

## Right to Information and Good Governance

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Lecture - 54

Exempted Information - 8

(Refer Slide Time: 00:14)

Other aspects under sec. 8: non disclosure norms

- Whether information about Judgements [how] can be sought u/RTI Act 2005? Khanapuram Gandaiah Vs. Administrative Officer SC Special Leave Petition (Civil) No.34868 OF 2009 (Decided on January 4, 2010)
- Quasi Judicial proceedings; impedes the process of investigation: Vijay Kamble Vs Customs Department, Mumbai F.No.CIC/AT/A/2008/01466 dated 23.03.2009: copies of show-cause notices and other documents relating to the proceeding by Directorate of Revenue Intelligence (DRI) and currently under adjudication by Commissioner of Customs (Exports).



So, in the Vijay Kamble versus Customs Department, Mumbai, the applicant sought show-cause notices and other document copies relating to certain proceedings that were being conducted before the Directorate of Revenue Intelligence. And the matter was currently under the adjudication of the Commissioner of Customs.

And he said, he should be entitled to the said information because I think, what the applicant suggested that he is actually involved in exposing fraud and corruption to the tunes of hundreds of crores of rupees, and this definitely, is something that will cause loss to the public exchequer. And hence, he should be allowed to get access to these show-cause notices as well.

What the applicant believed that there was a kind of fraud that was committed on the exchequer to the tune of 67 crore rupees, especially to the customs department. And if he

gets access to some of the show-cause notices, then he will be able to help the state in you know, exposing the fraud and corruption. And that is the justification that he actually suggested for the information that; as to the customs department denied this said information.

And what they said was, though this information could have been treated as a third-party information, because the matters were before an adjudicating officer, it is called the adjudicating officer to decide how to call for the said information and how not to call for the said information.

And to actually ask you know, an RTI query during the intervention or trying to intervene into an ongoing judicial process will actually curb the independence of the adjudicating process. And hence, the customs department denied the said information, and unfortunately, in this case, the show-cause notices pertained to nearly 12 third parties. So, 12 third parties had to be issued the kind of notices based on which probably final adjudicating process had to be taken place.

So, the full bench, in this case, had to take a call and A. N Tiwari, the Information Commission Commissioner who decided this in 2009, clearly said that the said information is exempted under Section 8 (1)(h). He said that when a quasi-judicial proceeding is undergoing, the RTI Act cannot be invoked to access information relating to that proceeding.

So very clearly, the intention of the legislature in Section 8 1h is to protect quasi-judicial proceedings, which unnecessarily cannot be rigged through RTI petitions. And this will be important to protect the impartiality of the quasi-judicial proceedings, it will help in, help maintain integrity of the investigative processes, and not that the said information will not be provided, but it cannot be provided when the proceedings are ongoing. Once the proceedings are completed and you know, any RTI that can be filed, the information probably can be shared at that point of time.

So that is the judgment that was given in this case. And I think it deals with Section 8(1)(h) in terms of quasi-judicial proceedings and the disclosure norms during a quasi-judicial proceeding.

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## Commercial confidence: Sec. 8 (1) (d)

- **Central Board of Secondary Education Vs. Sh. Anil Kumar Kathpal, Delhi HC 2012:** *"in achieving the objective of transparency and accountability of the RTI Act, other equally important public interests including preservation of confidentiality of sensitive information are not to be ignored or sacrificed and that it has to be ensured that revelation of information in actual practice, does not harm or adversely affect other public interests including of preservation of confidentiality of sensitive information. Thus, disclosure of marks which though existed, but were replaced by grades, was not allowed. Purposive, not literal interpretation of the RTI Act was advocated."*
- Also in the case of the **Bhagawal Seth vs. Bank of Baroda** decided on 12-1-2009, CIC observed that apart from commercial confidence there is also a fiduciary relationship between banks and the customers. So before providing the information the bank has to check the public interest. In this case the bank refuses to provide the information as if bank will provide it will lead to the breach of trust and may also harm the party as the competitiveness position of the third party.



Next, if we go to Section 8(1)(d). Section 8(1)(d) deals with information, which are exempted, which relate to commercial confidence, trade secret, or intellectual property, the disclosure of which would harm the competitive position of a third party.

Now, commercial confidence information or trade secret information or information that is in relation to intellectual property is exempted under the Right to Information Act under Section 8 (1)(d).

Now, what is pertinent and important to note here that once we start coming to Section 8 (1)(d), you will notice that this said information that is, commercial confidence, trade secret, and intellectual property are not absolutely exempted. Section 8(1)(d) says that though they are exempted, the competent authority may decide to disclose the said information in larger public interest if it so warrants, right.

