REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NOS.8396/2009, 16907/2006, 4788/2008, 9914/2009, 6085/2008, 7304/2007, 7930/2009 AND 3607 OF 2007,**

Reserved on : 12th August,2009/2nd September, 2009.

% **Date of Decision** : 30th November , 2009.

(1) **WRIT PETITION (CIVIL) NO. 8396 OF 2009**

UNION OF INDIA THR. DIRECTOR,
MINISTRY OF PERSONNEL, PG & PENSION ….Petitioner
Through Mr.S.K.Dubey, Mr.Deepak Kumar, advocates.

versus

CENTRAL INFORMATION COMMISSION &
SHRI P.D. KHANDELWAL ….Respondents
Through Prof. K.K. Nigam, advocate for CIC.
Respondent no.2, in person.

(2) **WRIT PETITION (CIVIL) NO.16907 OF 2006**

UNION OF INDIA ..... Petitioner
Through Mr. A.S. Chandhiok, ASG with Mr. Ritesh Kumar, Ms. Vibha Dhawan & Mr. Sandeep Bajaj, Advocates.

versus

SWEETY KOTHARI ..... Respondent
Through Mr. Bhakti Pasrija, Advocate.

(3) **WRIT PETITION (CIVIL) NO. 4788 OF 2008**

UNION OF INDIA THR. SECRETARY,
MINISTRY OF DEFENCE & ANOTHER .... Petitioners
Through Mr. A.S. Chandhiok, ASG with Mr. R. Balasubramanian, Advocate.

versus

THE CENTRAL INFORMATION COMMISSION

THR. ITS REGISTRAR & ANOTHER ..... Respondents
Through Prof. K.K. Nigam, Advocate for respondent No. 1.

(4) **WRIT PETITION (CIVIL) NO. 9914 OF 2009**

UNION OF INDIA THR. SECRETARY,
MINISTRY OF DEFENCE & ANOTHER .... Petitioners
Through Mr. A.S. Chandhiok, ASG with Mr. R. Balasubramanian, Advocate.

versus

THE CENTRAL INFORMATION COMMISSION
THR. ITS REGISTRAR &
MAJ.RAJ PAL (RETD.) ..... Respondents
Through Prof. K.K. Nigam, Advocate for respondent No. 1.
Maj. Raj Pal, in person.

(5) **WRIT PETITION (CIVIL) NO. 6085 OF 2008**

UNION OFINDIA & ANOTHER ..... Petitioners
Through Mr. A.S. Chandhiok, ASG with Mr. R. Balasubramanian, Advocate.

versus

CENTRAL INFORMATION COMMISSION
& ANOTHER ..... Respondents
Through Prof. K.K. Nigam, Advocate for respondent No. 1.

(6) **WRIT PETITION (CIVIL) NO. 7304 OF 2007**

UNION OF INDIA ..... Petitioner
Through Mr. A.S. Chandhiok, ASG with Mr. Ritesh Kumar, Ms. Vibha Dhawan & Mr. Sandeep Bajaj, Advocates.

Versus

BHABARANJAN RAY & ANOTHER ..... Respondents
Through

(7) **WRIT PETITIION (CIVIL) NO. 7930 OF 2009**

ADDL.COMMISSIONER OF
POLICE (CRIME) ..... Petitioner

Through Mr. A.S. Chandhiok, ASG with Ms. Mukta Gupta , Ms. Anagha, Mr. Ritesh Kumar, Ms. Vibha Dhawan & Mr. Sandeep Bajaj & Mr. Bhagat Singh, Advocates.

versus

CENTRAL INFORMATIONAL COMMISSION
& ANOTHER. ..... Respondents

Through Prof. K.K. Nigam, Advocate for respondent No. 1.
Mr. Prashant Bhushan, Advocate for respondent No. 2 .

(8) **WRIT PETITION (CIVIL) NO. 3607 OF 2007**

THE INSTITUTE OF CHARTERED
ACCOUNTANTS OF INDIA ..... Petitioner

Through Mr. Parag P. Tripathi, Sr. Advocate with Mr. Rakesh Agarwal & Mr. Anuj Bhandari, Advocates.

Versus

CENTRAL INFORMATION COMMISSION ..... Respondent

Through Prof. K.K. Nigam, Advocate.

CORAM :
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

SANJIV KHANNA, J.:

1. The petitioners herein have challenged orders passed by the Central Information Commission (hereinafter also referred to as CIC,

for short) under the Right to Information Act, 2005 (hereinafter referred to as the RTI Act, for short).

2. The challenge to the impugned orders involves interpretation of Sections 8(1), 18 and 19 of the RTI Act, which read as under:-

> "**Section 8. Exemption from disclosure of information.-** (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
>
> (a) Information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
> (b) Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
> (c) Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
> (d) Information including commercial confidence, trade secretes or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
> (e) Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.
> (f) Information received in confidence from foreign government;
> (g) Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
> (h) Information which would impede the process of investigation or apprehension or prosecution of offenders;
> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;
>
> Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of

which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over;

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public authority or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act. ”

“Section 18- Powers and functions of Information Commissions- 1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the

case may be, to receive and inquire into a complaint from any person,—

(*a*) who has been unable to submit a request to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior officer specified in sub-section (1) of Section 19 or the Central Information Commission or the State Information Commission, as the case may be;

(*b*) who has been refused access to any information requested under this Act;

(*c*) who has not been given a response to a request for information or access to information within the time-limit specified under this Act;

(*d*) who has been required to pay an amount of fee which he or she considers unreasonable;

(*e*) who believes that he or she has been given incomplete, misleading or false information under this Act; and

(*f*) in respect of any other matter relating to requesting or obtaining access to records under this Act.

(2) Where the Central Information Commission or State Information Commission, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof.

(3) The Central Information Commission or State Information Commission, as the case may be, shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—

(*a*) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;

(*b*) requiring the discovery and inspection of documents;

(*c*) receiving evidence on affidavit;

(*d*) requisitioning any public record or copies thereof from any court or office;

(*e*) issuing summons for examination of witnesses or documents; and

(*f*) any other matter which may be prescribed.

(4) Notwithstanding anything inconsistent contained in any other Act of Parliament or State Legislature, as the case may be, the Central Information Commission or the State Information Commission, as the case may be, may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public authority, and no such record may be withheld from it on any grounds.

Section 19 Appeal.—(1) Any person who, does not receive a decision within the time specified in sub-section (1) or clause (*a*) of sub-section (3) of Section 7, or is aggrieved by a decision of the Central Public Information Officer or State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or State Public Information Officer as the case may be, in each public authority:

Provided that such officer may admit the appeal after the expiry of the period of thirty days if he or she is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) Where an appeal is preferred against an order made by a Central Public Information Officer or a State Public Information Officer, as the case may be, under Section 11 to disclose third-party information, the appeal by the concerned third party shall be made within thirty days from the date of the order.

(3) A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission:

Provided that the Central Information Commission or the State Information Commission, as the case may be, may admit the appeal after the expiry of the period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(4) If the decision of the Central Public Information Officer or State Public Information Officer, as the case may be, against which an appeal is preferred relates to information of a third party, the Central Information Commission or State Information Commission, as the case may be, shall give a reasonable opportunity of being heard to that third party.

(5) In any appeal proceedings, the onus to prove that a denial of a request was justified shall be on the Central Public Information Officer or State Public Information Officer, as the case may be, who denied the request.

(6) An appeal under sub-section (1) or sub-section (2) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing.

(7) The decision of the Central Information Commission or State Information Commission, as the case may be, shall be binding.

(8) In its decision, Central Information Commission or State Information Commission, as the case may be, has the power to—

(*a*) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—

(*i*) by providing access to information, if so requested, in a particular form;

(*ii*) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;

(*iii*) by publishing certain information or categories of information;

(*iv*) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;

(*v*) by enhancing the provision of training on the right to information for its officials;

(*vi*) by providing it with an annual report in compliance with clause (*b*) of sub-section (1) of Section 4;

(*b*) require the public authority to compensate the complainant for any loss or other detriment suffered;

(*c*) impose any of the penalties provided under this Act;

(*d*) reject the application.

(9) The Central Information Commission or State Information Commission, as the case may be, shall give notice of its decision, including any right of appeal, to the complainant and the public authority.

(10) The Central Information Commission or State Information Commission, as the case may be, shall decide the appeal in accordance with such procedure as may be prescribed.

SECTION 8 OF THE RTI ACT

3. Section 8 (1) of the RTI Act begins with a non-obstante clause and stipulates that notwithstanding any other provision under the RTI Act, information need not be furnished when any of the clauses (a) to (j) apply. Right to information is subject to exceptions or exclusions stated in section 8(1) (a) to (j) of the RTI Act. Sub-clauses (a) to (j) are in the nature of alternative or independent sub clauses. In the present cases, we are primarily concerned with Clauses (e), (h), (i) and (j) of the RTI Act. Each sub-clause has been interpreted separately. Section 8(1)(h) of the RTI Act has been interpreted while examining WP(C) No. 7930/2009, Addl. Commissioner of Police (Crime) Vs. Central Information Commission & Another.

SECTION 8 (1) (e) OF THE RTI ACT

4. Section 8(1)(e) protects information available to a person in his fiduciary relationship. As per Section 3(42) of the General Clauses Act, 1897 the term “person” includes a juristic person, any company or association or body of individuals, whether incorporated or not. Section 8(1)(e) adumbrates that information should be available to a person in his fiduciary relationship. The “person” in Section 8(1)(e) will include the “public authority”. The word “available” used in this Clause will include information held by or under control of a public authority and also information to which the public authority has access to under any other statute or law. The term “information” has been defined in Section 2(f) of the RTI Act as under:

> “(*f*) "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 force; “

5. The information relating to a private body which can be accessed by a public authority under any other law in force is information which may be made available. Information “available” with a public authority can be furnished.

