

RETHINKING THE RIGHT TO INFORMATION BILL

TALK BY SRI CHITTA RANJAN BEHERA, A SOCIAL ACTIVIST, CUTTACK
 AT THE WORKSHOP ON RIGHT TO INFORMATION
 HELD AT DNK CONFERENCE HALL, KORAPUT 9 TH OCTOBER 2002
 ORGANISED BY KORAPUT ZILLA SWECHHASEBI SANGHA (KZSS)
 IN COLLABORATION WITH
 COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI), NEW DELHI

(The Workshop was attended by about 150 persons from different walks of life like NGO functionaries, lawyers, Government officials and social workers. Sri Badal Kumar Tah, President KZSS presided over the proceedings and Sri Subash Mohapatra, Secretary KZSS presented a note of welcome and introduction of theme for the participants. Sri Mrinal and Sushree Smriti of CHRI presented a national perspective of the right to information movement including a comparative analysis of the different State Acts and the proposed Draft Bill on Orissa RTI 2002. The one-day Workshop was divided into two sessions pre-lunch and post-lunch, each session being conducted in a participatory and interactive manner. Sri Chitta Ranjan Behera, a Social Activist from Cuttack, who addressed the Workshop as a Resource Person spoke at length in Oriya on his views in the context of the Draft Bill on RTI Orissa, the English version of which is reproduced below under the title 'RETHINKING THE RIGHT TO INFORMATION BILL '.)

IN LIEU OF AN INTRODUCTION

I am the one who about a year and half ago, to be more specific around mid-July 2001 seriously thought that enactment of Right to Information in our State of Orissa as done in some other States, to be coupled in due course with the passing of the Freedom of Information Bill 2000 in Parliament, would go a long way in making the system of governance transparent, responsive and accountable to the people, a goal which needs no explanation, but remains yet unrealized in India's ageing democracy. With this conviction, I together with a few friends prepared a Draft Bill on Orissa Right to Information 2001 taking the cue from the corresponding Acts of Tamilnadu, Goa, Maharashtra, Rajasthan, Karnataka and Delhi and Freedom of Information Bill 2000 of the Centre, just to share our loud thinking with others. The copy of the Citizens' Draft Bill, as it was then called, was sent to Sri Navin Patnaik, Chief Minister, Orissa, whose office (Sri S.K.Satpathy, then Additional Secretary on behalf of CM) gave a prompt reply by email dated 17 Oct 2001 congratulating our efforts and informed us that the said draft was marked to the Secretary Information and Public Relations Dept. (then Sri R.Balakrishnan, IAS) for necessary action. Series of sensitization programmes were undertaken in different parts of the State involving cross sections of public to mobilize their opinion in favour of enacting the proposed Bill. I myself chanced to be involved so far in nearly 35 nos. of such programmes in the State including 3 State level Consultations organized consecutively by CYSD, CARE and Basundhara. The interactions that I had with the participants of such programmes enriched our collective knowledge inter alia on how the typical functioning of our bureaucracy has been able to shield itself from access by the citizens in every respect including information transfer.

Meanwhile came the Draft Bill on Orissa Right to Information Act 2002 prepared by the Department of the Information and Public Relations, Government of Orissa, which was officially presented by its Secretary Sri R. Balkrishnan in a two-day Consultation held at Bhubaneswar by CARE, Orissa on 10 and 11 June 2002, attended among others by eminent journalist Bharat Dogra and representatives of MKSS Rajasthan and Delhi RTI Campaign Committee. In quick succession several friends involved with media, NGO, education, research, social work and law discussed the Government proposed Draft Bill with great enthusiasm in different fora. Of particular note is the dogged zeal of a young social activist Sri Pradip Pradhan of Humanity, with which he wrote a succession of long articles in local newspapers explaining the basic concepts and work done so far on the issue of right to information in Orissa and elsewhere. Among the editors of the local dailies, most of whom had shown some interest or the other in the topic on RTI, Sri Rabi Das of Paryabekshyak was found to have taken it to his heart and offered sometimes disproportionately large space to the RTI based news and views in his otherwise nascent and small newspaper. The issue of Right to Information generated so much of interest among the various sections of people that the people in remote, interior areas of the State started organizing some or other event in their place to deliberate on or listen to discourses around it. Apart from the cities of Cuttack and Bhubaneswar; where several programmes on the topic were organized in close succession, such far-flung places as Anugul, Kendrapara, Keonjhar, Harichandanpur, Jagatsinghpur, Balasore, Koraput and Nawrangpur, as I know, witnessed serious brainstorming sessions around the issue of right to information. The Delhi-based Commonwealth Human Rights Initiative did also make a common cause with the Orissa Campaign for RTI by way of disseminating very useful information on the Central FOI Bill and different State legislations on RTI on a number of occasions. As I know, their active presence in Consultations on RTI held at Bhubaneswar, Cuttack and Koraput contributed a lot to the heightening of the Campaign in the State. Apart from the concerned officials of CMO and Dept of I& PR who took it as their routine duty to attend the Consultations on RTI, some well-known officers of the State like Sri Dillip Kumar Mohapatra IPS, Sri Aurobindo Behera IAS, Sri Manmohan Praharaj, IPS and Prof. Arun Kumar Mohanty Editor Orissa Review showed their warm enthusiasm towards the Campaign for RTI by way of their independent, active participation in the then ongoing debates in the Consultations. Retd. Justice Sri P.C.Mishra, though all the time critical about the proposed Act, took great pains to attend all Cuttack-based Consultations and shared his bitter experience of red-tape with the audience.

