the second part of the definition merely qualifies the first part of the definition, or whether the two parts are independent of each other. Adopting the first approach would mean that the tests of ownership, control and substantial financing would be limited only to bodies covered in clauses (a) to (d) of Section 2(h). The second approach, on the other hand, would lead to the inclusion of entities not covered within clauses (a) to (d).

⁷*National Stock Exchange of India Limited v. Central Information Commission*, WP (C) No. 4748 of 2007 decided on 15 April 2010 by Delhi High Court.

⁸CIC order No. CIC/SM/C/001386, dated June 3, 2013.

⁹*Kribhco vs. Ramesh Chandra Bawa* W.P. (C) 6129/2007 and W.P.(C) 7770/2008, decided on May 14, 2010.

¹⁰ See also, *National Stock Exchange of India Limited v. Central Information Commission*, WP (C) No. 4748 of 2007 decided on 15 April 2010 by Delhi High Court.

The second approach has been upheld by High Courts as the correct interpretation of the definition. The Delhi High Court has stated that the second part of the definition is “distinct in alternative, and not cumulative”.¹¹ The Delhi High Court has clearly stated that the aim of the second part of the definition is to bring bodies that may not have been established by or under a notification, but are still substantially financed, owned or controlled by the government.¹² The Delhi High Court has also clarified that entities falling within the first part of the definition (from clauses (a) to (d) do not have to additionally be substantially financed, or owned and controlled by the government.¹³

Entities interpreted to be “public authorities”

As mentioned earlier, the bulk of the controversy regarding which entities are public authorities arises from the second part of the definition of public authorities. Decisions of courts on these issues (government control, substantial financing by the government, and the performance of public functions) are varied, and at times contradictory. In this section we provide a list of key cases and controversies that have emerged on these issues.

Control by the government. How is control by government defined? High Courts have considered entities to be controlled by the government on the basis of (a) the definition of “State” in Article 12 of the Constitution¹⁴ (most courts have however held that the Article 12 test is not relevant for the RTI Act¹⁵), and, (b) supervision and regulation by the government agencies under laws such as Kerala State Co-operatives Act.¹⁶ Some courts have also taken the opposite point of view arguing that regulation and supervision cannot be equated with control.¹⁷

Substantial Financing. The RTI Act does not define substantial financing. Consequently courts are often required to decide whether a particular form and quantum of financial aid constitutes substantial finance. Courts have not given a uniform interpretation of what constitutes

¹¹*Id.*

¹²*Indian Olympic Association v. Veeresh Malik* W.P.(C) No. 876/2007, decided on 7.01.2011 by the Delhi High Court. Reiterated in *VS Lee v. State of Kerala* 2010(1) KLT 691.

¹³*Delhi Sikh Gurudwara Management Committee v. Mohinder Singh Matharu* LPA No. 606 of 2010, LPA No. 607 of 2010 decided on 12 September 2012 by Delhi High Court.

¹⁴*Dr. PanjabraoDeshmukh Urban Co-operative Bank Ltd., Vidarbha Region v State Information Commissioner* AIR 2009 Bom 75.

¹⁵*M.P.Varghese v. Mahatma Gandhi University* AIR 2007 Ker 230; *KrishakBharti Cooperative Ltd. v. Ramesh Chander Bawa* W.P. (C) 6129/2007 decided on 14 May 2010 by the Delhi High Court; *IFCI Ltd v. RavinderBalwani*,II(2011)BC 69.

¹⁶*Mulloor Rural Co-operative Society Ltd v. State of Kerala* ILR 2012(2) Kerala 576; *Hindu Urban Cooperative Bank Ltd v. State Information Commission* (2011)ILR 2 Punjab and Haryana 64.

¹⁷*Dr. PanjabraoDeshmukh Urban Co-operative Bank Ltd., Vidarbha Region v State Information Commissioner* AIR 2009 Bom 75; *Nagar YuwakShikshanSanstha v. Maharashtra State Information Commission* AIR 2010 Bom 1; *A.C. Bhanunni v. The Commissioner, Hindu Religious and Charitable Endowments*, WP(C).No. 30470 of 2008 decided by the Kerala High Court on 11.03.2011.

substantial financing. In one case benefits received by the institution in the form of share capital contribution, subsidies, land allotment etc. were cited as examples of such financing.¹⁸ Payments of grants for salaries of teachers and staff in educational institutions have also been held to be substantial funding.¹⁹ In some cases, the quantum of financing was considered in arriving at a decision. For example, the Indian Olympic Association was considered a public authority because the central government paid the travel expenses of the players, and provided 85% of their living expenses.²⁰ Importantly, courts have refrained from adopting a benchmark based on the quantum of financing in most cases.²¹

Based on these criteria, High Courts have brought a number of entities within the ambit of “public authority”. These include:

- (a) Autonomous institutions such as sports associations: Indian Olympic Association²², Chandigarh Laws Tennis Association¹⁸.
- (b) Schools and educational trusts: Sanskriti School²³, Dhara Singh Girls High School, Ghaziabad²⁴, DAV College Trust²⁵.
- (c) Registered societies, and cooperatives: Jullundar Gymkhana and Sutlej Club²⁶, Mulloor Rural Co-operative Society Ltd.²⁷

Conclusion

As this brief review of emerging case law on the definition of public authorities reveals, courts have considered several criteria for adjudging whether an entity is or isn't public authority. Words such as 'control' and 'substantial financing' have been construed liberally to widen the ambit of the RTI Act by bringing a variety of entities within the definition of public authority. However, till date there appears to be no judicial unanimity on this issue and courts continue to pronounce judgments on a case-to-case basis. While one school of thought believes firmly in the need for greater legal certainty in what would be construed as a public authority, another school of thought perceives an inherent advantage in keeping it an open-ended definition. This Brief does not seek to resolve this debate. Rather, it aims to highlight the complexities involved

¹⁸*Hindu Urban Cooperative Bank Ltd v. State Information Commission* (2011)ILR 2 P&H 64.

¹⁹*Principal, M.D. SanatanDharam Girls College v State Information Commissioner*, AIR 2008 P&H 101; *Committee of Management, Ismail Girls National Inter College v. State of UP*, AIR 2009 All 36.

²⁰*Indian Olympic Association v. Veeresh Malik* W.P.(C) No. 876/2007.

²¹*Professional Assistant for Development Action (PRADAN) v. The Jharkhand State Information Commission*, W.P.(C) No. 4376 of 2009 decided on 10.03.2010 by the Jharkhand High Court; *D.A.V. College Trust v. Director Of Public Instruction* AIR 2008 P & H 117.

²²*Indian Olympic Association v. Veeresh Malik* W.P.(C) No. 876/2007.

²³*Indian Olympic Association v. Veeresh Malik* W.P.(C) No. 876/2007.

²⁴*Dhara Singh Girls High School, Ghaziabad v. State of Uttar Pradesh & Ors.* 2008 (4) CCC 352 (All)

²⁵*D.A.V. College Trust v. Director Of Public Instruction* AIR 2008 P & H 117.

²⁶*Hindu Urban Cooperative Bank Ltd v. State Information Commission* (2011)ILR 2 P&H 64.

²⁷*Mulloor Rural Co-operative Society Ltd v. State of Kerala* ILR 2012(2) Kerala 576.

in defining a public authority. Given the centrality of this definition to the implementation and effectiveness of the RTI Act, public debate on the subject is both welcome and necessary.

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