6. The term “fiduciary relationship” has not been defined in the RTI Act. Therefore, we have to interpret the term “fiduciary

relationship" keeping in mind the object and purpose of the RTI Act and the term "fiduciary" as is understood in common parlance. The RTI Act is a progressive and a beneficial legislation enacted to provide a practical regime to secure to the citizen's, right to information; to promote transparency, accountability and efficiency and eradicate corruption. Sub-section 8(1)(e) of the RTI Act permits screening and preservation of confidential and sensitive information made available due to fiduciary relationship. The aforesaid Clause has been interpreted by S. Ravindra Bhat, J. in ***CPIO, Supreme Court of India, New Delhi versus Subhash Chandra Agarwal and another*** (Writ Petition No. 288/200) decided on 2nd September, 2009 as under:-

> "55. It is necessary to first discern what a fiduciary relationship is, since the term has not been defined in the Act. In *Bristol & West Building Society v. Mothew* [1998] Ch 1, the term "fiduciary",was described as under:
>
> > *"A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan*,(2005) 1 SCC 212 and *Needle Industries (India) Ltd v. Needle Industries (Newey) India Holding Ltd* : 1981 (3) SCC 333 establish that Directors of a company owe fiduciary duties to its shareholders. In *P.V. Sankara Kurup v. Leelavathy Nambiar,* (1994) 6 SCC 68, the Supreme Court held that an agent and power of attorney holder can be said to owe a fiduciary relationship to the principal.
>
> 56. In a recent decision *(Mr. Krishna Gopal Kakani v. Bank of Baroda* 2008 (13) SCALE 160) the Supreme Court had to decide whether a transaction resulted in a fiduciary relationship. Money was sought to be recovered

by the plaintiff, from a bank, who had moved the court for auction of goods imported, and retained the proceeds,; the trail court overruled the objection to maintainability, stating that the bank held the surplus (of the proceeds)in a fiduciary capacity. The High Court upset the trial court 's findings, ruling that the bank did not act in a fiduciary capacity. The Supreme Court affirmed the High Court 's findings. The court noticed Section 88 of the Trusts Act, which reads as follows:

> *"Section 88.Advantage gained by fiduciary.- Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."*

Affirming the High Court 's findings that the bank did not owe a fiduciary responsibility to the appellant, it was held by the Supreme Court, that:

> *"9.An analysis of this Section would show that the Bank, to whom the money had been entrusted, was not in the capacity set out in the provision itself. The question of any fiduciary relationship therefore arising between the two must therefore be ruled out. It bears reiteration that there is no evidence to show that any trust had been created with respect to the suit money.."*

The following kinds of relationships may broadly be categorized as "fiduciary ":

Trustee/beneficiary (Section 88, Indian Trusts Act, 1882);

Legal guardians / wards (Section 20, Guardians and Wards Act, 1890);

Lawyer/client;

Executors and administrators / legatees and heirs;

Board of directors / company;

Liquidator/company;

Receivers, trustees in bankruptcy and assignees in insolvency / creditors;

Doctor/patient;

Parent/child.

57. *The Advanced Law Lexico*n, 3rd Edition, 2005, defines fiduciary relationship as *"a relationship in which one person is under a duty to act for the benefit of the other on the matters within the scope of the relationship ….Fiduciary relationship usually arise in one of the four situations (1) when one person places trust in the faithful integrity of another, who is a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship, or (4) when there is specific relationship that has traditionally be recognized as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer "*

58. From the above discussion, it may be seen that a fiduciary relationship is one whereby a person places complete confidence in another in regard to a particular transaction or his general affairs or business. The relationship need not be "formally "or "legally "ordained, or established, like in the case of a written trust; but can be one of moral or personal responsibility, due to the better or superior knowledge or training, or superior status of the fiduciary as compared to the one whose affairs he handles."

7. In ***Woolf vs Superior Court*** (2003)107 Cal.App. 4th 25**,** the California Court of Appeals defined fiduciary relationship as "any relationship existing between the parties to the transaction where one of the parties is duty bound to act with utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where

confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interests of the other party without the latter's knowledge and consent."

8. Fiduciary can be described as an arrangement expressly agreed to or at least consciously undertaken in which one party trusts, relies and depends upon another's judgment or counsel. Fiduciary relationships may be formal, informal, voluntary or involuntary. It is legal acceptance that there are ethical or moral relationships or duties in relationships which create rights and obligations. The fiduciary obligations may be created by a contract but they differ from contractual relationships for they can exist even without payment of consideration by the beneficiaries and unlike contractual duties and obligations, fiduciary obligations may not be readily tailored and modified to suit the parties. In a fiduciary relationship, the principal emphasis is on trust, and reliance, the fiduciary's superior power and corresponding dependence of the beneficiary on the fiduciary. It requires a dominant position, integrity and responsibility of the fiduciary to act in good faith and for the benefit of and to protect the beneficiary and not oneself.

9. One basic difference between fiduciary and contractual or any other relationship is the quality and the extent of good faith obligation.

In contractual or in other non fiduciary relationship, the obligation is substantially weaker and qualitatively different as compared to a fiduciary's legal obligation. Fiduciary loyalty and obligation requires complete subordination of self-interest and action exclusively for benefit of the beneficiary. Primary fiduciary duty is duty of loyalty and disloyalty an anathema. Contractual or other non fiduciary relationship may require that a party should not cause harm or damage the other side, but fiduciary relationship casts a positive obligation and demands that the fiduciary should protect the beneficiary and not promote personal self interest. Although, strict liability may not apply to instances of disloyalty, other than in cases of self-dealing, judicial scrutiny is still intense and the level of commitment and loyalty expected is higher in fiduciary relationships than non-fiduciary relationships. In some cases, trustees have been held liable even when there is conflict of interests as the beneficiary relies upon and is dependent upon the fiduciary's discretion. Fiduciary's loyalty obligation is stricter than the morals of the market place. It is not honesty alone, but the *punctilio* of an honour, the most sensitive is the standard of behaviour (Justice Cardozo in ***Meinhard vs Salmon N.Y. (1928) 164, n.e. 545, 546***.

10. In a contractual or other non fiduciary relationship, the relationship between parties is horizontal and parties are required to attend to and take care of their interests. Law of contract does not systematically or formally assign contracting parties to dominant or

subordinate roles. Paradigmatically, image of a contract is a horizontal relationship. Fiduciary relationship defines the fiduciary as a dominant party who has systematically empowered over the subordinate beneficiary.

11. It is not possible to accept the contention of Mr.Prashant Bhushan, advocate that statutory relationships or obligations and fiduciary relationships or obligations cannot co-exit. Statutory relationships as between a Director and a company which is regulated by the Companies Act, 1956, can be fiduciary. Similarly, fiduciary relationships do not get obliterated because a statute requires the fiduciary to act selflessly with integrity and fidelity and the other party depends upon the wisdom and confidence reposed. All features of a fiduciary relationship may be present even when there is a statute, which endorses and ensures compliance with the fiduciary responsibilities and obligations. In such cases the statutory requirements, reiterates the moral and ethical obligation which already exists and does not erase the subsisting fiduciary relationship but reaffirms the said relationship.

12. A contractual or a statutory relationship can cover a very broad field but fiduciary relationship may be confined to a limited area or act, e.g. directors of a company have several statutory obligations to perform. A relationship may have several facets. It may be partly fiduciary and partly non fiduciary. It is not necessary that all statutory,

contractual or other obligations must relate to and satisfy the criteria of fiduciary obligations. Fiduciary relationships may be confined to a particular act or action and need not manifest itself in entirety in the interaction or relationship between the two parties. What distinguishes a normal contractual or informal relationship from a fiduciary relationship or act is as stated above, the requirement of trust reposed, highest standard of good faith and honesty on the part of the fiduciary with regard to the beneficiaries' general affairs or in a particular transaction, due to moral or personal responsibility as a result of superior knowledge and training of the fiduciary as compared to the beneficiary, resulting in dependence of the beneficiary. In this regard I may quote, the following observations in the decision dated 23rd April, 2007 by five members of the CIC in ***Rakesh Kumar Singh and others versus Harish Chander, Assistant Director and others*** ***MANU/CI/0246/2007.***

> "31. The word "fiduciary is derived from the Latin fiducia meaning "trust, a person (including a juristic person such as Government, University or bank) who has the power and obligation to act for another under circumstances which require total trust, good faith and honesty. The most common example of such a relationship is the trustee of a trust, but fiduciaries can include business advisers, attorneys, guardians, administrators, directors of a company, public servants in relation to a Government and senior managers of a firm/company etc. The fiduciary relationship can also be one of moral or personal responsibility due to the superior knowledge and training of the fiduciary as compared to the one whose affairs the fiduciary is handling. In short, it is a relationship wherein one person places complete confidence in another in regard to a

> particular transaction or one's general affairs of business. The Black's Law Dictionary also describes a fiduciary relationship as "one founded on trust or confidence reposed by one person in the integrity and fidelity of another. The meaning of the fiduciary relationship may, therefore, include the relationship between the authority conducting the examination and the examiner who are acting as its appointees for the purpose of evaluating the answer sheets"

13. The relationship of a public servant with the Government can be fiduciary in respect of a particular transaction or an act when the law requires that the public servant must act with utmost good faith for the benefit of the Government and confidence is reposed in the integrity of the public servant, who should act in a manner that he shall not profit or take advantage from the said act. However, there should be a clear and specific finding in this regard. Normal, routine or rather many acts, transactions and duties of a public servant cannot be categorized as fiduciary for the purpose of Section 8(1)(e) of the RTI Act and information available relating to fiduciary relationship. (The said reasoning may not be applicable to service law jurisprudence, with which we are not concerned.)

14. Fiduciary relationship in law is ordinarily a confidential relationship; one which is founded on the trust and confidence reposed by one person in the integrity and fidelity of the other and likewise it precludes the idea of profit or advantage resulting from dealings by a person on whom the fiduciary obligation is reposed.

15. The object behind Section 8(1) (e) is to protect the information because it is furnished in confidence and trust reposed. It serves public purpose and ensures that the confidence, trust and the confidentiality attached is not betrayed. Confidences are respected. This is the public interest which the exemption under Section 8(1)(e) is designed to protect. It should not be expanded beyond what is desired to be protected. Keeping in view the object and purpose behind Section 8(1)(e) of the RTI Act, where it is possible to protect the identity and confidentiality of the fiduciary, information can be furnished to the information seeker. This has to be examined in case to case basis, individually. The aforesaid view is in harmony and in consonance with Section 10 of the RTI Act which reads as under:-

> "Section 10. (*1*) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.
>
> (*2*) Where access is granted to a part of the record under sub-section (*1*), the Central Public Information Officer or State Public Information Officer, as the case may be, shall give a notice to the applicant, informing—
>
> *(a)* that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;
>
> *(b)* the reasons for the decision, including any findings on any material question of fact,

> referring to the material on which those findings were based;
>
> *(c)* the name and designation of the person giving the decision;
>
> *(d)* the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and
>
> *(e)* his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided, including the particulars of the senior officer specified under sub-section (*1*) of section 19 or the Central Information Commission or the State Information Commission, as the case may be, time limit, process and any other form of access."