The people, though initially enthused at the prospect of a new kind of legislation that vitally concerned their daily life, soon felt deeply skeptical of the success that the new law might achieve in effecting a breakthrough in the age-old tradition of secrecy built into our system of governance. Speaker and speaker in these local level meetings described their harrowing experience of getting harassed by the officials, even when they wanted to get simple things like a BPL Card or a Residential Certificate. I clearly recollect one case i.e. a Group Meeting on RTI being held on the initiative of Agramee at Padepadar in Nawarangpur district on 15th of September 2002, where the attending Gurubhais (teachers of non-formal schools in different villages) mostly belonging to ST and SC groups complained that the meetings of Gram Sabhas were not held at all while the forged reports about them by the GP Secretary in connivance with the Sarpanch and Ward Members were being regularly submitted to the BDO showing inter alia utilization of the sanctioned money under different Schemes. By that time the experience of the micro-level social audit programme in Jharnapalli of Bolangir district undertaken sometime earlier by Action Aid, was also well known to many circles. The Report of the said programme, as presented in course of different Consultations, had brought to fore the tendency to maintain secrecy of official information, even when the information asked for relates to construction of a road, school building or watershed, as a built-in feature of the local administration.

Such pessimistic signals from the people at grass root level made me go again through our Constitution itself to find out the roots, if any, of the official secrecy that permeates the whole system of governance. Again, actuated by a similar quest, I undertook a study of various Rules, Codes and Manuals that govern the conduct of Government Servants in our State and country in their day-to-day transaction with the public. Frankly speaking, were I not sufficiently provoked, as I was, by the stories of negative experience of the people with the officials at every level, I would not have cared to glance at these otherwise obsolete documents written in an age-old colonial style.

I can't claim that I exhausted the whole lot of them as required. But whatever impression I gathered from the reading of the said texts so far, did induce in me a strong rethinking on the very idea of having an Act for Right to Information as a means of breaking the deeply entrenched cobweb of secrecy underlining our system of governance

In the pages that follow I wish to present some significant strands of my rethinking and argue out that an enactment of the present Draft Bill on Orissa RTI 2002, or even that of the Centre proposed FOI Bill 2000 ought to be preceded by a concerted drive to update and recast the hitherto dominating, contradiction-ridden, rotten-from-within and colonial-style legal-administrative corpus of the country in tune with the critical imperative of building up a transparent, responsive and accountable system of governance, which is a long cherished aspiration of our people from the days of freedom struggle, lest we again land up in a situation of 'putting the cart before the horse' as occurred on myriad occasions in the past.

A QUICK GLANCE AT THE ORISSA RTI DRAFT BILL

Before we go over to the heart of the subject matter i.e. where does the present Draft Bill on Orissa Right to Information stand vis-à-vis the different, relevant legislations and rules now in force both at State and Central level, we need to have a quick glance at the salient provisions of the proposed 11-Clause RTI Bill, which has been framed by the State Department of Information and Public Relations.

Under **the Clause 2 (Definitions)**, the proposed Draft Bill doesn't provide any definition or listing of the Competent Authorities (Authorities of Govt. and Public Offices, who are accountable for providing information to the members of the public), but leaves the discretion to the Government to decide and notify the same in the Gazette from time to time. The Sub-Clause defining 'Information' covers a host of public and private bodies, but excludes conspicuously the legislative, judiciary and executive organs (Governor and Departments), and political parties from its fold.

The Clause 4 (Procedure for Supply of Information) stipulates that an information seeker has to apply in a prescribed format along with payment of an access fee to a Competent Authority, who shall supply the information within 30 working days of the date of the receipt of the application, but in case of the information relating to life and liberty of an individual, within 48 hours. Defining of both format and fee is however left to the future discretion of the Government. Further in this regard, **the Clause 6 (Procedure of Disposal of Request for Information by the Competent Authority)**, says that the Competent Authority shall also take 30 days to communicate the decision on rejection of an application.

The Clause 5 elaborately mentions restrictions on right to information. In addition to the well known grounds for withholding official information, such as sovereignty and integrity of India, security of State and international relations, the Clause also proscribes disclosure of information, that causes communal disharmony or adversely affects 'administration of justice' or 'investigation of an

offence'. Again, the information concerning communication between the Cabinet and Governor and that which might 'prejudicially affect' the conduct of the Centre-State relations including the 'confidential' exchanges between them are kept outside the purview of the citizen's right to information. In view of such spacious and subjective exceptions provided under the Clause, the officials might keep umpteen number of information that relates to various developmental schemes of Central Sector secret from the public. Moreover, the Clause is however silent about how a piece of information shall be judged as adversely affective or prejudicial or confidential for the purpose of withholding it from disclosure.

As per **the Clause 7(Appeals)**, an aggrieved person can appeal to the next higher officer of a Competent Authority against the latter's failure to comply with his request for information in a deadline of 30 days. But the question arises, under the existing system of governance, which is centralized and regimented from top to bottom, how far a citizen's appeal against the act of a particular officer made before his superior stand? It is further provided that the aggrieved citizen may make a second appeal to the Lok Pal (which is however a one-man authority, being practically non-existent at present), whose decision is final. The Clause doesn't provide for a categorical stipulation of the deadline, within which the said appeals shall be disposed of, but says in a non-legal language, 'the endeavour shall be made to dispose of the appeal within 45 days' of its presentation'.

