Administrative Reforms Commission and Right to Information

The Administrative Reforms Commission's recommendations on the RTI Act do not seem to be aimed at giving it more teeth. On the contrary, having failed to have in-depth consultation with groups working to promote RTI, it has actually arrived at avoidable conclusions.

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The first report of the (Second) Administrative Reforms Commission (ARC), on the right to information, was submitted to the government of India in early June 2006. Media reports, presumably based on a press note issued by the ARC secretariat, suggested that the report is strongly supportive of the right to information and has recommendations aimed at further strengthening the newly enacted Right to Information (RTI) Act. Unfortunately, even a cursory reading shows that the report is actually very problematic.

Many of the recommendations are indeed supportive of the right to information. These include the recommendation to replace minister's oath of secrecy by an oath of transparency,[1] or to amend the Civil Services Rules and make the provision of "full and accurate" information asked for under the RTI Act obligatory for the civil servant.[2] The ARC also, very rightly, stresses on record keeping and recommends the establishment of public records offices, under the overall control of information commissions. They also recommend making suo motu disclosures available in printed form and earmarking funds for updating records.[3]

The ARC points out the importance of having detailed guidelines and of imparting training in RTI not only to the public information officers, but to all civil servants.[4] They recognise that the quantum of fees prescribed should not become a limiting factor and recommend uniformity among states.[5] Of particular significance is their recommendation aimed at facilitating the access of various types of information from private agencies,[6] and of generally strengthening the hands of the central and state information commissions.[7]

The support that ARC has expressed to keeping file notings accessible under the RTI Act[8] could not have come at a better time, and equally timely is their recommendation that the selection of information commissioners be done by a committee that includes the chief justice of the Supreme Court (for the central ones) and of the respective high courts (for the states).[9]

Problematic Recommendations

However, there are other recommendations that are so problematic that, if they were to be accepted, they would not only undo the good done by the above mentioned progressive recommendations but threaten to totally undermine the RTI Act itself.

The first of these is the recommendation that Section 7 of the RTI Act may be amended to insert a sub-section (10) as follows:

> The PIO may refuse a request for information if the request is manifestly frivolous or vexatious. Provided that such a refusal shall be communicated within 15 days of receipt of application, with the prior approval of the appellate authority. Provided further that all such refusals shall stand transferred to CIC/SIC, as the case may be and the ClC/SlC shall dispose of the case as if it is an appeal under section 19(3) of the RTI Act.[10]

In support of this recommendation, the ARC gives the following justification:

> The highlight of the Act is that the information seeker "shall not be required to give any reason for requesting the information....or any other personal details....". This salutary provision is important to ensure that there is no subjective evaluation of the request, or denial on specious grounds. However, certain instances have

been brought to the notice of the commission in which the requests were patently frivolous or vexatious (or mala fide). There are also cases in which public servants under a cloud and facing grave disciplinary charges have repeatedly attempted to use the act to intimidate, harass or at times even humiliate seniors with requests that have been vexatious. If safeguards are not provided in such situations, there could be three dangers. First, such frivolous or vexatious requests may overwhelm the system and defeat the very purpose of the act. Second, the even tenor of administration may be paralysed, seriously undermining delivery of services. Third, if public servants facing serious charges successfully resort to such tactics directly or through proxies it may lead to breakdown of discipline, insubordination and disharmony in public institutions. The commission therefore feels that adequate safeguards should be provided against vexatious and malicious requests, even as no fetters are imposed on citizens seeking information in accordance with the letter and spirit of Section 6(2).[11]

Unfortunately, the commission does not give any details of the instances that were brought to their notice, nor of the methods by which RTI was used to intimidate, harass or even humiliate officers. In the absence of such details, it is difficult to assess whether these cases were such that remedies were already available in the RTI Act. It is equally difficult to imagine how the truth, which is what the RTI Act provides, could be used for mala fide purposes (whatever that might mean), or for intimidating, harassing or humiliating a person.

The ARC goes on to state that UK and South Africa also have exemptions of this type in their freedom of information laws. In fact, the UK act only immunises against repeated identical requests from the same person, within a short time. In any case, closer to home examples belie the fears expressed. Many states (notably Maharashtra and Delhi), have had state RTI Acts that did not permit refusal of information on these grounds. Yet, there were no reports of officers being intimidated, harassed or humiliated.