16. Thus, where information can be furnished without compromising or affecting the confidentiality and identity of the fiduciary, information should be supplied and the bar under Section 8(1)(e) of the Act cannot be invoked. In some cases principle of severability can be applied and thereafter information can be furnished. A purposive interpretation to effectuate the intention of the legislation has to be applied while applying Section 8(1)(e) of the RTI Act and the prohibition should not be extended beyond what is required to be protected. In cases where it is not possible to protect the identity and confidentiality of the fiduciary, the privileged information is protected under Section 8(1)(e) of the RTI Act. In other cases, there is no jeopardy and the fiduciary relationship is not affected or can be protected by applying doctrine of severability.

17. Even when Section 8(1)(e) applies, the competent authority where larger public interest requires, can pass an order directing disclosure of information. The term "competent authority" is defined in Section 2(e) of the RTI Act and reads as under:-

> (*e*) "competent authority" means—
>
> *(i)* the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;
>
> *(ii)* the Chief Justice of India in the case of the Supreme Court;
>
> *(iii)* the Chief Justice of the High Court in the case of a High Court;
>
> *(iv)* the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;
>
> *(v)* the administrator appointed under article 239 of the Constitution;"

18. The term "competent authority" is therefore distinct and does not have the same meaning as "public authority" or Public Information Officer (hereinafter also referred to as PIO, for short) which are defined in Section 2(e) and (h) of the RTI Act.

19. The term "competent authority" is a term of art which has been coined and defined for the purposes of the RTI Act and therefore wherever the term appears, normally the definition clause i.e. Section 2(e) should be applied, unless the context requires a different interpretation. Under Section 8(1)(e) of the RTI Act, the competent authority is entitled to examine the question whether in view of the

larger public interest information protected under the Sub-clause should be disclosed. The jurisdiction of PIO is restricted and confined to deciding the question whether information was made available to the public authority in fiduciary relationship. The competent authority can direct disclosure of information, if it comes to the conclusion that larger public interest warrants disclosure. The question whether the decision of the competent authority can be made subject matter of appeal before the First Appellate Authority or the CIC has been examined separately. A decision of the PIO on the question whether information was furnished/available to a public authority in fiduciary relationship or not, can be made subject matter of appeal before the Appellate Authorities including the CIC.

SECTION 8(1)(i) OF THE RTI ACT

20. The said sub-clause protects Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers. The first proviso however stipulates that the prohibition in respect of the decision of the Council of Ministers, the reasons thereof and the material on the basis of which decisions were taken shall be made public after the decision is taken and the matter is complete or over. Thus, a limited prohibition for a specified time is granted. Prohibition is not for an unlimited duration or infinite period but lasts till a decision is taken by the Council of Ministers and the matter is complete or over.

21. The main clause to Section 8(1)(i) uses the term Cabinet Papers which include records or deliberations, but the first proviso refers to the decision of the Council of Ministers, reasons thereof and the material on the basis of which the decisions were taken. The term "Council of Minsters" is wider than and includes Cabinet Ministers. It is not possible to accept the contention of Mr. A.S. Chandhiok , Learned Addl. Solicitor General that cabinet papers are excluded from the operation of the first proviso. The legal position has been succulently expounded in the order dated 23.10.2008 passed by the CIC in Appeal No.CIC/WA/A/2008/00081:

> "The Constitution of India, per se, did not include the term "Cabinet", when it was drafted and later on adopted and enacted by the Constituent Assembly. The term "Cabinet" was, however, not unknown at the time when the Constitution was drafted. Lot of literature was available during that period about "Cabinet", "Cabinet System" and "Cabinet Government". Sir Ivor Jennings in his "Cabinet Government", stated that the Cabinet is the supreme directing authority. It has to decide policy matters. It is a policy formulating body. When the Cabinet has determined on policy, the appropriate Department executes it either by administrative action within the law, or by drafting a Bill to be submitted to Parliament so as to change the law. The Cabinet is a general controlling body. It neither desires, nor is able to deal with all the numerous details of the Government. It expects a Minister to take all decisions that are of political importance. Every Minister must, therefore, exercise his own discretion as to what matters arising in his department ought to receive Cabinet sanction.
>
> 3. In the Indian context, the Cabinet is an inner body within the Council of Ministers, which is responsible for formulating the policy of the Government. It is the Council of Ministers that is collectively responsible to

the Lok Sabha. The Prime Minster heads the Council of Ministers and it is he, *primus inter pares* who determines which of the Ministers should be Members of the Cabinet.

4. It is a matter of common knowledge that the Council of Ministers consist of the Prime Minister, Cabinet Ministers, Ministers of State and the Civil Services. The 44th Amendment to the Constitution of India for the first time not only used the term "Cabinet" but also literally defined it. Clause 3 of Article 352, which was inserted by 44th Amendment, reads as under:-

"The President shall not issue a Proclamation under clause (1) or a Proclamation varying such Proclamation unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under article 75) that such a Proclamation may be issued has been communicated to him in writing."

5. As per Section 8 of the Right to Information Act, 2005 a "Public Authority" is not obliged to disclose Cabinet papers including records of deliberations of the Council of Ministers, secretaries and other officers. Section 8(1) subjects this general exemption in regard to Cabinet papers to two provisos, which are as under:-

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be public after the decision has been taken, and the matter is complete, or over.

6. From a plain reading of the above provisos, the following may be inferred:-

i) Cabinet papers, which include the records of deliberations of the Council of Ministers, Secretaries and other officers shall be disclosed after the decision has been taken and the matter is complete or over.

ii) The matters which are otherwise exempted under Section 8 shall not be disclosed even after the decision has been taken and the matter is complete or over.

iii) Every decision of the Council of Ministers is a decision of the Cabinet as all Cabinet Ministers are also a part of the Council of Ministers. The Ministers of State are also a part of the Council of Ministers, but they are not Cabinet Ministers.

As we have observed above, the plea taken by the First Appellate Authority, the decision of the Council of Ministers are disclosable but Cabinet papers are not, is totally untenable. Every decision of the Council of Ministers is a decision of the Cabinet and, as such, all records concerning such decision or related thereto shall fall within the category of "Cabinet papers" and, as such, disclosable under Section 8(1) sub-section (i) after the decision is taken and the matter is complete, and over."

22. However, there is merit in the contention of Mr.A.S. Chandhiok, Learned Addl. Solicitor General relying upon Article 74(2) of the Constitution of India, which reads as under:-

"**74. Council of Ministers to aid and advise President**.-(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advise tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

23. Seven Judges of the Supreme Court in ***S.P. Gupta and others versus President of India and others*** AIR 1982 SC 149 have examined and interpreted Article 74(2) of the Constitution of India.

The majority view of six Judges is elucidated in the judgment of Bhagwati, J. (as his lordship then was) in para 55 onwards. It was observed that the Court cannot embark upon an inquiry as to whether any and if so what advice was tendered by the Council of Ministers to the President. It was further observed that the reasons which prevailed with the Council of Ministers, would form part of the advice tendered to the President and therefore they would be beyond the scope/ambit of judicial inquiry. However, if the Government chooses to disclose these reasons or it may be possible to gather the reasons from other circumstances, the Court would be entitled to examine whether the reasons bear reasonable nexus [See, para 58 at p.228, ***S.P. Gupta*** (supra)]. Views expressed by authorities/persons which precede the formation of advice tendered or merely because these views are referred to in the advice which is ultimately tendered by the Council of Ministers, do not necessarily become part of the advice protected against disclosure under Article 74(2) of the Constitution of India. Accordingly, the material on which the reasons of the Council of Ministers are based and the advice is given do not form part of the advice. This has been lucidly explained in para 60 of the judgment as under:

> "60. …..But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form the part of advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the

> evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the Judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly, the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in cl.(2) of Art. 74."

24. Certain observations relied upon by the Union of India in the judgment of the Supreme Court in ***State of Punjab versus Sodhi Sukhdev Singh*** AIR 1961 SC 493, were held to be mere general observations and not ratio which constitutes a binding precedent. Even otherwise, it was held that report of Public Service Commission which formed material on the basis of which the Council of Ministers had taken a decision, did not form part of the advice tendered by the Council of Ministers. When Article 74(2) of the Constitution applies and bars disclosure, information cannot be furnished. RTI Act cannot and does not have the ability and mandate to negate the constitutional protection under Article 74(2). The said Article refers to inquiry by courts but will equally apply to CIC.

25. Bhagwati, J. (as his Lordship then was), has proceeded to examine and interpret Section 123 of the Evidence Act, 1872 and the protection on the basis of State privilege or public interest immunity.

Section 22 of the RTI Act is a non-obstante provision and therefore overrides Section 123 of the Evidence Act, 1872. Protection under Section 123 of the Evidence Act, 1872 cannot be a ground to deny information under the RTI Act. However, the question of public interest immunity has been examined in detail and the same is of relevance while interpreting Section 8(1)(j) of the RTI Act and this aspect has been discussed below.

26. The second proviso to Section 8(1)(i) of the RTI Act explains and clarifies the first proviso. As held above, the first proviso removes the ban on disclosure of the material on the basis of which decisions were taken by the Council of Ministers, after the decision has been taken and the matter is complete or over. The second proviso clarifies that even when the first proviso applies, information which is protected under Clauses (a) to (h) and (j) of Section 8(1) of the RTI Act, is not required to be furnished. The second proviso is added as a matter of abundant caution *exabudent catulia*. Sub-clauses (a) to (j) of Section 8(1) of the RTI Act are independent and information can be denied under Clauses 8(1)(a) to (h) and (j),even when the first proviso is applicable.

SECTION 8(1)(j) OF THE RTI ACT

27. The said clause has been examined in depth by Ravindra Bhat, J. in ***Subash Chand Agarwal*** (supra) under the heading point 5.

28. Examination of the said Sub-section shows that it consists of three parts. The first two parts stipulate that personal information which has no relationship with any public activity or interest need not be disclosed. The second part states that any information which should cause unwarranted invasion of a privacy of an individual should not be disclosed unless the third part is satisfied. The third part stipulates that information which causes unwarranted invasion of privacy of an individual will not be disclosed unless public information officer or the appellate authority is satisfied that larger public interest justifies disclosure of such information. As observed by S. Ravindra Bhat, J. the third part of Section 8(1)(j) reconciles two legal interests protected by law i.e. right to access information in possession of the public authorities and the right to privacy. Both rights are not absolute or complete. In case of a clash, larger public interest is the determinative test. Public interest element sweeps through Section 8(1)(j).Unwarranted invasion of privacy of any individual is protected in public interest, but gives way when larger public interest warrants disclosure. This necessarily has to be done on case to case basis taking into consideration many factors having regard to the circumstances of each case.