As regards the penalty for the failure of the Competent Authority to ensure timely supply of the requested information or supply of correct information, **the Clause 9 (Penalties)** makes not only a very ambiguous provision, but also a provision which is nakedly contradictory to the letter and spirit of the existing Service Rules, referred the Bill itself. A laborious interpretation of the Clause would mean that 'the disciplinary authority' of the concerned Department would conduct the enquiry into the alleged acts of omission and commission of the 'Competent Authority' and also award penalties against him as per the existing 'Service Rules'. As is well known, the Service Rules so referred i.e. 'The Orissa Government Servant's Conduct Rules 1959' is not only conspicuous in its lack of any provision for the Government Servants to disclose official information to the citizens, but also categorically holds the said practice as an offence under its Section 11 like the Section 5 of Official Secrets Act 1923. Under the circumstances, when the Service Rules itself proscribes disclosure of information to the citizens on the part of a Public Servant, how can it prescribe any manner of enquiry to be conducted into an alleged act of non-disclosure by him? Over and above, the same Clause says, the disciplinary authority may order him (Public Servant) 'to pay a fine of Rs.200/- per day for the period of delay'. But the question arises, how can the disciplinary authority adjudge at all a case of 'delay' in supply of information, when the existing Service Rules itself bans the supply of information?

The Clause 8 (Obligations on Competent Authorities) says that every Competent authority shall maintain its records as per the operational requirements (indexing, cataloguing etc.) in such a way as to enable every information-seeking person to access them. But the Clause doesn't mention computerization or electronic methods of documentation and transmission of the records available in public offices, an obligation of the public authorities, which has been underlined by the Information Technology Act, 2000. Under the circumstances, by default it is implied that the records shall be maintained and transacted as per the provisions of such existing handbooks as Orissa Records Manual 1964 (primarily meant for offices of Heads of Departments) and Orissa Secretariat Instructions 1961 (exclusively meant for offices of State Secretariat), which prescribe antiquated methods of documentation and disposal of information corresponding to the age of manual hand writing and type writer.

The Clause 10 provides for an 11-Member Supervisory Body to be known as **State Council for Right to Information** with the Minister of GA (General Administration) Dept as its Chairman, along with 4 official members, 4 non-official members and 2 MLAs. This Body is envisaged to guide the State Government in respect of proper implementation of the law on right to information. But the proposed Council is not a Statutory Body, and therefore has an uncertain tenure and may abruptly cease to function when the Ministry that constituted it topples down

Finally, **the Clause 11 (An Act to have Over-riding Effect)** states in a blanket manner that the provisions of this Act shall have over-riding effect vis-à-vis that of other State Acts. Most of the legislations in the past had such over-riding clause in them, which however remained a dead letter soon after the enactment. In the present case, such apprehension is bound to arise, since the framers of the Orissa RTI Draft Bill 2002 have not spelled out their position on such long-standing Codes and Manuals in force as Orissa Records Manual 1964, Nizarat Manual 1962, Government Servant's Conduct Rules 1959, Rules of High Court 1948, GRCO of the High Court of Judicature (1985 and 1988), Orissa Secretariat Instructions 1961 etc, that are at clear variance with the provisions of the proposed Orissa Right to Information Act 2002.

Before parting with this Overview, it is worthwhile to comment on a conspicuous deficiency of the proposed Draft Bill on RTI for Orissa. It is well understood that the Draft Bill by keeping a penalty provision, shows at least a wholesome gesture to punish the guilty officers of the State for their failure to provide the information correctly and timely to the interested citizens. But the moot question arises, how does this punitive deal directly and tangibly benefit the aggrieved citizen, who toiled and spent away so much to get a piece of information, but was ditched in the end? When the principle of tortuous liability of State is an established article of law in our democracy as evident from the Consumer Protection Act 1986, should we not extend it to Right to Information legislation at Centre and in States? If so, it should in practical terms mean that the information seeker who was unjustly denied information or given wrong or misleading information, **is entitled to receive adequate compensation from the concerned public servant or from his office, for the loss he suffered in pursuing a just right of his own sanctified by law.**

EXISTING INFORMATION REGIME

On a close scrutiny of the various legislations, codes, manuals, instructions etc. which are now in force both at Central level and in Orissa State, it would be evident that the Draft Bill on Orissa RTI 2002 has been framed in complete disregard of the said legal documents. It is not my purpose here to go into the merit or demerit of this or that existing provision under laws bearing on citizens' right to information, but to simply demonstrate by way of definite examples from the existing legal literature of the State, how the proposed Draft Bill on Orissa RTI not only stands isolated from and at variance with the mainstream information regime of the State, but also presents a retrogressive picture of itself compared with the latter.

ORISSA RECORDS MANUAL 1964

If we take a look at the Orissa Records Manual 1964, which is the most comprehensive of its kind, and is applicable generally to all the offices of Heads of Departments, we are left with no iota of doubt that the **Draft Bill on Orissa RTI 2002 in its present form shall take the people from frying pan to fire.** As per this existing Manual Vide Chapter IX (Rules for the Supply of Information and Copies relating to Papers and Documents in Public Offices and for Inspection of Such Papers and Documents) spanning Sections 332-430, any citizen by applying in simple prescribed forms (Form

Nos. 78 & 79, each costing Re.0.7 paise only) can get the required information or a copy of a document from any public office on payment of an ordinary searching fee of Re. 1/- only, and that too on the third day of the application so made (excluding the day of presentation of the application). If a citizen can pay an extra searching or expedition fee of Re.1/- over and above the ordinary searching fee, he is entitled to get the required information or copy on the same day of application itself.

