How I became an Information Commissioner

Some friends wonder how I have the gall to be critical of the lack of process in selecting Information Commissioners, since they believe I must have resorted to influence and patronage for my selection.

Let me detail the story of how i got selected:

In the first week of August 2008 Arvind Kejriwal learnt that the government had decided on the names of four persons whom they would appoint as Central Information Commissioners. These were:

1. Satyananda Mishra
2. M.L.Sharma
3. Annapurna Dixit
4. R.B.Sreekumar

I believe there is a tacit understanding between the ruling party and the opposition on such matters and overall there is a certain give and take in matters of appointments. Arvind discussed with me that though we had been fighting for appointment of good Commissioners and transparency in the selection process we were not making any headway. He therefore suggested that we propose four names from civil society. We got together a list of credible persons and Arvind arranged to get letters sent to the PM, Advani and Prithvraj Chavan by some prominent civil society members recommending these.

On 20 August Prithviraj Chavan asked for a meeting of the Selection Committee to be called on 21 August at 6.00pm. I have heard that on 20 night the four names were shown to LK Advani. Advani strongly objected to the name of Sreekumar since he had been a senior police officer in Gujarat at the time of the Godhra riots and openly criticized Narendra Modi.

He said he would oppose Sreekumar's selection and said, 'Why not one of the names suggested by civil society?' The selection Committee meeting was not held on 21 August.

I did not know Prithviraj Chavan, nor did he know me. Whether he made any checks about the other three members of our panel I do not know. As for me, he called up a business person in Mumbai and asked him what kind of person I was. This person had never met me, but based on what he had read in the papers he said I would be a good choice. After this Prithviraj Chavan called me and asked me if I would accept if I was selected as a Central Information Commissioner, and I said yes.

On 27 August a meeting was called and my name was put in place of R.B. Sreekumar.

Some of this information is available at http://persmin.gov.in/DOPT/RTICorner/ImpFiles/6_4_2008_IR_Vol_I_Noting.pdf

I can assure all of you, that I did not use any influence or network. It was a random occurrence, but my selection was also without any process and a random occurrence.

The record also shows Asok K Mahaptra's name and I do not have any knowledge of how his name was dropped. I would urge RTI activists who have an understanding of the legal issues of the law to apply for the positions of Information Commissioners. Ciitizens should put forward names of persons with a background in transparency and build pressure

I would also like to point out two matters as a personal clarification:

I had informed the government that I was paying volunteers to work with me is mentioned on page 22. Whereas in 2007-2008 five Commissioners disposed 7722 cases I alone averaged about 5400 cases per year.

Judiciary and RTI

The Supreme Court of India consistently held from 1975 to 2005 that RTI is a fundamental right of citizens. However certain decisions and pronouncements of the Courts in the last four years could weaken this powerful fundamental right. These should be discussed by RTI users and the legal fraternity.

Challenging decisions of the Information Commission and stay orders: The law provides for no appeals against the decisions of the Commission. However these decisions are being challenged in High Courts through writ petitions by many public authorities to deny information to citizens. In most of these cases a stay is obtained ex-parte. At times, Commissions have been stopped from even investigating matters before them. These cases die down as most of the applicants are unable to respond effectively in Courts for lack of resources.

There is a need for the court to examine prima facie whether the grounds fall in the writ jurisdiction of a Court, and whether any irreparable harm would befall the petitioner if a stay is not given, since these continue for many years. The Supreme Court has stated many times that an essential requirement for any judicial, quasi-judicial or administrative order is that reasons must be provided. There are a number of High Court orders staying the disclosure of information as per the orders of the information commissions where no reasons are given.

Disclosure of Information: The law has strong provisions to

ensure disclosure of most information, and lays down in Section 22 that its provisions supersede all earlier laws. It further stipulates that denial of information can only be done based on the provisions of Section 8 or 9. Additionally the onus to justify denial of information is on the PIO in any appeal proceedings. Denial of information should be rare. An analysis of the judgements of the Supreme Court on the RTI Act shows that out of sixteen judgements disclosure of information was ordered only in the judgement mentioned below at number 1. I am giving my comments on three judgements below:

1 In Appeal No. 6454 of 2011 the Court held, "Some High Courts have held that Section 8 of RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that therefore Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach." I feel the earlier approach where exemptions are interpreted narrowly, since these abridge a fundamental right of citizens. Another strong statement in the said judgment is : *'Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to* destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a *tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties.'*

A study by RAAG has shown that about 50% of the RTI applications are made since the departments do not discharge their duty under Section 4 of the RTI Act which mqndates disclosure of most of the information *suo moto* as per the law. About 25% of the applications seek information about citizens trying to obtain their delayed ration cards, progress of their application for various services or complaints of illegal activities for which the government departments should have replied. There is no condemnation of the officers who,- often for not receiving bribes,- do not do their duty, but the citizen using his fundamental right is strongly admonished without any evidence or basis.

2) In the Girish Ramchandra Deshpande judgement given in October 2012 the Court has held that copies of all memos, show cause notices and orders of censure/punishment, assets, income returns, details of gifts received etc. by a public servant are personal information exempted from disclosure as per Section 8(1) (j) of the RTI Act. It further states that these are matters between the employee and the employer, without realising that the employer is the citizen,- the master of democracy,- who provides legitimacy to the government. This judgement appears to have neither legal reasoning, nor a legal principle and is based on concurring with the denial of information by the information commission. The ratio of the R.Rajagopal judgement given by the Supreme Court in 1994 clearly lays down that no claim to privacy can be claimed for personal information on public records by public servants. It appears this judgement was not presented to the Court.

In Section 8 (1) (j) there is a proviso 'that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person". There is no mention of this proviso in the judgement and no word that the court was satisfied that this information would not be

provided to parliament or state legislature.

3) A Madras High Court judgement on 17 September 2014 has caused considerable confusion since it said that citizens must give reasons for seeking information. This was in direct violation of Section 6 (2) of the Act which states," An applicant making request for information shall not be required to give any reason for requesting the information". The court realised this mistake in a week and withdrew this observation. This judgement not only violated the RTI Act it was in violation of Article 19 (1) (a) of the constitution.

I hope the courts will take an active part in expanding the reach and scope of RTI. If they interpret the RTI Act giving more importance to exemptions and widening their scope, this great law may become 'Right to Denial of Information'. This would be a sad regression for democracy.

Shailesh Gandhi

RTI activist and Former Central Information Commissioner