29. Referring to these factors relevant for determining larger public interest in ***R.K. Jain versus Union of India*** (1993) 4 SCC 120 it was observed :-

"54. The factors to decide the public interest immunity would include (a) where the contents of the documents are relied upon, the interests affected by their disclosure; (b) where the class of documents is invoked, whether the public interest immunity for the class is said to protect; (c) the extent to which the interests referred to have become attenuated by the passage of time or the occurrence of intervening events since the matters contained in the documents themselves came into existence; (d) the seriousness of the issues in relation to which production is sought; (e) the likelihood that production of the documents will affect the outcome of the case; (f) the likelihood of injustice if the documents are not produced……"

55. ……When public interest immunity against disclosure of the State documents in the transaction of business by the Council of Ministers of the affairs of State is made, in the clash of those interests, it is the right and duty of the court to weigh the balance in the scales that harm shall not be done to the nation or the public service and equally to the administration of justice. Each case must be considered on its backdrop. The President has no implied authority under the Constitution to withhold the documents. On the other hand it is his solemn constitutional duty to act in aid of the court to effectuate judicial review. The Cabinet as a narrow centre of the national affairs must be in possession of all relevant information which is secret or confidential. At the cost of repetition it is reiterated that information relating to national security, diplomatic relations, internal security of sensitive diplomatic correspondence per se are class documents and that public interest demands total immunity from disclosure. Even the slightest divulgence would endanger the lives of the personnel engaged in the services etc. The maxim *salus populi est suprema lex* which means that regard to public welfare is the highest law, is the basic postulate for this immunity. Political decisions like declaration of emergency under Article 356 are not open to judicial review but it is for the electorate at the polls to decide the executive wisdom. In other areas every communication which preceded from

> one officer of the State to another or the officers inter se does not necessarily per se relate to the affairs of the State. Whether they so relate has got to be determined by reference to the nature of the consideration the level at which it was considered, the contents of the document of class to which it relates to and their indelible impact on public administration or public service and administration of justice itself. Article 74(2) is not a total bar for production of the records. Only the actual advice tendered by the Minister or Council of Ministers to the President and the question whether any, and if so, what advice was tendered by the Minister or Council of Ministers to the President, shall not be enquired into by the court. In other words the bar of judicial review is confined to the factum of advice, its extent, ambit and scope but not the record i.e. the material on which the advice is founded. In *S.P.Gupta case* this Court held that only the actual advice tendered to the President is immune from enquiry and the immunity does not extend to other documents or records which form part of the advice tendered to the President."

30. In ***S.P. Gupta*** (supra), the Supreme Court held that democratic form of Government necessarily requires accountability which is possible only when there is openness, transparency and knowledge. Greater exposure about functioning of the Government ensures better and more efficient administration, promotes and encourages honesty and discourages corruption, misuse or abuse of authority, Transparency is a powerful safeguard against political and administrative aberrations and antithesis of inefficiency resulting from a totalitarian government which maintains secrecy and denies information. Reference was again made to ***Sodhi Sukhdev Singh*** (supra) and it was observed that there was no conflict between 'public

interest and non-disclosure' and 'private interest and disclosure' rather Sections 123 and 162 of the Evidence Act, 1872 balances public interest in fair administration of justice, when it comes into conflict with public interest sought to be protected by non-disclosure and in such situations the court balances these two aspects of public interest and decides which aspect predominates. It was held that the State or the Government can object to disclosure of a document on the ground of greater public interest as it relates to affairs of the State but the courts are competent and indeed bound to hold a preliminary enquiry and determine the validity of the objection to its production and this necessarily involves an enquiry into the question whether the evidence relates to affairs of the State. Where a document does not relate to affairs of the State or its disclosure is in public interest, for the administration of justice, the objection to disclosure of such document can be rejected. It was observed :

> "The court would allow the objection if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document."

31. A statement or defence to non-disclosure is not binding on the courts and the courts retain the power to have a prima facie enquiry and balance the two public interest and affairs of the State. The same

is equally true and applies to CIC, who can examine the documents/information to decide the question of larger public interest. Section 18(4) of the RTI Act empowers CIC to examine any record under the control of a public authority, while inquiring into a complaint. The said power and right cannot be denied to CIC when they decide an appeal. Section 18 is wider and broader, yet jurisdiction under section 18 and 19 of the RTI Act is not water-tight and in some areas overlap.

32. The Supreme Court in **S.P Gupta**'s case considered the question whether there may be classes of documents which the public interest requires not to be disclosed or which should in absolute terms be regarded as immune from disclosure. In other words, we may examine the contention whether there can be class of documents which can be granted immunity from disclosure not because of their contents but because of their class to which they belong. Learned Additional Solicitor General in this regard made pointed reference to the following observations in ***S.P.Gupta*** (supra) :

> "69. …. The claim put forward by the learned Solicitor General on behalf of the Union of India is that these documents are entitled to immunity from disclosure because they belong to a class of documents which it would be against national interest or the interest of the judiciary to disclose…….. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad (vide : Conway v. Rimmer, 1968 AC 910 at pp. 952, 973, 979, 987 and 993 and Reg v. Lewes

> J.K. Ex parte Home Secy., 1973 AC 388 at p.412). Papers brought into existence for the purpose of preparing a submission to cabinet (vide Commonwealth Lanyon property Ltd v. Commonwealth, 129 LR 650) and indeed any documents which relate to the framing of government policy at a high level (vide : Re Grosvenor Hotel, London). It would seem that according to the decision in Sodhi Sukhdev Singh's case (AIR 1961 SC 493) (supra) this class may also extend to "notes and minutes made by the respective officers on the relevant files, information expressed or reports made and gist of official decisions reached" in the course of determination of questions of policy. Lord Reid in Conway v. Rimmer (supra) at page 952 proceeded also to include in this class "all documents concerned with policy-making within departments including, it may be minutes and the like by quite junior officials and correspondence with outside bodies". It is this case to consider what documents legitimately belong to this class so as to be entitled to immunity from disclosure, irrespective of what they contain. But it does appear that cabinet papers, minutes of discussions of heads of departments and high level documents relating to the inner working of the government machine or concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure."

33. The aforesaid observations have to be read along with the ratio laid down by the Supreme Court in subsequent paras of the said judgment. In para 71, it was observed that the object of granting immunity to documents of this kind is to ensure proper working of the Government and not to protect Ministers or other government servants from criticism, however intemperate and unfairly biased they may be. It was further observed that this reasoning can have little validity in democratic society which believes in open government. It was accordingly observed as under:-

> "The reasons given for protection the secrecy of government at the level of policy making are two. The first is the need for candour in the advice offered to Minister; the second is that disclosure 'would create or fan ill-informed or captious public or political criticism.' Lord Reid in Conway v. Rimmer thought the second 'the most important reason'. Indeed, he was inclined to discount the candour argument.

I think both reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service (i.e. the executive arm of the government) and the public interest in the administration of justice. Sometimes the public service reasons will be decisive of the issue; but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed.

The same view was expressed by Gibbs A.C.J. in Sankey v. Whitlam (supra) where the learned acting Chief Justice said:

> "I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with special care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection – the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned."

There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or

> inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to any one by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases."

34. Possibly the only class of documents which are granted immunity from disclosure is those mentioned under Article 74(2) of the Constitution. These are documents or information which are granted immunity from disclosure not because of their contents but because of the class to which they belong. Other documents and information which do not fall under Article 74(2) of the Constitution cannot be held back on the ground that they belong to a particular class which is granted absolute protection against disclosure. All other documents/information is not granted absolute or total immunity. Protection from disclosure is decided by balancing the two competing aspects of public interest i.e. when disclosure would cause injury or unwarranted invasion of privacy and on the other hand if non-disclosure would throttle the administration of justice or in this case, the public interest in disclosure of information. In such cases, the Court/CIC has to decide, which of the two public interests pre-dominates.

35. Same view has been taken by the Supreme Court in its subsequent judgment in the case of ***R.K. Jain*** (supra). It was observed as under:-

"43. It would, therefore, be concluded that it would be going too far to lay down that no document in any particular class or one of the categories of cabinet papers or decisions or contents thereof should never, in any circumstances, be ordered to be produced. Lord Keith in *Burmah Oil case* considered that it would be going too far to lay down a total protection to Cabinet minutes. The learned Law Lord at p.1134 stated that "something must turn upon the subject-matter, the persons who dealt with it, and the manner in which they did so. Insofar as a matter of government policy is concerned, it may be relevant to know the extent to which the policy remains unfulfilled, so that its success might be prejudiced by disclosure of the considerations which led to it. In that context the time element enters into the equation. Details of an affair which is stale and no longer of topical significance might be capable of disclosure without risk of damage to the public interest….. The nature of the litigation and the apparent importance to it of the documents in question may in extreme cases demand production even of the most sensitive communications to the highest level". Lord Scarman also objected to total immunity to Cabinet documents on the plea of candour. In *Air Canada case* Lord Fraser lifted Cabinet minutes from the total immunity to disclose, although same were "entitled to a high degree of protection…."

44. x x x x x

45. In a clash of public interest that harm shall be done to the nation or the public service by disclosure of certain documents and the administration of justice shall not be frustrated by withholding the document which must be produced if justice is to be done, it is the courts duty to balance the competing interests by weighing in scales, the effect of disclosure on the public interest or injury to administration of justice, which would do greater harm. Some of the important considerations in the balancing act are thus: "in the interest of national security some information which is so secret that it cannot be disclosed except to a very few for instance the State or its own spies or agents just as other countries have. Their very lives may be endangered if there is the slightest hint of what they are doing." In *R. v. Secretary of State for Home Affairs, ex p Hosenball* in the interest of national security Lord Denning, M.R. did not permit disclosure of the

> information furnished by the security service to the Home Secretary holding it highly confidential. The public interest in the security of the realm was held so great that the sources of the information must not be disclosed nor should the nature of information itself be disclosed."

36. Reference in this regard may also be made to the judgment of the Supreme Court in ***Dinesh Trivedi M.P. and others versus U.O.I*** (1997) 4 SCC 306 and ***Peoples' Union for Civil Liberties versus Union of India*** (2004) 2 SCC 476.