As per this Manual again, members of the public who are parties to a case or authorized agents of the parties are allowed to inspect the records of pending cases in the presence of the concerned staff of a public office, by applying in Form No. 80 costing 7 paise only along with an application fee of 20 paise worth of stamps and ordinary inspection fee of Re.1/- (Total cost for one inspection- Re.1 and 27 paise only). By paying an expedition fee of Re.1/- extra, a citizen of the above categories can inspect an official record on the same day of the application itself.

Again, as per the Section 332 of Orissa Records Manual, every public office is to have an Officer-in-Charge of the Record Room, who is the authority over the Copying Section too. Under him there shall be a Record Keeper, who shall also be in charge of the Record Room. Though all applications for information, copy, and inspection shall be officially presented to the Officer-in-Charge [Section 335 (2)], for all practical purposes, it is the Record Keeper who is 'responsible for strict compliance of the rules' relating thereto [Section 332]. So far the intent of this provision goes, a citizen need not roam around here and there in the premises of a public office, merely to know whom he should approach for getting the desired piece of information, but straight go to the Officer-in-Charge of the Record Room, which is so to say the single window, meant for receiving, processing and disposing of all applications from members of public relating to information in a well-set procedure and deadline.

In its strident drive to facilitate public access to official information as befits a democratic polity, the Orissa Records Manual 1964 in **Section 358 (Copies of Public Documents when to be withheld) makes a classic declaration, "Copies of Public Documents which applicants may have a right to inspect are not to be withheld from them, even though they may be used as evidence against Government."**

The moot question therefore arises, when the existing Orissa Records Manual provides for the right of a common citizen for information, copy and inspection of all official records at a very nominal cost (Rs.1 Paise 27 in case of ordinary applications and Rs.2 Paise 27 in case of Urgent ones) and in a relatively shorter duration (3 days in case of ordinary applications, and one day in case of urgent ones), and more so in a well laid-down single-window procedure that fixes accountability on a particular Officer (Officer-in-Charge of the Record Room), I am at a dismay as to why the proposed Draft Bill on Orissa RTI should provide for a cumbersome, time-consuming, expensive, multi-window and too-much qualified procedure for a common citizen to access official information.

ORISSA SECRETARIAT INSTRUCTIONS 1961

While the Orissa Records Manual 1964 is primarily meant to guide the Public Servants working in the offices of the Heads of the Departments, the Orissa Secretariat Instructions 1961 serves to this day as the only handbook of its kind in respect of several aspects of the conduct of secretariat staff including supply of information to the public.

Its Section VII-37 (Supply of copies of records and information to the public) first of all categorically says that giving or withholding of information is their absolute discretion. Next it however says, any

person wishing to obtain information or records should apply in writing to the registrar Home Department stating their occupation and purpose alongwith an advance deposit of searching fee of Re.1/-. If it is decided to give the information or copy so applied for, then the applicant has to pay copying fees at the rate of two annas per 100 words on a foolscap paper. The record keeper shall certify the information or record as the true copy before supplying it to the applicant.

Though the Section VII-37 of the Orissa Secretariat Instructions 1961 is silent on the deadline within which the information or copy shall be supplied, it however provides for a single window system of disposing of the applications for information and a relatively cheaper rate of supplying the official information, compared to the Draft Bill on Orissa Right to Information 2002.

RULES OF THE HIGH COURT OF ORISSA 1948

The Rules of the High Court of Orissa 1948, Vol-1, Fourth Edition 1983 (Part V, Miscellaneous, Chapter XXI, Information and Copies) a citizen can apply in the prescribed form costing 5 paise only (Section 23) for copies of the plaint, statements, affidavits and petitions filed in the suit before a decree is passed and also for copies of any judgement, decree or order at any time after it has been passed, on payment of an ordinary searching fee of Re. 1/- along with 50 paise per page of 150 words or Re. 1/- for a page of 150 to 300 words. He is entitled to receive the copies applied for within the 5th day of his application in ordinary circumstances. If a citizen can pay an extra fee of Re. 1/- he can get the copies applied for on the same day of the application itself.

Besides the said Rules say that apart from the parties to a case, a stranger to the suit may apply for and get the ordinary and urgent copies of the documents of a case after the decree has been passed in the above said manner. But in respect of a case whose decree has not been passed, a stranger can also apply for and get the required copies, both ordinary and urgent, provided he can show sufficient reasons to the Court for getting the copies so applied for.

Again the GRCO (General Rules and Circular Orders) of Orissa High Court (Criminal Vol-1, 1977, Part-III, Chapter-1, Information and Copies) and GRCO (Civil, Vol-1, 1983, Part-III, Chapter-1, Information and Copies) do also prescribe in more detail, how the parties to a case, their pleaders and even strangers can apply for and get the copies both on ordinary and urgent basis from the Orissa High Court and the rest of the Subordinate Courts in more or less similar prescribed manner.

Moreover, the Rules of the High Court of Orissa 1948, Vol-II (Chapter-XII, Inspection, Search, etc.) published in 1967 says inter alia that not only parties to a case, but any stranger can approach the Court through an application in the prescribed manner along with payment of the necessary fees and charges, for copies, search and inspection of all pleadings and related documents or records of a case (Vide Sections 1, 2, 3, 4). The next i.e. Section 5 of the said Chapter specifically mentions, “An application may be made to the Registrar for the issue urgently of a copy of any judgment, decree or order of the Court or of any proceedings filed in the Court and upon the order being so made, the said copy shall be made ready and issued within seven days of the making of the application or such further time as the Registrar may specify”.