The ARC recommends that all such rejections be automatically referred to the information commission as an "appeal". Given the fact that the information commissions already have a fast growing backlog of appeals, the influx of hundreds of additional cases could finish the RTI Act once and for all. Besides, even if information commissions decentralise to some extent, as recommended by the ARC, it would be impossible for most people, especially the poor and the illiterate, to attend the hearings of the information commissions, or to send written submissions, and effectively argue why their request is neither frivolous nor ought to be thought of as vexatious. And without their effective testimony, it would be unfair to deny them information.

Vexatious to Whom, and Why?

There is the delightful case of a peanut seller, sitting on the pavement opposite the house of a district collector, asking for a photocopy of the logbook of the Collector's staff car for the last year. The collector was not amused and very vexed. But is that any ground for refusing this very reasonable and legitimate request – for after all the Collector's car and its fuel are paid for by the taxes this man pays.

The problem is exacerbated by the fact that the ARC lays down no criteria for objectively determining what is "manifestly" frivolous and/or vexatious. In fact, it is virtually impossible to lay down such criteria, for these terms are essentially subjective. The Little Oxford Dictionary defines frivolous as "paltry; trifling; futile; silly". In this sense, to "senior" officials doing "important" work, many requests by citizens, especially the poor ones, might appear frivolous. But what is paltry or trifling to a rich man might be a matter of life or death to the poor. So, whose standards would prevail, and who would decide?

Vexatious is even more problematic. The Little Oxford Dictionary defines vexatious as "annoying". Any common citizen who has dealt with the bureaucracy would know that by and large the bureaucrat has a very low tolerance level to provocation. Therefore, any request questioning the judgment, the efficiency, the impartiality, the commitment or the integrity of a bureaucrat could be annoying to the bureaucrat or to the bureaucracy. But the right to ask such annoying questions is the essence of the right to information, and flows from the fundamental right of the public to question the public servant. If that becomes a basis for rejecting a request for information, then the whole basis of the act is undermined.

The real danger of this recommendation is that, if accepted, it would very likely lead to a situation where most applications would be routinely rejected as being frivolous or vexatious. Considering there is no penalty recommended for wrongly rejecting applications on these grounds, and none can be prescribed, for the grounds themselves are so subjective, public authorities would have nothing to fear from the information commission. Besides, as the commission has itself conceded, "departments tend to be defensive rather than proactive in redressing a grievance (or even in disclosing information) particularly when it directly pertains to their conduct (or misconduct)."[12] Can such departments really be trusted to honestly apply this test?

It would have been much better if the ARC had shared with the public what specific cases led them to this recommendation. In analysing the specific cases, the collective wisdom of the people of India would most likely have come up with a much better solution.

Exempting Laborious Requests

Another problematic recommendation of the ARC is that:

> Information can be denied if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.[13]

Here, also, no details of what would be a "substantial" and "unreasonable" diversion of resources has been (or can be) given, as these terms are no less subjective than "frivolous" and "vexatious". Denial of information on this basis would also most likely result in large-scale rejection of applications, and recommended safeguards suffer from the same infirmities described above.

Though the ARC has given no details of what prompted it to come out with this recommendation, it does state that "there may be cases where the efforts in compiling information may not be commensurate with the results achieved".[14] Perhaps this statement is based on a misunderstanding of the term "information", as defined in the RTI Act, and a lack of familiarity with section 7(9) of the act.

Sub-sections (f), (i) and (j) of section 2 of the RTI Act collectively define the terms "information", "record" and "right to information". Nowhere in these sub-sections is there any obligation on a public authority to compile information, or for that matter to collect primary information in order to respond to an RTI requisition. It would, therefore, be reasonable to assume that the RTI Act ordinarily provides access to information *that is already*

available or ought to be available with a public authority.

Compilation of Information

One can ask under the RTI the question: how many of the patients treated for tuberculosis in Delhi government hospitals, during 2005-06, were smokers? There are three alternatives:

1 Such information is not collected from the patients, and therefore the government can inform the applicant that this information is not available.
2 Or, though it is collected from each patient, it is neither compiled for the whole of Delhi, nor is such a compilation obligatory. In this case, the public authority can compile it, if this is not too laborious and time consuming, or provide to the applicant the disaggregated data, which the applicant will have to compile herself.
3 If it is already collected and compiled, then it can be provided in the form asked for.

There is, however, one section of the act where there could be an implied obligation to compile or aggregate information. Section 7(9) creates the obligation on a public authority to "ordinarily" provide information in the form that it is sought. However, here also, the act goes on to qualify that this should be so "…unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question". In other words, the existing RTI Act ingenuously solves the problem by allowing information to be provided in the form in which it exists and only obligating compilation or aggregation where it is specifically asked for and does not "disproportionately divert" the resources of the public authority. Consequently, there was no need for the ARC to intervene and to blatantly recommend another basis for rejecting information, especially a basis that could not be regulated and would very likely become a convenient alibi for rejecting most information.