37. Considerable emphasis and arguments were made on the question of 'candour argument' and the observations of the Supreme Court in the case of ***S.P. Gupta*** (supra). It will be incorrect to state that candour argument has been wholly rejected or wholly accepted in the said case. The ratio has been expressed in the following words:

> "70. ….. We agree with these learned Judges that the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs A.C.J. in Sankey v. Whitlam (supra), it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Grown may be more frank and candid if these concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it (vide : the observations of Lord Denning in Neilson v. Lougharre, (1981) 1 All ER at p. 835.
>
> 71. There was also one other reason suggested by Lord Reid in *Conway* v. *Rimmer* for according protection against disclosure to documents

> belonging to this case: “To my mind,” said the learned Law Lord: “the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of Government is difficult enough as it is, and no Government could contemplate with equanimity the inner workings of the Government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.” But this reason does not commend itself to us. The object of granting immunity to documents of this kind is to ensure the proper working of the Government and not to protect the ministers and other Government servants from criticism however intemperate and unfairly based. Moreover, this reason can have little validity in a democratic society which believes in an open Government. It is only through exposure of its functioning that a democratic Government can hope to win the trust of the people. If full information is made available to the people and every action of the Government is bona fide and actuated only by public interest, there need be no fear of “ill-informed or captious public or political criticism”. But at the same time it must be conceded that even in a democracy, Government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to be made public. It is therefore in the interest of the State and necessary for the proper functioning of the public service that some protection be afforded by law to documents belonging to this class. What is the measure of this protection is a matter which we shall immediately proceed to discuss.”

38. This becomes clear when we examine the test prescribed by the Supreme Court on how to determine which aspect of public interest predominates. In other words, whether public interest requires disclosure and outweighs the public interest which denies access. Reference was made with approval to a passage from the

judgment of Lord Reid in ***Conway vs Rimmer*** 1968 AC 910. The Court thereafter elucidated:-

> "72. …..The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence. The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the could would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class."

39. Again reference was made to the following observations of Lord Scarman in ***Burmah Oil versus Bank of England*** 1979-3 All ER 700:

> "But, is the secrecy of the inner workings of the government at the level of policy making are two. The first is the need for candour in the advice offered to Ministers; the second is that disclosure 'would create or fan ill-informed or captious public or political criticism.' Lord Reid in Conway v. Rimmer thought the second 'the most important reason'. Indeed, he was inclined to discount the candour argument."

40. However, the said observations have to be read and understood in the context and the year in which they were made. In the **S.P Gupta's** case, the Supreme Court observed that interpretation of every statutory provision must keep pace with the changing concepts and values and to the extent the language permits or rather does not prohibit sufficient adjustments to judicial interpretations in accord with the requirements of fast changing society which is indicating rapid social and economic transformation. The language of the provision is not a static vehicle of ideas and as institutional development and democratic structures gain strength, a more liberal approach may only be in larger public interest. In this regard, reference can be made to the factors that have to be taken into consideration to decide public interest immunity as quoted above from ***R.K. Jain case*** (supra).

41. The proviso below Section 8(1)(j) of the RTI Act was subject of arguments. The said proviso was considered by the Bombay High Court in ***Surup Singh Hryanaik versus State of Maharashtra*** AIR 2007 Bom. 121 and it was held that it is proviso to the said sub-section and not to the entire Section 8(1). The punctuation marks support the said interpretation of Bombay High Court. On a careful reading of Section 8(1), it becomes clear that the exemptions contained in the clauses (a) to (i) end with a semi colon ";" after each such clause which indicate that they are independent clauses. Substantive sub section Clause (j) however,

ends with a colon ":"followed by the proviso. Immediately following the colon mark is the proviso in question which ends with a full stop ".". In Principles of Statutory Interpretation, 11th Ed. 2008 (at page No. 169) G.P Singh, has noted that "If a statute in question is found to be carefully punctuated, punctuation, though a minor element, may be resorted to for purposes of construction." Punctuation marks can in some cases serve as a useful guide and can be resorted to for interpreting a statute

42. Referring to the purport of the proviso in ***Surup Singh*** (supra), the Bombay High Court has held that information normally which cannot be denied to Parliament or State Legislature should not be withheld or denied.

43. A proviso can be enacted by the legislature to serve several purposes. In ***Sundaram Pillai versus Patte Birman*** (1985) 1 SCC 591 the scope and purpose of a proviso and an explanation has been examined in detail. Normally, a proviso is meant to be an exception to something in the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. A proviso cannot be torn apart from the main enactment nor can it be used to qualify and set at naught, the object of the main enactment. Sarthi on "Interpretation of Statutes", referred to in the

said judgment, states that a proviso is subordinate to the main section and one of the principles which can be applied in a given case is that a proviso would not enlarge an enactment except for compelling reasons. It is unusual to import legislation from a proviso into the body of the statute. But in exceptional cases a proviso in itself may amount to a substantive provision. The proviso in the present cases is a guiding factor and not a substantive provision which overrides Section 8(1)(j) of the RTI Act. It does not undo or rewrite Section 8(1)(j) of the RTI Act and does not itself create any new right. The purpose is only to clarify that while deciding the question of larger public interest i.e., the question of balance between 'public interest in form of right to privacy' and 'public interest in access to information' is to be balanced.

SECTION 8(2) OF THE RTI ACT

44. Section 8(2) of the RTI Act empowers a public authority to allow access to information even when the Official Secrets Act, 1923 or any of the exemption clauses in Sub-section (1) are applicable. The requirement is that public interest in disclosure should outweigh the harm to protected interest. The question of public interest and when the right to disclosure of information would outweigh rights to secrecy and confidentiality or privacy as has been referred to and considered above. Section 8(2) of the RTI Act empowers the public authority to decide the question whether right to disclosure over-weighs the harm to protected interests. PIO cannot decide this question and cannot

pass an order under Section 8(2) of the RTI Act holding, inter alia, that information is covered by the exemption clauses under Section 8(1) of the RTI Act but public interest in disclosure overweighs and justifies disclosure. Once PIO comes to the conclusion that any of the exemption clauses is applicable, he cannot decide and hold that Section 8(2) of the RTI Act should be invoked and lager public interest requires disclosure of information. Unlike Section 8(1)(j) of the RTI Act, under section 8(2) this power to decide whether larger public interest warrants disclosure of information is not conferred on the PIO.

APPEALS AND COMPLAINTS

45. Chapter V of the RTI Act incorporates powers and functions of Central Information Commissions, appeals and penalties. Section 18 of the RTI Act which defines powers and functions of the Central Information Commission and/or State Information Commissions relates to administrative functions of the said Commissions and their power and authority to ensure general compliance of the provisions of the RTI Act by the PIOs. The said Section ensures that the Central or the State Information Commissions have superintendence and can issue directions to PIOs so that there is effective and proper compliance of the provisions of the RTI Act in letter and spirit. For this purpose, Information Commissions have been vested with powers under the Code of Civil Procedure, 1908 and right to inspect any

record during the pendency of in respect of any decision made under this Act. No record can be withheld from the Central or the State Information Commissions on any ground. This power to inspect the records, etc., will equally apply when CIC decides appeals under Section 19 of the RTI Act.

46. Section 19 of the RTI Act relates to appellate power of the first appellate authority and the Central or the State Information Commissions.

47. Appeal can be filed before the first appellate authority when the information seeker does not receive any decision within the time specified in Section 7(1) or if the information seeker is aggrieved from the quantum of cost demanded for furnishing of information under Section 7(3)(a) of the RTI Act or against the decision of the PIO. Under Section 19(1) of the RTI Act, appeal before the first Appellate Authority cannot be filed against an order or a decision of the competent authority or the public authority or the appropriate government.

48. Under Section 19(3) of the RTI Act, second appeal before the Central or the State Information Commissions is maintainable against the decision under Sub-section (1) of the first Appellate Authority. The scope of appeal therefore before the second Appellate Authority is restricted to subject matters that are appealable before the first Appellate Authority under Sub-section (1) of Section 19 of RTI Act.

Second Appellate Authority cannot therefore go into the questions which cannot be raised and made subject of appeal before the first Appellate Authority. As a necessary corollary, the second Appellate Authority i.e. the Central of the State Information Commissions can examine the decision of the PIO or their failure to decide under Section 7(1) or the quantum of cost under Section 7(3)(a) of the RTI Act. They can also go into third party rights and interests under Section 19(4) of the RTI Act. Central or the State Information Commissions cannot examine the correctness of the decisions/directions of the Public Authority or the competent authority or the appropriate government under the RTI Act, unless under Section 18 the Central/State Information Commission can take cognizance. The information seeker is however not remediless and where there is a lapse by the competent authority, the public authority or the appropriate government, writ jurisdiction can be invoked. It is always open to a citizen to make a representation to public authority, appropriate government or the competent authority whenever required and on getting an unfavourable response, take recourse to constitutional rights under Article 226/227 of the Constitution of India. In a given case, the Central or the State Information Commissions can recommend to the competent authority, public authority or the appropriate government to exercise their powers but the decision of the competent authority, public authority or the appropriate government cannot be made subject matter of appeal, unless the

right has been conferred under Section 18 or 19 of the RTI Act. Central and State Information commissions have been created under the statute and have to exercise their powers within four corners of the statute. They are not substitute or alternative adjudicators of all legal rights and cannot decide and adjudicate claims and disputes other than matters specified in Sections 18 and 19 of the RTI Act.

49. It was urged by Mr.A.S. Chandhiok, learned Additional Solicitor General of India that Section 8(1) of the RTI Act is not the complete code or the grounds under which information can be refused and public information officers/appellate authorities can deny information for other justifiable reasons and grounds not mentioned. It is not possible to accept the said contention. Section 22 of the RTI Act gives supremacy to the said Act and stipulates that the provisions of the RTI Act will override notwithstanding anything to the contrary contained in the Official Secrets Act or any other enactment for the time being in force. This non-obstante clause has to be given full effect to, in compliance with the legislative intent. Wherever there is a conflict between the provisions of the RTI Act and another enactment already in force on the date when the RTI Act was enacted, the provisions of the RTI Act will prevail. It is a different matter in case RTI Act itself protects a third enactment, in which case there is no conflict. Once an applicant seeks information as defined in Section 2(f) of the RTI Act, the same cannot be denied to the information seeker except on any of the grounds mentioned in Sections 8 or 9 of

the RTI Act. The Public Information Officer or the appellate authorities cannot add and introduced new reasons or grounds for rejecting furnishing of information. It is a different matter in case what is asked for by the applicant is not 'information' as defined in Section 2(f) of the RTI Act. (See, Writ Petition (Civil) No.4715/2008 titled ***Election Commission of India versus Central Information Commission and others***, decided on 4th November, 2009 and Writ Petition (Civil) No. 7265/2007 titled ***Poorna Prajna Public School versus Central Information Commission & others*** decided on 25th September, 2009).

50. There is one exception, to the aforesaid principle. Dissemination of information which is prohibited under the Constitution of India cannot be furnished under RTI. Constitution of India being the fountainhead and the RTI Act being a subordinate Act cannot be used as a tool to access information which is prohibited under the Constitution of India or can be furnished only on satisfaction of certain conditions under the Constitution of India.