On a meticulous scrutiny of the provisions made under the Rules of Orissa High Court, one can of course notice some difference in the nature of minute detail between the Volume I and Volume II. For instance, the Volume 1 says that an ordinary application for copies shall be complied within 5 days, and an urgent application on the very day of the application itself, whereas the Volume II stipulates 7 days for all applications ordinary or urgent. However, the intention behind these

provisions seems to be a laudable one i.e. recognizing the common man's right to access the court records at a small expense and in a quick manner as far as possible.

Now a crucial question arises, when the Rules and GRCO of High Court of Orissa itself admit the need for disclosure of the Court Records to the common citizens at a moderate cost, through a well-settled single-window procedure and in a relatively shorter duration, why the framers of the Draft Bill on Orissa RTI 2002 excluded the Courts from the category of public offices as described under its Section 2 C (Definitions-Information), which are held accountable for disclosing their information?

ORISSA NIZARAT MANUAL 1962

The Orissa Nizarat Manual 1962 published under the authority of Board of Revenue, Orissa says in Section 54 (Rules for supply, custody and sale of maps) that Village maps skeleton and detailed, Thana maps, Municipal maps, Irrigation maps, Town maps, Taluk and Tehsil maps, Subdivisional maps, Skeleton and detailed District maps, State road maps, Divisions maps and State maps are available in the district offices for sale. They are also available for sale in offices of Gazetted Tehsildars and where there is no Gazetted Tehsildars, in the Sub divisional offices. Copies of the maps as also of Thana lists and Tehsils lists (which contain names of villages situated in each Thana and Tehsil and some other particulars) can be had from the Nazir on cash payment on any working day. A notice, both in English and Oriya, specifying the hours of sale of maps shall be hung up in the notice board of the office and as well on the outer wall of the Nazir's room. The price of the maps varies from Rs.1 and paise 25 per sheet to Rs.7 and paise 50, depending upon the content and size of each.

I don't understand, why the proposed Draft Bill on Orissa RTI while referring to 'Information' under its Sections 2 and 3 does not at all mention Map, which is, as a matter of fact, a very critical form of information, required frequently by the people and organizations in their day-to-day business. Moreover, when the Nizarat Manual of 1962 could afford to provide for the supply of all sorts of maps at a very moderate cost, in a single day and that too through a well-laid single-window procedure to any applicant person, why the proposed RTI Bill not emulate this citizen-friendly provision that was made about 40 years back?

ORDERS OF PANCHAYATI RAJ DEPARTMENT 1997 & 1999

The Department of Panchayati Raj, Government of Orissa in the Circular No.12692 (30)/GP dated 8.8.1997 with a view to bring about transparency in the activities of Gram Panchayats had instructed all Collectors to implement Right to Information for all villagers vis-a-vis the GP functionaries in respect of such subjects as Minutes of Gram Sabha and GP meetings, Register of birth and death, records of development activities in the GP, List of Beneficiaries of different programmes as identified by the GP, Income and Expenditure accounts of GP, Register of Assets of GP, Register of Ownership Deeds of GP Assets and Records of Kendu Leaf Grants. **The Circular had further stipulated that information in respect of these subjects should be supplied to the applicant within 15 days of the application and on payment of Rs.2/- per page.**

Then the same Department of Panchayati Raj, Government of Orissa in the Circular No.6337 PR/GP dated 21.5.1999 addressed to all PD DRDAs of the State with a view to bring about transparency in the activities of Panchayat Samitis and Gram Panchayats issued a fresh instruction that **information shall be supplied within a week to the applicant villager on payment of Rs. 2/- per page by the office of DRDA and Zilla Parishad** in respect of such subjects as the scheme-wise allocation of

money to the GPs and Blocks, mode of allocation of money between Block and Gram Panchayat, mode of selection of beneficiaries, programmes like watershed and afforestation etc. implemented by different line Departments, action plan on different schemes, list of members of different committees at Block and district level and guidelines for implementation of different schemes and programmes; and by Panchayat Samiti in respect of village-wise and GP- wise list of different projects and VWR, muster roll, list of watershed projects and details thereof, village-wise and GP-wise list of allocation of money for different schemes, list of members of different committees at Block and GP level and guidelines of different schemes and programmes; and by Gram Panchayat in respect of the village-wise list of BPL families, scheme-wise list of beneficiaries, progress chart of different projects scheme-wise and village-wise list of persons registered under EAS, list and details of the watershed project and village-wise list of names of members of village committee and vigilance committee.

It is not understandable at all, when the latest order of Panchayati Raj Department issued in 1999 talked of supplying information in a deadline of 7 days, and that too on the basis of a simple application on a plain paper, why the Draft Bill on Orissa RTI stipulates a long period of 30 days as the deadline for supply of requested information, and again, why the said Bill talks of a ‘prescribed form of application’ (Section 4) but does not actually prescribe it.

CENTRAL STATUTES & RULES VIS-À-VIS ORISSA DRAFT BILL

THE INDIAN PENAL CODE 1860

Though the Indian Penal Code 1860 does not deal explicitly with a citizen’s Right to Information as the Indian Evidence Act 1872 does, it however contains various provisions which have close bearing on the responsibility of a public servant to provide correct information to the public, failing which the public servant concerned is liable to punishment for his acts of omission and commission in this regard.