Exclusion of the Armed Forces

Perhaps the most incomprehensible of the ARC recommendations is that "The armed forces should be included in the second schedule of the act".[15] This essentially means that the armed forces get excluded from the purview of the RTI Act and get protection under sub-section 1 of section 24 of the RTI Act, which states:

> Nothing contained in this Act shall apply to the intelligence and security organisations specified in the second schedule, being organisations established by the central government or any information furnished by such organisations to that government;

The ARC seems to offer two reasons for this recommendation. First, that "When organisations such as BSF, CRPF, Assam Rifles are exempted, there is no rationale for not exempting the armed forces as well".[16] Secondly, "…because almost all activities of the armed forces would be covered under the exemption 8(a) which states that there shall be no obligation to give to any citizen, information which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the state...".[17] Both these arguments seem to be flawed.

To take the second one first, even if many of the activities of the armed forces are related to security matters and could, therefore, be exempt, there is no reason why the remaining activities of the armed forces should also be exempt. The armed forces employ more than a million men and women. Given the fact that the right to information has been judged by the Supreme Court of India to be a fundamental right, why should these employees and their families be denied their fundamental right to seek information from their employer?

The citizens of India should also have a right to seek information about the environmental impacts of the activities of the armed forces, especially considering that these forces control a large amount of land and operate in many very ecologically vulnerable areas. The armed forces are also among the largest spenders of public funds and the citizens of India have a right to know how those funds are being managed and spent.

In fact, the inclusion of other security organisations, like the BSF, the CRPF and the Assam Rifles in the second schedule of the RTI Act is unsustainable on similar grounds, and all such organisations should forthwith be removed from this schedule.

Perhaps the ARC has fallen prey to a common misconception that secrecy enhances national security. In fact, it is under the cloak of secrecy that inefficiency, patronage and treachery flourish. The exemptions already provided in section 8 of the RTI Act are more than adequate to ensure that the security of India is not compromised. Beyond these, intelligence and security agencies would work far more effectively if they worked under the watchful eye of the public.

Some other recommendations, though perhaps well meaning, need further thought. These include the recommended exemption of "examination question papers and related matters" from the RTI Act.[18] Whereas examination papers should ordinarily be exempt, the phrase "related matters" unnecessarily broadens the scope of the recommendation and runs the risk of giving inadvertent support to a somewhat unfortunate recent judgment by the Central Information Commission on whether examinees have a right to get copies of their answer sheets after the evaluation is over. In a recent case the CIC[19] has refused an examinee a copy of her answer sheet because its disclosure would violate the fiduciary relationship between the examiner and the examination authority.

The ARC's recommendation that at least half of the members of the information commissions should be with non-civil service backgrounds is also welcome.[20] However, the need of the hour is to persuade the central and state governments to appoint "persons of eminence in public life",[21] as specified in the act. Just appointing people from outside the government will not solve the problem, unless they are committed to the cause of transparency and have the independence and stature to stand up to bureaucratic pressures.

Similarly, the recommendation that a National Coordination Committee (NCC)

may be set up to oversee the implementation of the RTI Act[22] is a good one. However, the composition suggested is problematic as no non-officials are proposed as members.

Classification of Information

The ARC has made various recommendations regarding the classification of information, following from its recommendation that the Official Secrets Act, 1923 should be repealed and substituted by a chapter in the National Security Act (NSA).[23] The recommended repeal of the Official Secrets Act is welcome though, as also conceded by the ARC,[24] it would have little or no implication on access to information under the RTI Act, 2005, which supersedes it. However, the recommendations relating to the new section of the NSA,[25] the amendments to the manual of office procedure[26] and the classification of information[27] could have serious adverse implications on access to information under the RTI Act, if not accompanied by a suitable clarification.

This difficulty arises because, as of now, section 22 of the RTI Act, which says that "The provisions of this act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act", has made all classifications of information (like secret, confidential, etc) irrelevant while accessing information under the RTI Act. Therefore, when information is asked for under the RTI Act, the PIO and the public authority have to apply their minds as to whether the information asked for is exempt or not under the RTI Act and cannot go by whether it is classified as secret or not.

However, if the proposed new system of classification is adopted, information will again be classified as top secret, secret, etc, but *in a manner such that it corresponds* to the exemptions under the RTI Act. So, for example, information that would be exempt under section 8(1)(a) of the RTI Act would be classified as "top secret", 8(1)(b) as "confidential", and so on.[28] This will result in a situation where, once again, information will start being denied because it is classified rather than because it has been determined to be exempt under the RTI Act.