51. Learned Additional Solicitor General had urged that Section 8(1) of the RTI Act empowers and authorizes public information officers to deny information but the decision on merits cannot be questioned in appeal before the Central/State Information Commission. It was submitted that the decision of the public information officers and the first appellate authority cannot be made

subject matter of second appeal before the CIC except when under Section 8(1) of the RTI Act the Central/State Information Commission has been empowered to examine the correctness or merit of the decision of the public information officer. In this connection, my attention was drawn to the language of Section 8(1)(j) of the RTI Act. This contention cannot be accepted. Power of the CIC as observed above, under Sections 18 and 19 includes power to go into the question whether provisions in any clause of Section 8(1) of the RTI Act, have been rightly interpreted and applied in a given case. The power of the CIC is that of an appellate authority which can go into all questions of law and fact and is not circumscribed or limited power. Indeed the argument will go against the very object and purpose of the RTI Act and negates the power of general superintendence vested with the Central/State Information Commissions under Section 18 of the RTI Act.

(1) <u>WRIT PETITION (CIVIL) NO. 8396 OF 2009</u>

52. Respondent no.2-P.D. Khandelwal by his application dated 26th April, 2007 had asked for inspection of the file/records of Appointments Committee of the Cabinet mentioned in letter no. 18/12/99-EO(SM-II) in which the following directions were issued:

> "There shall be no supersession inter-se seniority among all officers considered fit for promotion will be maintained as before. Department of Revenue should expeditiously undertaken amendment to Recruitment Rules to bring it on part with All India Services to avoid supersession."

53. The request was declined by the CPIO as exempt under Section 8(1)(i) of the RTI Act. On first appeal a detailed order was passed inter alia holding that records of Appointments Committee of the Cabinet are Cabinet Papers and distinct from decision of Council of Ministers, reasons thereof and materials on the basis of which decisions are taken. It was accordingly held that the first proviso to Section 8(1)(i) of the RTI Act is not applicable. Reference was made to Article 74 of the Constitution of India which refers to Council of Ministers and it was held that Cabinet is a creature of rule making power under Article 77(3) of the President of India. In the words of the first Appellate Authority it was held:

> "…….This rule-making power (for conduct of the Government business) of the President of India is his supreme power, in his capacity as the supreme executive of India. This power is unencumbered even by the Acts of Parliament, as this rule-making power flows from the direct constitutional mandate and they are not product of any legislative authorization. In view of the fact that the "separation of powers" is one of the fundamental feature of the our Constitution, these rules, promulgated by the President of India, for regulation of conduct of Government's business (Transaction of business and allocation of business) cannot be fettered by any act or by any Judicial decision of any Court, Commission, Tribunal, etc. Since ACC is a product of the rules framed under Article 77(3) of the Constitution of India, its business (deliberations including the decision whether they are to be made public) are not the subject-matter of the decisions of any other authority other than the President of India himself.
>
> Therefore, unless these rules, framed under Article 77(3) themselves provide for disclosure of

information pertaining to the working of the cabinet and its committees, no disclosure can be made pertaining to them, under the RTI Act. Therefore, the RTI Act has rightly provided for non-disclosure of the information pertaining to "Cabinet Papers."

54. The CIC has rightly rejected the said reasoning.

55. Article 77 of the Constitution reads :

> "**77. Conduct of business of the Government of India.**—(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.
>
> (2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.
>
> (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."

56. In ***Jayanti Lal Amrit Lal Shodan versus Rana,*** (1964) 5 SCR 294 the Supreme Court had drawn a distinction between the Executive power of the Union under Article 53 and the Executive functions vested with the President under specific Articles. It was observed that *the functions specifically vested in the President have to be distinguished from the Executive Power of the Union.* The functions specifically vested with the President cannot be delegated and have to be personally exercised. The aforesaid principle was expanded in ***Sardari Lal versus Union of India*** AIR 1971 SC 1547 holding, inter alia, that Joint Secretary to the Government of India by virtue of power delegated to under Article 77(3) could not on behalf of

President of India pass an order dispensing with an enquiry under Article 311(2) of the Constitution. However the decision in ***Sardari Lal*** *(supra)* has been overruled in ***Shamsher Singh versus State of Punjab*** AIR 1974 SC 2192. It was held that decision in ***Jayanti lal*** (supra) was confined to Article 258 of the Constitution and had no bearing on Articles 74, 75 and 77 of the Constitution. It was held that whatever Executive functions have to be exercised by the President, whether such function is vested in the Union or in the President as President, it is to be exercised with the advice of Council of Ministers. The President being the Constitutional head of the Executive is bound by the said advice except under certain exceptions which relate to extraordinary situations. Even in functions required to be performed by the President on subjective satisfaction could be delegated by rules of business under Article 77(3) to the Minister or Secretary of the Government of India. The satisfaction referred to in the Constitutional sense is the satisfaction of the Council of Ministers who advice the President or the Governor.

57. Article 77 nowhere prohibits or bans furnishing of information. The only prohibition is mentioned in Article 74(2) of the Constitution which has been examined above. The query raised obviously does not fall within the protection granted under Article 74(2) of the Constitution and no reliance can be placed on the said Article in the present case. On the question of distinction between the Cabinet and

the Council of Ministers I entirely agree with the reasoning given by the Chief Information Commissioner which has been quoted above.

Accordingly, the Writ Petition is dismissed.

(2) WRIT PETITION (CIVIL) NO. 16907 OF 2006

58. Respondent no.1-Sweety Kothari had filed an application seeking following information:

> " (a) Copies of the advertisements calling for applications for selection of ITAT members in Calendar Years 2002 and 2003.
>
> (b) Recommendation of Interview/Selection Board regarding selection of the said members.
>
> (C) Names of the person finally selected as ITAT members in the above-mentioned Calendar Years."

59. Information at serial nos. (a) and (c) have been supplied but information at serial no.(b) was denied by the Public Information Officer and the first appellate authority. Central Information Commission by the impugned order dated 7th June, 2006 has directed furnishing of the said information. The contention of the petitioner herein is that the final selection is approved by the Appointment Committee of the Cabinet (ACC) and therefore Section 8(1)(i) of the RTI Act was attracted, was rejected. It was the contention of the public authority that Appointment Committee of the Cabinet functions under the delegated powers of the Cabinet and for all practical purposes it is co-extensive with the Cabinet's powers attracts exemption under Section 8(1)(i) of the RTI Act. To this

extent, the CIC agreed but relying upon the first proviso to Section 8(1)(i) of the RTI Act it was observed that appointments have already been made and therefore information should be disclosed and put in public domain.

60. The recommendations made by the interview/selection board, is one of the material which is before the Appointment Committee of the Cabinet. Therefore the recommendations are not protected under Article 74(2) of the Constitution of India which grants absolute immunity from disclosure of the advice tendered by Ministers and the reasons thereof. After appointments have been made, even if Section 8(1)(i) applies, the first proviso comes into operation.

61. Learned counsel for the petitioner submitted that information should be denied under Section 8(1)(j) of the RTI Act. It appears that no such contention was raised before the Central Information Commission. The order passed by the Public Information Officer also does not rely upon Section 8(1)(j) of the RTI Act. In the grounds reference has been made to Section 8(1)(j) of the RTI Act but without giving any foundation and basis to invoke the said clause. There is no foundation to justify, remand of the matter to CIC to examine exclusion under Section 8(1)(j) of the RTI Act. Information seeker is asking for recommendations made by the selection/interview board and not for comments or observations. List of candidates as per the recommendations of the interview/selection board have to be

furnished. Reference before the CIC was made to Section 123 of the Evidence Act, 1872, and as held above in view of Section 22 of the RTI Act, the said provision cannot be a ground to deny information. In view of the aforesaid, the present Writ Petition is dismissed.

(3) WRIT PETITION (CIVIL) NO. 4788 OF 2008

62. Central Information Commission by the impugned Order dated 6th June, 2008 has directed furnishing of the information under clauses (b) to (e) to the Respondent no.2-Brig.Deepak Grover (retd.):

> "(a)The ACR profiles of all officers of 1972 batch of Engineer Officers who were considered in the Selection Board No.1 held in September 05"
>
> (b) The weightage, if any, given over and above the ACR grading to each of the officers considered in the Selection Board referred to at Para 3(a) above.
>
> (C) The final comparative graded merit of all the Engineer Officers of the 1972 batch placed before the Selection Board referred to at Para 3(a) above.
>
> (d) The recommendations of the Selection Board referred to at Para 3(a) above with respect to all the Engineer officers of the 1972 batch considered by the Board.
>
> (e) The No. of Engineer Officers considered vis-à-vis those approved for promotion by the Selection Board No.1 for the 1968, 1969, 1970, 1971, 1972 and 1973 batches."
>
> [Note; information (a) has been denied.]

63. The public authority had relied upon Section 8(1)(e) and (j) of the RTI Act. Central Information Commission referred to the judgment of the Supreme Court in Civil Appeal No. 7631/2002 titled ***Dev Dutt versus Union Public Service Commission and others***

(decided on 12th May, 2008) but it was observed that this decision was not applicable as the information seeker had asked for third party ACRs. Thus information (a) was denied. CIC made reference to their decision dated 13th July, 2006 in the case of ***Gopal Kumar versus Ministry of Defence*** (Case No. CIC/AT/A/2006/00069) and it was observed that disclosure of contents of ACR is not exempted under Section 8(1)(j) but the principle of severability under section 10 of the RTI Act should be applied. Informations (b) to (e) were directed to be furnished. The Central Information Commission did not permit the petitioner herein to rely upon Section 8(1)(a) of the RTI Act as the said Section was not invoked by the Public Information Officer or the first appellate authority. The said approach and reasoning is not acceptable. Public authority is entitled to raise any of the defences mentioned in Section 8(1) of the RTI Act before the Central Information Commission and not merely rely upon the provision referred to by the Public Information Officer or the first appellate authority to deny information. An error or mistake made by the Public Information Officer or the first appellate authority cannot be a ground to stop and prevent a public authority from raising a justiciable and valid objection to disclosure of information under Section 8(1) of the RTI Act. The subject matter of appeal before the Central Information Commission is whether or not the information can be denied under Section 8(1) of the RTI Act. While deciding the said question it is open to the public authority to rely upon any of the Sub-sections to

Section 8(1) of the RTI Act, whether or not referred to by the public information officer or the first appellate authority. Under Section 19(9) notice of the decision is to be given to a public authority.