The Section 21 of IPC defines a ‘public servant’ to include such categories of persons as every commissioned officer in the military, naval or air force of India, every judge, every officer of a Court of Justice, every juryman, assessor or a member of Panchayat assisting a Court of Justice or public servant, every arbitrator or other person to whom a cause or matter has been referred for decision or report by a Court of Justice or by any other competent public authority, every person who holds any office by virtue of which he is empowered to place or keep any person in confinement, every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offences to justice, or to protect public health, safety or conveniences, every officer whose duty it is, as such officer, to give information of offences, to bring offenders to justice, every officer whose duty it is as such officer to take, receive, keep or expend any property on behalf of the Government, every person who is by virtue of his office discharges responsibilities in the conduct of election, and moreover every person who receives pay, remuneration or commission from the Government or from a local authority or corporation established by or under a Central , Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act , 1956.

The Section 167 (Public Servant framing an incorrect statement) mentioned under Chapter IX (Of Offences by or relating to Public Servants) of IPC 1860 has provided for punishment of imprisonment upto 3 years or fine or both against a Public Servant for framing an incorrect statement or making a wrong translation of a statement with the intention of causing injury to any person.

Now let's see the provision on this point made in the Draft Bill on Orissa RTI 2002 in its Clause 9 (Penalties). It talks of a round-about and ambiguous provision for the disciplinary authority to conduct an enquiry into the charge of providing false information to the applicant person, and thereon, if the charge is established, to penalize the defaulter officer. Both enquiry and penalisation, the provision says, are to be executed as per the 'service rules applicable' to him (the defaulter officer). But interestingly enough, **the existing Service Rules either of the Central or of State Government servants, as we would a little later see, are clearly prohibitive of the very act of disclosure of official information to the public, which is considered a serious offence on the part of Government servants, punishable with dismissal from service or prosecution or both.** In view of such glaring incongruity of the Draft Bill on Orissa RTI 2002 with existing Service Rules for the Government servants, is it not absurd to expect anything for people's access to official information even when the Bill is made into a law?

Under the circumstances, a genuine concern for making the action of State transparent before the people calls for **not only a suitable, prior amendment of the outdated Service Rules before the Bill is enacted, but also incorporation of the aforesaid salutary provision of IPC 1860 into the body of Draft Bill on Orissa RTI with a view to mete out exemplary punishment to the Government servants providing false information to the public.**

INDIAN EVIDENCE ACT 1872

The Evidence Act 1872 in its Section 74 provides a sweeping definition of 'public documents', which consist of documents forming the acts or records of the acts of the Sovereign Authority. And as per the said Section, the expression 'Sovereign Authority' covers within its fold all official bodies and tribunals, public officers of legislative, judicial and executive organs. Further **the Evidence Act in its Section 76 (Certified copies of public documents)** says, "Every public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies."

It is of course true that the same Evidence Act in its Sections 123 and 124 makes the citizen's right to information absolutely discretionary on the part of the Government servants. However, the clear and bold acknowledgement of people's right to information, copy and inspection of public documents vis-à-vis all the agencies of sovereign authority, as mentioned under the Sections 74-76 of Evidence Act, is as a matter of fact, unparalleled elsewhere in the legal literature of India. **In a sharp contrast to the exhaustive sweep of the Evidence Act, the proposed Draft Bill on Orissa RTI is not only very limited in its definition of 'public documents', but also visibly constrained to consider such premier institutions of governance as Courts, Political Parties, Legislators, Council of Ministers, Governor etc. accountable for the people's access to official information.**

WHY THE PROPOSED ORISSA RTI ACT 2002 WON'T WORK AT ALL?

Before drafting any Bill, it should be ensured that there exists a conducive environment, especially a supportive and facilitating legal regime, which is an essential requirement for implementation of a new law. As we would presently see, the existing legal-administrative system, which binds both State

and citizenry to its norms and parameters, handed down as it is with little or no change since colonial times, is nakedly prohibitive of transparency and public participation in governance, and which if not drastically overhauled by way of concerted and integrated efforts of the people at large, is bound to render every new initiative for legislative reform, howsoever well intentioned, dysfunctional and even at times counter-productive.

THE ORISSA GOVERNMENT SERVANTS' CONDUCT RULES 1959

Its Section 11 reads, "Unauthorised Communication of information: No Government servant shall, except in accordance with any general or special order of the Government or in the performance in good faith of the duties assigned to him, communicate directly or indirectly any official document or information to any Government servant or any other person to whom he is not authorized to communicate such document or information".

Needless to say, every Government servant is not only bound to observe this norm of secrecy as a matter of his duty and discipline, but also steeped in a culture of secrecy in their day-to-day transaction with public. Even if the Right to Information is made into a law enjoining upon the Government Servants to disclose official information in the manner as would be prescribed, it would immediately come into sharp conflict with the pro-secrecy provisions of long-standing Conduct Rules, which have been for all practical purposes guiding every conduct of the Government servants. **Unless and until the Government Servants Conduct Rules 1959 are radically reframed with a view to make openness and transparency before the public a cardinal principle for award in respect of CCR (Character and Conduct Roll) of the Government Servants in place of the hitherto dominating consideration for secrecy, no enactment of Right to Information, howsoever ideal and foolproof, can break the age-old culture of secrecy and apathy towards the public.**

THE ORISSA SECRETARIAT INSTRUCTIONS 1961

Reinforcing the principle of secrecy that permeates the Government Servants Conduct Rules 1959, the Orissa Secretariat Instructions 1961, an elaborate manual for the employees working in the State Secretariat have codified stringent norms for maintaining tight secrecy of official information and records from the public. **Its Chapter VII (Arrangement and Custody of Records) has a Section No. 37, which is styled as 'Supply of Copies of Records and Information to the Public', but opens with the sentence "The public have no right to see or have copies of records in possession of the Government, which reserves to itself the right to refuse or modify an application. No reason shall be given in case of refusal.'** The subsequent provisions under the said Section that inter alia prescribe a procedure for the members of public to obtain official information, have rendered it so much complicated and conditional on the discretion of the officers-that-be that they are as good as a naked negation of the people's right to information as declared in the opening sentence of the Section quoted above.