As the classification itself might have been done many years prior to the information actually being asked for, it would be difficult to pinpoint, on appeal, responsibility for wrong classification and, therefore, wrong rejection. It would also be difficult to insist, as the RTI Act does, that the onus of proof remain on the denier of information, as the officer who originally classified the information as secret and thereby denied access might have long retired. In any case, as it would be impossible to penalise the officer who wrongly classified a document, and that also many years back, there would be a resurgence of the "tendency to classify information even where such classification is clearly unwarranted", as recognised by the ARC itself.[29] In effect, the balance would again shift in favour of secrecy rather than transparency, thereby undermining both the letter and spirit of the RTI Act.

Perhaps the additional clarification that would be required is to explicitly state that whereas classified information cannot ordinarily be revealed to unauthorised persons, its classification would not be relevant when an application is received under the RTI Act and determination of whether the information can or cannot be provided under the RTI Act would be done solely on the basis of the provision of that Act.

The commission set out to "look at the implementation" of the RTI Act and to "make suitable recommendations to fulfil the objectives of the Act".[30] However, in this laudable task it seems to have primarily consulted bureaucracies. Many of the problems listed above could surely have been avoided if the commission had been more open and participatory in its approach and had shared its thinking with groups and movements working to promote RTI.

Though the commission reportedly had extensive interactions with state governments and central government ministries, it seems to have organised just one consultation with civil society groups.[31] Interestingly, the participants of this consultation recommended[32] that there was no need to amend the RTI Act, or even the Official Secrets Act. In response to a specific question, whether exemptions need to be rationalised, the group responded: "There is no need as the exemptions are quite rational". Despite this, the ARC went ahead and recommended amendments to the RTI Act and recommended "rationalisation" of exemptions. This does not appear to be a very good model of participatory decision-making.

What makes it all the more ironical is that in the introduction to their report, the commission states that good governance has four elements – transparency, accountability, predictability and participation.[33] However, in their own functioning they seem already to have violated at least two – by not making their report available to the public as soon as it was finalised, they have compromised on transparency,[34] and by not consulting the people while formulating their recommendations, they seem to have compromised on participation. Let us hope they now also compromise on a third – and do not become predictable in this style of functioning. EPW

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Notes

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1 Government of India (2006): *Right to Information: Master Key to Good Governance*, First Report, Second Administrative Reforms Commission, New Delhi, pp 17-18, para 2.2.4.
2 Op cit, p 21, para 3.1.4.
3 Op cit, p 32, para 5.4.11.
4 Op cit, p 35, para 5.5.5.
5 Op cit, p 40, para 6.2.7.
6 Op cit, p 44, para 6.6.6.
7 Op cit, p 36, para 5.6.4.
8 Op cit, p 21, para 3.2.2.
9 Op cit, p 28, para 5.2.5a.
10 Op cit, p 48, para 6.9.5.
11 Op cit, p 47, para 6.9.1, emphasis added.
12 Op cit, p 46, para 6.8.2.
13 Op cit, p 49, para 6.9.5b.
14 Op cit, p 48, para 6.9.4, emphasis added.
15 Op cit, p 19, para 2.5.6.
16 Op cit, p 18, para 2.5.2.
17 Op cit, p 18, para 2.5.3.
18 Op cit, p 25, para 4.1.8(a) (i).
19 Appeal No ICPB/A-2/CIC/2006 dated February 6, 2006; Appellant Ms Treesa Irish.
20 Op cit, p 29, para 5.2.5d.
21 Section 12(5) of the Right to Information Act, 2005.
22 Op cit, p 37, para 5.6.4d.
23 Op cit, p 11, para 2.2.12a.
24 Op cit, p 5, para 2.2.3; p 6, para 2.2.5; p 10, para 2.2.10.
25 Op cit, p 11, para 2.2.12b.
26 Op cit, p 22, para 3.2.3.
27 Op cit, pp 24-25, para 4.1.8.
28 Op cit, p 25, para 4.1.8 (a) (i).
29 Op cit, p 23, para 4.1.1.
30 Op cit, p 2, para 1.1.4.
31 National Colloquium on Right to Information Act, National Judicial Academy, Bhopal, December 11-12, 2005.
32 Op cit, pp 97-98.
33 Op cit, p 1, para 1.1.1.
34 The ARC report on the Right to Information was not available to the public for at least a month after it was submitted to the government of India.