64. Decision in ***Dev Dutt case*** (supra) holds that public servant has a right to know the annual grading given to him and the same must be communicated to him within a reasonable period. However, the said ratio as per para 41 of the said judgment is not applicable to military officers in view of the decision of the Supreme Court in ***Union of India versus Maj. Bahadur Singh*** (2006) 1 SCC 368. The present case is one of a military officer. Further, the information seeker wants to know observations in and contents of his ACR and not merely his gradings. The petitioners herein have also relied upon Section 8(1)(e) and (j) of the RTI Act in addition to Section 8(1)(a) of the RTI Act.

65. CIC has partly allowed the appeal but did not notice that under queries (b) to (e) the respondent no. 2 had also asked for ACR grading of other officers and comparative grade/merit charge of all officers of 1972 batch. Thus information mentioned in (a) and (b) to (e) were some-what similar. Information (a) has been denied but (b) to (e) have been allowed. There is no discussion and reasoning given in the order with reference to either Section 8(1)(e) or (j) of the RTI Act. In ***R.K. Jain's*** case (supra) it was observed

> **"48.** In a democracy it is inherently difficult to function at high governmental level without some

> degree of secrecy. No Minister, nor a Senior Officer would effectively discharge his official responsibilities if every document prepared to formulate sensitive policy decisions or to make assessment of character rolls of co-ordinate officers at that level if they were to be made public. Generally assessment of honesty and integrity is a high responsibility. At high co-ordinate level it would be a delicate one which would further get compounded when it is not backed up with material. Seldom material will be available in sensitive areas. Reputation gathered by an officer around him would form the base. If the reports are made known, or if the disclosure is routine, public interest grievously would suffer. On the other hand, confidentiality would augment honest assessment to improve efficiency and integrity in the officers.
>
> **49.** The business of the Government when transacted by bureaucrats, even in personal level, it would be difficult to have equanimity if the inner working of the Government machinery is needlessly exposed to the public. On such sensitive issues it would hamper the expression of frank and forthright views or opinions. Therefore, it may be that at that level the deliberations and in exceptional cases that class or category of documents get protection, in particular, on policy matters. Therefore, the court would be willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved."

66. It cannot be said that comments in ACRs in all cases have to be furnished as a matter of right and in no case Section 8(1)(e) or (j) of the RTI Act will apply. Each case has to individually examined keeping in mind the factual matrix. While applying Section 8(1)(j) the two interests have to be balanced. As the matter is remanded back on the question of applicability of Section 8(1)(a) of the RTI Act, the petitioners herein will be entitled to raise objection under Sub-section (e) and (j) of the RTI Act before the Central Information Commission.

67. However, as noticed above, in view of Section 22 of the RTI Act reference to the provisions of the Army Act and the subordinate legislation made thereunder is irrelevant. Whether or not information should be furnished has to be examined in the light of Section 8(1) of the RTI Act.

(4) WRIT PETITION (CIVIL) NO. 9914 OF 2009

68. Respondent no.2-Maj. Rajpal (retd) was invalidated from army service on medical grounds on 26th August, 1992. On 14th May, 2007 he asked for the following information:-

> " (i) List of senior service officers who formed the "selection panel".
>
> (ii) List of affected service officers placed before the "selection board".
>
> (iii) My medical category listed and placed before the "selection board".
>
> (iv) Board proceedings and its subsequent disposal duly enclosing the relevant AO/AI's on the subject.
>
> (v) A copy of Military Seecretary-14 (MS-14) Branch letter No. 55821/Gen/MS-14/B dated 21 August, 1992 addressed to 664 Coy ASC Tk tptr type 'C', C/O 56 APO, Subject : Photograph Officers, The said letter has been signed by Sh B.R. Sharma, ACSO, Offg AMS-14 for MS."

69. Information was partly denied by the Public Information Officer and the first appellate authority. On second appeal by the impugned Order dated 12th February, 2009 the Central Information Commission has directed furnishing of following information :-

> "(i) A list of senior officers who constituted the Selection Board.
>
> (ii) A copy of the Board proceedings of the Selection Board including the copy of the record in the recommendation of the Board was subsequently dealt with."

70. Union of India objects and has filed the present Writ Petition.

71. It is mentioned in the writ petition that the respondent no.2 was considered for promotion to the rank of Lt. Colonel (Time Scale) in June 1990 but because of low medical category he was not granted the said grade.

72. The period in question admittedly relates to the year 1990. The respondent no.2 has been adversely affected and was denied promotion as a result of the said board proceedings. As held above the test of larger public interest cannot be put in any strait jacket but is flexible and depends upon factual matrix of each case. It is difficult to comprehend and accept that any public interest would be served by denying information to the respondent no.2 with regard to selection board proceedings and record of how the recommendations of the selection board was subsequently dealt in an old matter relating to the year 1990. The matter is already stale and of no interest and concern to others, except respondent no.2. Reference can be made to para 54 of the decision of the Supreme Court in ***R.K. Jain*** (supra) that the extent to which the interests referred to have become attenuated by passage of time or occurrence of intervening events is

a relevant circumstance. Passage of time since the creation of information may have an important bearing on the balancing of interest under section 8(1)(j) of the RTI Act. The general rule is that maintaining exemption under the said clause diminishes with passage of time. The test of larger public interest merits disclosure and not denial of the said information. However, direction to disclose names of the officers who constituted the said panel could not have been issued without complying with provisions of Section 11 and Section 19(4) of the RTI Act. The said procedure has not been followed by the CIC. I am however not inclined to remand the matter back on the said question as disclosure of the said names would result in unwanted invasion of privacy of the said persons and there is no ground to believe that larger public interest would justify disclosure of said names. The impugned order passed by the CIC dated 12th February, 2009 is non-speaking and no-reasoned and does not take the said aspects into consideration. Even the written submissions of the respondent no.2 do not disclose any larger public interest which would justify disclosure of the name of the officers. This will also take care of objection under section 8(1)(e) of the RTI Act.

73. The Writ Petition is accordingly partly allowed and the petitioner need not disclose the name of the officers who constituted the selection panel and applying the doctrine of severability, copy of the board minutes and subsequent record of recommendation should be supplied without disclosing the names of the officers.

(5) WRIT PETITION (CIVIL) NO. 6085 OF 2008

74. Col. H.C. Goswami (retd.)-respondent no.2 is a retired Army officer of 1963 batch officer. He was charge sheeted on the ground of misconduct and general court martial was convened and he was sentenced to be cashiered and directed to serve rigorous imprisonment of two years. The court martial proceedings and subsequent orders were quashed in Crl. Writ Petition No.675/1989. The respondent no.2 was held entitled to all benefits as if he was not tried and punished and the said judgment was upheld by the Supreme Court. Consequent upon the judgment, the respondent no.2's case was put up for consideration for promotion to the rank of Brigadier on 7th September, 1999 before selection board-II. By letter dated 25th October, 1999 respondent no.2 was informed that he was not found fit for promotion. This order was successfully challenged in W.P.(C) 7391/2000 decided on 7th August, 2008. The Division Bench held that the selection board-II could not have directly or indirectly relied upon or discussed respondent no.2's trial and punishment in the court martial proceedings while evaluating his performance and considering his case for promotion. Reference was made to Master Data sheets and CR dossiers in which the details of CRs earned since commissioned and court certificates, awards, citations in respect of honours, details of disciplinary cases are mentioned. It was noticed that evaluation of merits of the officers was not based upon

any quantification of marks or aggregation of marks. There was no cut off discernible from the record to justify or deny promotion to any one falling below the cut off. Accordingly, the recommendations made by the selection board II denying promotion was set aside with a direction to reconvene a selection board to consider the case of the respondent no.2 afresh. It was in these circumstances that the respondent no.2 had filed an application under the RTI Act seeking the following information :-

> " Regarding the proceedings of No.2 Selection Board held in August/September 1999 and the proceedings of no.2 selection Board held in Aug/Sep 1990 of 1963 batch for promotion to the rank of Brigadier:
>
> 1. The extracts of all my ACRs which were considered for his promotion to the rank of Brigadier
>
> 2. The OAP (Overall Performance) Grading/Pointing of his promotion to the rank of Brigadier of the batch 1999 with whom my name was considered.
>
> 3. The OAP of the last officer who was approved and promoted to the rank of Brigadier of the batch 1999 with whom my name was considered.
>
> 4. The OAP Grading/Points of the last officer of 1963 batch who was approved by the No.2 Selection Board held in Aug/Sep 1990 for promotion to the rank of Brigadier."

75. Before the CIC it was submitted that there was no appraisal known as OAP (Overall Performance) with the Ministry of Defence and there was no figurative assessment of officers. However, it was admitted that an overall profile was considered by the senior officers to determine whether the officer was entitled to promotion. A sample

of the said profile was placed on record before the CIC and consists of the following heads :

> "Agenda No:
> Arm/Service:
> Member Data Sheet:
> Date
> PFH:
> Page
> Year birth:
> Med cat:
> Hons/Awd:
> Civil Qual:
> DOC:
> DOS:
> Disc.
> BPR:
> Prev Bd Res-"

76. It was stated before the CIC that the grading in the overall profile proforma was done on the basis of the information in the ACRs and thereafter the selection board decided whether or not the officer was fit for promotion in his turn to the next rank or should not be empanelled, etc.

77. Learned CIC in the impugned order has quoted several paragraphs from the judgment in the case of ***Dev Dutt*** (supra) but has held that the said judgment is not intended to be applicable to the military officers. However, the appeal filed by the respondent no.2 has been allowed on the ground that the said respondent No.2 has now retired and the effect of disclosure at best would lead to readjustment of pension benefits without seriously compromising any

public interest. In these circumstances, the overall profile of respondent no.2 has been directed to be disclosed.

78. The disclosure directed by CIC does not require interference except that names of the officers who were members of the selection committee II need not be revealed. Information asked for is personal to the respondent No.2 and if names of members of selection Committee II are not revealed, there will be no unwarranted invasion of privacy. Even otherwise the facts disclosed above, repeated judgments in favour of the respondent no.2 and his frustration is not difficult to understand. Blanket denial of information would be contrary to public interest and disclosure of information without names would serve public cause and justice.

Writ Petition is accordingly disposed of.