The most important portion of the Orissa Secretariat Instructions 1961 is its **Chapter III (Conduct and Discipline)**, the whole of which is religiously kept by heart by all the employees of the State Secretariat. The Chapter describes the do's and don'ts for the Secretariat employees in clear and categorical terms, one such provision being **'Divulging Official Information (Section 14)', that says, "Official Information acquired by members of the office in their capacity as employees or otherwise must be treated as strictly confidential"**. The said Section further prohibits an employee from making a spare copy of any official document. Interestingly enough, the said Section doesn't differentiate between a legislator and a member of the public in respect of their

worthiness or otherwise of getting official information and with equal disdain for both goes on to say, **“Members of the Office Establishment may not approach members of the legislature or public for the redress of their grievances. Apart from the fact that questions involved are rarely, if ever, of public importance, the practice usually entails disclosure to non-official persons of information which has been obtained from official sources and has come into the possession of the Government servant concerned in the course of his official duties and any such disclosure is a breach of rule 11 of the Government Servant Conduct Rules.”**

With a view to compel an absolute compliance of the above mentioned rule for secrecy of official information vis-à-vis the legislators and public, **the Section 17 of Chapter III** of the Orissa Secretariat Instructions provides for ‘Penalty for Disobedience’ saying, **“Disobedience of the orders in rules 12 to 16 shall be severely dealt with and may render the offender liable for punishment including dismissal or prosecution or both”**.

In a situation when the long-standing manual ‘Orissa Secretariat Instructions 1961’ holds the disclosure of official information as an unpardonable offence on the part of Government employees of the topmost organization of State bureaucracy i.e. Secretariat, **how can one expect an Act for Right to Information to render them open and transparent before the people?**

ORISSA RECORDS MANUAL 1964

This Manual despite its several, liberal pro-transparency provisions contains, of course, some limiting clauses in respect of supplying official information to the public, which leave the matter of people’s access to public documents to a state of doubt and uncertainty. For instance, **its Section 333 (2) under Chapter IX reads, “ in granting such applications regard shall be had to the rules prescribed in this Chapter and any other rules, orders or provisions of law in force relating to the supply of information or copies”**. For all practical purposes, it means that notwithstanding the provisions of Orissa Records Manual, the blatantly prohibitive provisions of Orissa Government Servant’s Conduct Rules 1959 and Orissa Secretariat Instructions 1961 as mentioned above would come at once into force to deny access to official information to a member of the public, whenever the latter applies for the same in the prescribed procedure.

Again, its Section 424 clearly prohibits a citizen’s access **‘to privileged communication or to any part of the record, which the public has no right to inspect’**, without however defining what is ‘a privileged communication’ or which record the public don’t have ‘right to inspect’.

However, in contrast to this prohibitory provision, the same Manual in **Section 358 (Copies of Public Documents when to be withheld) in an absolutely democratic spirit declares, “Copies of Public Documents which applicants may have a right to inspect are not to be withheld from them, even though they may be used as evidence against Government.”**

The net result of such conflicting and contradictory provisions of Orissa Records Manual 1964 and as well of other such Codes, has been a state of dysfunction and irrelevance that its otherwise several, salutary provisions for transparency have been pushed into, and continuing deprivation of the common citizen of his right to information.

INDIAN EVIDENCE ACT 1872

This age-old Central Statute despite its unique provisions ordaining a total transparency of the entire State machinery before the people under its Sections 74-76, is however prejudiced against the citizen's right to information, as evident from its Sections 123 and 124, which read as follows:

“123: Evidence as to affairs of State: No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer as the head of the department concerned, who shall give or withhold such permission as he thinks fit.

“124: Official communications : No public officer shall be compelled to disclose communications made before him in official confidence, when he considers that the public interest would suffer by the disclosure.”

Keeping these provisions of Evidence Act in tact, the proposed enactment of Right to Information either at State level or at Central level would turn out to be an exercise in futility.

OFFICIAL SECRETS ACT 1923

This notorious, foul smelling piece of colonial legislation, which remains in force to-day with all its anti-people rigour views the people and Government servants without exception, as the potential agents of the foreign enemies, who are, as if, out to give away the official secrets to the outsiders, and who, on being caught, need be sternly punished under the various provisions of the Act. Not to talk of communication, even mere fact of keeping an official document with himself by an official or non-official person, not authorized to keep it, is considered an unpardonable offence inviting the prescribed punishment of 3 years of imprisonment or fine or both .A token excerpt from Section 5 of the Official Secrets Act, as mentioned below, shall suffice to indicate the tenor of the remaining substance of the Act:

“If any person..... retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof, he shall be guilty of offence under this section.”

Needless to say, the Official Secrets Act 1923, which was largely instrumental in institutionalizing the mechanism of secrecy in the system of governance of the country over the years and continues to feed to this day, the all-pervasive culture of secrecy in the day-to-day transaction between State and citizens, deserve to be abrogated lock, stock and barrel, so that a genuine effort can be initiated towards making the business of governance open, accountable and transparent in true sense. Otherwise, every case of enacting Right to Information in the State or at Centre is bound to meet its doom as soon as it is given effect to under the overwhelming influence of the Official Secrets Act 1923.