So, I think some of the said information can be shared, some of the said information can definitely be given as the case may be. Now, to explain the positions under Section 8(1)(d), we may probably look at the case of the Central Board of Secondary Education versus Anil Kumar. It is a case decided with the Delhi High Court in the year 2012.

In this case, very interestingly, the Central Board of Secondary Education had actually moved from marks to the grading system, right, during that time; I think they have reversed this at some point of time, and from a grading system, they have come to marks system, right.

Now, a father was very keen to know his daughter's marks from the Secondary Education Board. So, what he did was, he filed an RTI petition to the Central Board of Secondary Education and she had got grade like A2 and A1 in most of her subjects. For example, in English, she got grade A2 and in social science, she had received grade A1.

So, he was a concerned father and he thought that the grading system did not adequately show you know, what kind of marks his daughter had received. And he said that, if he was given the kind of actual marks that his daughter has secured, this will actually help him identify her weakness in studies and he could take timely action so that she can pursue a proper career after her grade 12. This was what the father had stated and he wanted the actual marks to be disclosed.

Now, the Central Board of Secondary Education declined the said information. They said, 'look, the very reason why it was moved from a marks system to a grading system right, would be defeated if citizens were allowed to file an RTI petition and seek their marks individual marks'. So if the marks are any are going to be disclosed, why should the grading system introduced.

So, the Central Board of Secondary Education referred to the National Policy and Education, 1986, and the Program of Action in 1992, which re-casted the examination system and suggested that grades be used in place of marks. Interestingly, the National Curriculum framework of 2005 also envisaged a valuation system which would grade the students on the regular activity in the classroom and enable students to understand and focus on learning gaps.

And the board also said that the introduction of grades in examination had been debated for a long period of time, and a continued consultation had also taken place among eminent educationists and experts and the nine-point grading system had been introduced in the secondary school examination from the year 2010. So, the system of declaring subject-wise marks had thus been replaced by subject-wide grade or grade points.

The purpose of introducing the grading system was to take away the frightening judgment of the quality of marks could lead to a stress-free and joyful learning environment and was intended to minimize misclassification of students on the basis of the marks to eliminate unhealthy cutthroat competition and to reduce societal pressure. The order denying the information as to the marks was thus justified by the Central Board of Secondary Education.

Now, interestingly, when the matter came before the High Court, it was argued that you know, when we talk about grades and marks, there is no specific mention under the Right to Information Act that the said information should not be provided for because, you know, it is about a candidate seeking his own marks, it is not me seeking somebody else's marks.

So, in her interest, should not these marks be disclosed? What is wrong if she was given these marks because it is not something that is disclosed in the public domain? So, I think, in the interest of transparency, in the interest of improvement, the marks could have been disclosed as what was argued in this case for the disclosure of the scene.

So, the court, in this case, said that look, you cannot read the RTI act in isolation. The RTI act makes a very delicate balance between disclosure norms and non-disclosure norms. And the whole grading system was to preserve the confidentiality of the marking system. That is the whole purpose of the grading system.

Now, that the grading system was introduced preservation of confidentiality is important. It is important that students do not you know, get caught in the mark race as the case may

be. And I think, in achieving the purpose of RTI, that transparency and accountability is very important. However, whether there is a public interest requirement to disclose, the court said, no, there is no public interest requirement to disclose.

So, they said that you know, RTI cannot be allowed to circumvent those kinds of policies in which there is an necessity to preserve that kind of said information, in this case, the kind of marks that the candidate had actually got. And hence, I think the grading system continues and you know, citizens probably would not get the right to seek individual marks. And clearly, the grading system prohibited the disclosure of individual marks and that was the very purpose and to maintain that purpose I think RTI cannot be used to circumvent and seek those individual marks. I think those were the concerns that were addressed in this case.

Now, let me read a paragraph from this case that I have extrapolated and put it in the slide. The High Court said, in achieving the object of transparency and accountability of the RTI, other equally important public interest is to preserve and confidentially maintain sensitive information, this cannot be ignored or sacrificed under the RTI Act and that it has to be ensured that the revelation of information, in actual practice does not harm or adversely affect other public interest.

So RTI should not affect other public interest of confidentiality of sensitive information. Thus, the court said disclosure of marks, which though existed, but were replaced by grades was not allowed, purposefully. And not literal interpretation of the RTI act was advocated. So, this is what the court held in this particular matter. So, I think it is a kind of an important observation from the Delhi High Court. And it is kind of important denial keeping the grading system and its object in mind.