(6) WRIT PETITION (CIVIL) NO. 7304 OF 2007

79. Central Information Commission has allowed the appeal of Respondent no.1-Bhabaranjan Ray vide the impugned Order dated 26th April, 2007 and has directed that he should be shown his ACRs together with those of third parties who had been promoted to Senior Administrative Grade (SAG). The impugned Order is extremely brief and cryptic and directs that openness and transparency requires that every public authority should provide reasons to the affected persons by showing him all papers/documents. The reasoning given is as under:

> "12. As for the contents of the application, the Appellant desires to see the files/records/documents which led to his being denied promotion to SAG grade from Selection Grade. The Commission feels that in the interest of transparency, the Appellant must be allowed access to all such records. The Commission also pointed out that this particular case attracted Section 4(1)(d) of the RTI Act which reads : "every public authority shall provide reasons for its administrative and quasi judicial decisions to the affected persons." Since in the present case, the Appellant, without doubt, is an affected party, it is incumbent upon the Respondents to show him all the papers and documents relating to this issue. In his application, the Appellant has also desired to see the copies of ACRs of his own together with those who had been promoted to the SAG in the DPC held on 23 July 1998. The Commission sees no reason as to why these ACRs should not be shown to him. Granted that ACRs by their nature are confidential but on the other hand they are also in the public domain and through an ACR no public authority should unjustifiably either favour or deny justice to a concerned employee. The Commission directs the Respondents, therefore, to show call the relevant documents to the Appellant by 10 May 2007."

80. There is no examination or consideration of the relevant provisions of Section 8(1) of the Act and it may be noticed that disclosure of information relating to third parties requires compliance of procedure under Sections 11 and 19(4) of the RTI Act. Grades in ACRs must be disclosed in the light of the judgment of the Supreme Court in ***Dev Dutt*** (supra) but the question of disclosure of internal comments on the officers has to be decided in each case depending on the factual background. No universal applicable rule as such can be laid down. In some cases it is possible that the records may be

denied or may be made available after erasing the name of the officer who have given the comments. Reference can also be made to passages from the decision in the case of R.K.Jain(supra) quoted above.

81. Respondent no.1 in his counter affidavit has pointed out several facts on the basis of which it was submitted that larger public interest demands disclosure of the said information. He has referred to the Order dated 25th Feb., 2005 passed by the Central Administrative Tribunal, Calcutta directing the petitioner herein to hold a review DPC without taking into consideration the un-communicated adverse entries below the bench mark. He has also referred to the order passed by the Calcutta High Court dated 7th October, 2005 upholding the said decision and has submitted that the petitioners inspite of the said orders have even in the review DPC rejected his case for promotion to Sr. Administrative Grade without recording any reasons. It is stated that this had compelled the respondent no.1 to file another petition before the Central Administrative Tribunal.

82. Accordingly, the matter is remanded back to the Central Information Commission for fresh adjudication keeping in view the above discussion.

(7) <u>WRIT PETITION (CIVIL) NO. 7930 OF 2009</u>

83. By the impugned order dated 9.3.2009 CIC has directed furnishing of copy of the FIR registered by the officers of the Special

Cell with Jamia Nagar P.S. regarding encounter at Batla House on 19th September, 2008 and furnishing of post mortem reports of inspector Mr. Mohan Chand Sharma, Mr. Atif Ameen and Mr. Sajid after erasing the name of the person who had filed the FIR and details of doctors who have conducted the post mortem by applying principle of severability under Section 10 of the RTI Act. It was held that disclosing names of the said persons would impede process of investigation under Section 8(1)(h) and the non-disclosure of the said names was justified under Section 8(1)(g) of the RTI Act as it could endanger life and physical safety of the said persons.

84. Addl. Commissioner of Police has filed the present writ petition aggrieved by the direction given by the CIC in the impugned order dated 9.3.2009 directing furnishing of the FIR without the name of the complainant and copy of the post mortem report without disclosing of the doctors. Reliance is placed by the petitioner on Section 8(1)(h) of the RTI Act.

85. Mere pendency of investigation, or apprehension or prosecution of offenders is not a good ground to deny information. Information, however, can be denied when furnishing of the same would impede process of investigation, apprehension or prosecution of offenders. The word “impede” indicates that furnishing of information can be denied when disclosure would jeopardize or would hamper investigation, apprehension or prosecution of offenders. In Law

Lexicon, Ramanatha Aiyar 2nd Edition 1997 it is observed that "the word "impede" is not synonymous with 'obstruct'. An obstacle which renders access to an inclosure inconvenient, impedes the entrance thereto, but does not obstruct it, if sufficient room be left to pass in and out. 'Obstruct' means to prevent, to close up."

86. The word "impede" therefore does not mean total obstruction and compared to the word 'obstruction' or 'prevention', the word 'impede' requires hindrance of a lesser degree. It is less injurious than prevention or an absolute obstacle. Contextually in Section 8(1)(h) it will mean anything which would hamper and interfere with procedure followed in the investigation and have the effect to hold back the progress of investigation, apprehension of offenders or prosecution of offenders. However, the impediment, if alleged, must be actual and not make belief and a camouflage to deny information. To claim exemption under the said Sub-section it has to be ascertained in each case whether the claim by the public authority has any reasonable basis. Onus under Section 19(5) of the RTI Act is on the public authority. The Section does not provide for a blanket exemption covering all information relating to investigation process and even partial information wherever justified can be granted. Exemption under Section 8(1)(h) necessarily is for a limited period and has a end point i.e. when process of investigation is complete or offender has been apprehended and prosecution ends. Protection from disclosure will also come to an end when disclosure of

information no longer causes impediment to prosecution of offenders, apprehension of offenders or further investigation.

87. FIR and post mortem reports are information as defined under Section 2(f) of the RTI Act as they are material in form of record, documents or reports which are held by the public authority.

88. First Information Report as per Section 154 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Code, for short) is the first information recorded in writing by an officer in-charge of a police station and read over to the informant. The substance of the said information is entered in a book/register required to be maintained as per the form prescribed by the State Government. Copy of the First Information has to be furnished forthwith and free of cost to the informant and under section 157 of the Code the same has to be sent forthwith to the Magistrate empowered to take cognizance of the said offence. There are judicial decisions in which FIR has been held to be a public document under the Evidence Act, 1872. Under Sections 74 and 76 of the Evidence Act, 1872 a person who has right to inspect a public document also has a right to demand copy of the same. Right to inspect a public document is not an absolute right but subject to Section 123 of the Evidence Act,1872. Inspection can be refused for reasons of the State or on account of injury to public interest. Under Section 363(5) of the Code any person affected by a judgment or an order passed by a criminal court, on an

application and payment of prescribed charges is entitled to copy of such judgment, order, deposition or part of record. Under Sub-section (6) any third person who is not affected by a judgment or order can also on payment of a fee and subject to such conditions prescribed by the High Court can apply for copies of any judgment or order of the criminal court.

89. In the present writ petition the Asst. Commissioner of Police has not been able to point out and give any specific reason how and why disclosure of the first information report even when the name of the informant is erased would impede process of investigation, apprehension of offenders or prosecution of offenders. In fact both the Public Information Officer as well as the first Appellate Authority have stated that the first information report has to be furnished to the accused and the informant. It is also not denied that a copy of the first information report has been sent to the concerned Magistrate and forms part of the record of the criminal court. It is not pleaded or stated that the first information report has been kept under sealed cover. It may be also noticed that the respondent no.2 in the counter affidavit has stated that one of the persons who has been detained is the son of the caretaker of the flat at Batla House. In these circumstances I do not see any reason to interfere with and modify the order passed by CIC directing furnishing copy of FIR minus the name of the informant. The contention of the petitioner that copy of the FIR cannot be furnished to the respondent no.2 under the Code is

without merit as the said information has been asked for under the RTI Act and whether or not the information can be furnished has to be examined by applying the provisions of the RTI Act. As per Section 22 of the RTI Act, the said Act overrides any contrary provision in any other earlier enactment including the Code.

90. However, disclosure of post mortem reports at this stage when investigation is in progress even without names of the doctors falls in a different category. It has been explained that post mortem reports contains various details with regard to nature and type of injuries/wounds, time of death, nature of weapons used, etc. Furnishing of these details when investigation is still in progress is likely to impede investigation and also prosecution of offenders. It is the case of the petitioners that enquiries/investigation are in progress and further arrests can be made. Furnishing of post mortem report at this stage would jeopardize and create hurdles in apprehension and prosecution of offenders who may once information is made available take steps which may make it difficult and prevent the State from effective and proper investigation and prosecution.

Writ petition is accordingly disposed off.

(8) <u>WRIT PETITION (CIVIL) NO. 3607 OF 2007</u>

91. Respondent no.2 herein-Mr. Y.N. Thakkar had made a complaint alleging professional misconduct against a member of the Institute of Chartered Accountants of India. The complaint was

examined by the Central Council in its 244th meeting held in July 2004 and was directed to be filed as the council was prima facie of the opinion that the member concerned was not guilty of any professional or other misconduct. The council did not inform or give any reasons for reaching the prima facie conclusion. In fact it is stated in the writ petition filed by the Institute of Chartered Accountant that the council was not required to pass a speaking order while forming a prima facie opinion.

92. On 7th January, 2006 respondent no.2 filed an application seeking details of reasons recorded by the council while disposing of the complaint. The information was not furnished and was denied by the PIO and the first Appellate Authority on the ground that the opinion expressed by the members of the council was confidential.

93. By the impugned order dated 31st January, 2007 CIC has directed furnishing of information without disclosing the identity of the individual members.

94. In the writ petition filed, the Institute of Chartered Accountant has projected that respondent no.2 wants, and as per the impugned order, the CIC has directed furnishing of deliberations and comments made by members of the council while considering the complaint, reply and the rejoinder. Respondent no.2 has not asked for copy of deliberations or the discussion and comments of the members of the council. He has asked for reasons recorded by the council while disposing of his complaint. During the course of discussion, members of the council can express different views. Confidentiality has to be

maintained in respect of these deliberations and furnishing of individual statements and comments may not be required in view of Section 8(1)(e) and (j) of the RTI Act. However, I need not decide this question in the present writ petition as the respondent no.2 has not asked for copy of the deliberations and comments. His application is for furnishing of reasons recorded by the council while disposing of the complaint. There is difference between the reasons recorded by the council while disposing of the complaint and comments and deliberations made by individual members when the complaint was examined and considered. Reasons recorded for rejecting the complaint should be disclosed and there is no ground or justification given in the writ petition why the same should not be disclosed. In fact, as per the writ petition it is stated that the council did not pass a speaking order rejecting the complaint and it is the stand of the petitioner that no speaking order is required to be passed while forming a prima facie opinion. It is open to the petitioner to inform respondent no.2 that no specific reasons have been recorded by the council. The consequence and effect of not recording of reasons is not subject matter of the present writ petition and is not required to be examined here. Writ Petition is accordingly disposed of with the observations made above.

(SANJIV KHANNA)
JUDGE

NOVEMBER 30, 2009.
P