CENTRAL CIVIL SERVICE CONDUCT RULES 1964

The Officers of All India Services, working under the State Government of Orissa, are required to abide by the Central Civil Service Conduct Rules 1964, which in its Section 11 like the Orissa Government Servant's Conduct Rules forbid the 'unauthorized' communication by a public servant to the citizens and considers it a punishable offence. In view of this, how can the enactment of a

Right to Information law in the State of Orissa or at the Centre improve the state of transparency in governance before the citizens?

MANUAL OF OFFICE PROCEDURE FOR THE CENTRAL GOVERNMENT

As per this Manual, only Ministers, Secretaries and other officials specially authorized by the Minister are permitted to meet the representatives of the Press and to give them information. In case of any dispute concerning the unauthorized communication, the Principal Information officer of Government of India is the final arbiter.

Keeping the Minister at the head of the information regime and living the matters relating to information to the discretion of the Minister means devoiding the system of governance of an inbuilt and inherent mechanism to freely and timely respond to and interact with the citizenry day to day, which is the hall mark of a democratic polity. Unless and until the existing top down system of information administration as ordained by the manual of office procedure is replaced by a system in which every layer of governance is equally transparent, responsive and accountable to the citizens in their respective spheres, no enactment of Right to Information law would be able to effect a modicum of change in the present situation of secrecy and suspicion.

CONSTITUTION OF INDIA

The most formidable obstacle to the implementation of a Right to information law in the States and country comes from the Constitution itself. It defies human reason as to how a visibly anachronistic and anti-people article i.e. Oath of Secrecy found place in the third Schedule of the Constitution and is still being tolerated to this day without any compunction, the like of which is noticed nowhere in the democratic world. The Article 75 (4) of the Constitution makes it binding on every Minister before entering into his office to swear by an Oath of Secrecy, which reads as follows:

“I..... swear in the name of God that I will not reveal to any person or persons any matter, which shall be brought under my consideration or shall be known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister”.

As is well known, in the typical Indian system of Parliamentary Democracy, a Minister is both a member of legislature and a head of the executive in respect of the portfolios he holds. **When a Minister, the Head himself vows in the name of God to maintain secrecy of official information from the people, how can the rest of the executive i.e. the Government servants whom he heads and leads for all practical purposes, be expected to disclose official information to the people just for the sake of a piece of legislation, called Right to Information or Freedom of Information Act?** Over and above, there are Conduct Rules, Codes and Manuals for the Government Servants, as already examined by us, which bind them to the observance of strict secrecy of official information from the public.

The National Commission to Review the Working of the Constitution (2000-2002), which submitted their 1800 and odd page Report to the Prime Minister on 31st March 2002 have therefore observed inter alia,

“Much of the common man’s distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision making processes which vitally affect his interest. Government procedures and regulations shrouded in a veil of secrecy donot allow the clients to know how their cases are being handled. They shy away from questioning officers handling their cases

because of the latter's snobbish attitude and bow-wow style. Right to information should be guaranteed and needs to be given real substance. . . . The traditional insistence on secrecy should be discarded. **In fact, we should have an oath of transparency in place of an oath of secrecy.** Administration should become transparent and participatory.”

The Oath of Secrecy apart, the Indian Constitution is replete with provisions, which are just uncritically borrowed from its colonial predecessor Government of India Act 1935, and legitimize and reinforce by the full backing of the supreme law of the land, an obsolete and nefarious regime of administrative secrecy, that is squarely incompatible with a democratic polity of modern times. **Such immunitarian provisions of the Constitution as guaranteeing a special manner of Protection to the Permanent Civil Service of the colonial style (Article 311), Privileges of the Legislators (Article 105 for MPs and Article 194 for MLAs), Security of tenure to the Judges (Article 124 for Supreme Court Judges and Article 217 for High Court Judges), and above all Legal Protection to the President and Governors (Article 361),** which together make the citizens stare at the key functionaries of the State with awe and wonder, and which give a free hand to these functionaries to deal with them as they like without being directly accountable to them, do also contribute indirectly but substantially to the maintenance of a regime built upon secrecy, red-tape, corruption and alienation from the people.

Unless and until the Constitution is rid of its colonial self and remade in such a manner as to place the citizen at its centre-stage, with all the organs of power being directly accountable to him in his every day life, no piecemeal enactment of Right to Information can bring about the much desired elements of transparency, responsiveness and accountability to the governance of the day, over which the whole nation cries hoarse.

BY WAY OF SUMMING UP

In view of the circumstances described above, the author feels impelled to suggest that the Orissa Draft Bill for Right to Information in order that it fulfils the aim and objects for which it is proposed, need to be reviewed thoroughly in course of a genuine people's debate preceding its enactment in the Orissa Legislative Assembly. Meanwhile all the existing laws, Codes and Manuals that concern the transaction between the Government and people should be examined in depth with a view to incorporate all their good, pro-transparency features in the proposed Draft Bill and jettison all their dark, pro-secrecy and anti-people features once and for all. Simultaneously, a concerted endeavour be initiated for a suitable amendment of the Constitution for replacing the Oath of Secrecy by an Oath of Transparency and for ridding it of its numerous anomalies and inner contradictions from the perspective of a participatory, transparent, responsive and accountable governance, the call of the hour. Or else by mere passing of the Draft Bill in the Orissa Legislative Assembly in a hurried manner, would inevitably land us, as I have observed earlier, in an absurd position of 'Putting the Cart before the Horse'