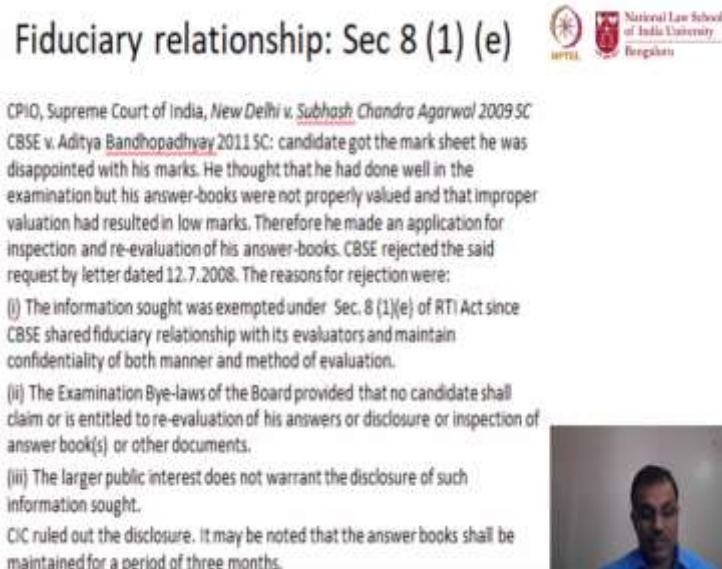
Also, in the case of the Bhagwanlal Seth versus the Bank of Baroda, it is a case decided by the CIC in 2009. The CIC observed that apart from commercial confidence, there is also a fiduciary relationship between the banks and the customer. So before providing the said information, the bank has to check the public interest, and hence, the bank may

refuse to provide information if the banks, it would lead to a breach of trust and it would lead to a breach of fiduciary relationship or the competitive position of the third party.

So, I think, banks also have a duty to keep information in commercial confidence and they cannot disclose information regarding their clients or their customers because it may affect the competitive position of those third parties as well.

So, some of these institutions very clearly have a mandate to deny the information under Section 8(1)(d). Coming to Section 8(1)(e) which they clearly exempt information, which is available to a person in his fiduciary relationship.

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The slide is titled "Fiduciary relationship: Sec 8 (1) (e)". It features the logos of NITRR and National Law School of India University, Bangalore in the top right corner. The main content consists of a bulleted list of legal cases and their outcomes regarding Section 8(1)(e) of the RTI Act. A small video inset of a man in a blue shirt is visible in the bottom right corner of the slide.

- CPIO, Supreme Court of India, *New Delhi v. Subhash Chandra Agarwal* 2009 SC
- CBSE v. Aditya Bandhopadhyay 2011 SC: candidate got the mark sheet he was disappointed with his marks. He thought that he had done well in the examination but his answer-books were not properly valued and that improper valuation had resulted in low marks. Therefore he made an application for inspection and re-evaluation of his answer-books. CBSE rejected the said request by letter dated 12.7.2008. The reasons for rejection were:
  - (i) The information sought was exempted under Sec. 8 (1)(e) of RTI Act since CBSE shared fiduciary relationship with its evaluators and maintain confidentiality of both manner and method of evaluation.
  - (ii) The Examination Bye-laws of the Board provided that no candidate shall claim or is entitled to re-evaluation of his answers or disclosure or inspection of answer book(s) or other documents.
  - (iii) The larger public interest does not warrant the disclosure of such information sought.
- CIC ruled out the disclosure. It may be noted that the answer books shall be maintained for a period of three months.

Again, unless the competent authority is satisfied that larger public interest warrants the disclosure of the said information. So, information that is received in a fiduciary capacity is also exempted under the Right to Information Act Section 8(1) (e).

Now, one will definitely observe and see that the fiduciary relationship is a concept which applies in those cases where information is received between those kinds of persons who stand in a close relationship with each other. This could be a relationship between a banker and a customer, a doctor and the patient, a guardian and a ward, and so on and so forth.



So, I think while it is very relevant to understand where and how fiduciary relationship operates, it is something that very clearly allows a person holding such information not to disclose the said information under the Right to Information Act.

The clear fiduciary relationship is advanced by several regulatory bodies. However, please note, a fiduciary relationship is not keeping the information in privacy and confidentiality. It is the information that is held as a trust in trust of another party and that information, ordinarily, there is an obligation to protect the said information.

However please note, sometimes this information that is held in a fiduciary capacity is not completely immune from the scrutiny of the public authorities. So, this said information will have to be shared. So, there is nothing like an absolute duty to protect the said information under the term, fiduciary capacity.

However, you know, in this case, called Subhash Chandra Agarwal versus the CPIO, Supreme Court. The Apex Court held that the purpose of exemption is to permit screening and preservation of confidential and sensitive information made available in a fiduciary capacity. So that is what the Supreme Court held in that case. And I think the Supreme Court very clearly wanted to state that there are instances when such information can be held in a fiduciary capacity.