

Author: Marc-Aurèle Racicot*

Assistant Adjunct Professor and Information Access and Protection of Privacy (IAPP)
Certificate Program Manager at the University of Alberta

Title: Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience

Volume 2 issue 2

Abstract

In this article, the author examines the third party exemption of India's Right to Information Act, 2005. In his analysis, he identifies and discusses the principles on the need for transparency in contractual relationships between the government and private parties. The author identifies potential problems in the RTI Act, 2005, and in light of the Canadian experience with the 24 year old Access to Information Act, proposes ways to circumvent them or minimize their impact on the implementation of the Act.

Introduction

The Indian Right to Information Act, 2005 ("RTI Act") repealed and replaced a 2002 statute, the Freedom of Information Act, which was highly criticized and never came into force (Slough, 2005; Bhushan, 2002; Joshi, 2002). The two main criticisms were that it contained no provision for penalty for willful nondisclosure of information or for willfully incorrect disclosure of information by a government authority, and that there was no provision for an appeal to an independent authority (Bhushan, 2002). The Indian Government passed the RTI Act with amendments by the Lok Sabha on May 11, 2005 and the Rajya Sabha on May 12, 2005. The RTI Act has been in force since November 2005 but India adopted a very limited number of rules and some existing States' legislations were repealed.

It has been 24 years since the Canadian Access to Information Act (R.S.C. 1985, c. A-1) (ATIA) was passed but a true culture of openness has not yet been realised. For the legislation to be meaningful, FOI education cannot be limited to government officials; citizens and private organizations must also understand how the legislation works and how it may affect them when dealing with the public organizations.

Objectives

This paper specifically examines the third party exemption and notification process of the RTI Act. Proposals to circumvent potential difficulties when applying this exemption and notification process are given by comparing it with the Canadian experience. This exemption has been a major ground for litigation under Canada's ATIA. The principles involved when balancing the right of access and the need for confidentiality are discussed, as is how the RTIA third party exemption procedure can be approached in a way that promotes the purpose of the Act and not as a means of hindering disclosure.

The Process under Indian Legislation - The Right to Information Act, 2005

Pursuant to sections 5 and 6 of the RTI Act, requests for access to information from a public authority are made to a CPI Officer¹, to the State Public Information Officer, or to their Assistants. The Officer responsible for the disposal of the request must first take into consideration any representation made by a third party under section 11, with the exemption based on Parliament's consideration that individuals/organizations providing information to the Government may object to its general release. Paragraph 2(n) of the RTI Act contains a specific definition of the term:

"Third party" means a person other than the citizen making a request for information and includes a public authority.

The Act also contains a specific exemption to 'third party information' and provides for a very specific notification process for it. Exemptions from disclosure are found in section 8 of the Act, as follows:

Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,— [...]

Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the

¹ Pursuant to subsection 1(2), the Act "extends to the whole of India except the State of Jammu and Kashmir." Hence, the RTI Act applies to the Central Government as well as to the State's Governments. For the purpose of this paper, I will only refer to the Central Government regime (ex. Central Public Information Officer), unless otherwise mentioned.

competent authority is satisfied that larger public interest warrants the disclosure of such information; [underlining added]

Use of the term 'including', makes it clear that the information is not limited to commercial confidence, trade secrets or intellectual property. Another relevant exemption deals with 'personal information'. Unless large public interest justifies it, there is no obligation to disclose information which has "no relationship to any public activity or interest" or if it "would cause unwarranted invasion of the privacy of the individual."

The application of these discretionary exemptions requires a two-step process. The CPI Officer must make a finding of harm; then, further to finding potential harm, s/he must determine whether the record should nevertheless be disclosed in the public interest. Finally s/he must consider the exceptions/overrides to these exemptions as discussed below.

The RTI Act provides for greater flexibility in disclosure. The opening wording of section 8 "...there shall be no obligation to give..." is interesting. In the Canadian legislation the words "...shall refuse to disclose..." are used. In the former wording it is understood that although there is no obligation to give, there is discretion to do so.

The language used in section 8 – "there shall be no obligation to give any citizen" - and the language of RTI subsections 8(2) and (3), clarifies the intent of the legislator to maximize disclosure of information in the public interest by establishing criteria to assist the CPI Officer's decision. 8(2) provides a general public interest overriding clause and an additional 'public interest override' is found in subsection 11(1) in fine. 8(3) provides a 20-year overriding clause which applies to various references to 'third party information' and 'personal information'.

If a case of 'third party information' meets the injury test and does not qualify in the listed exceptions or overriding clauses, the CPI Officer is under no obligation (may refuse to disclose) to give information if s/he believes the disclosure will harm the competitive position of the third party and if s/he is satisfied there is no public interest in disclosing the information.

The Notification Process

The notification provision is found in section 11 of the RTI Act. Timelines are very short; typically, a response must be provided within 30 days of receipt. If the life or liberty of a person is at stake, subsection 7(1) in fine provides that " ... the information sought ... shall be provided within forty-eight hours of the receipt of the request."

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.

Requests involving disclosure of third party information, which relates to or has been supplied by a third party and has been treated as confidential by that third party, require the Officer to give written notice to such third party and invite him/her to make an oral or written submission within five days from the receipt of the request. Hence, the three prerequisites for the notification process are:

- (1) the CPI Officer must intend to disclose the information;
- (2) the information must relate or must have been supplied by a third party; and
- (3) the information must have been treated as confidential by the third party.

The third party has 10 days from receipt of the notice to make his submission.

Notwithstanding the 30 days mandated by section 7², the CPI Officer must, within 40 days after the receipt of the request, decide whether to disclose the information and provide a written statement of his decision to the third party. An appeal under section 19 may be filed against the decision³ within 30 days. As it is not specified, it is assumed that the notice will mention that if no appeal is filed within 30 days, the requested information will be released.

The Appeal

If the third party is not satisfied with the decision made under subsection 11(3) s/he may file an appeal before the Central Information Commission within 30 days from the date of the order⁴. Interestingly, the appeal mechanism from a decision made under section 11 is found in subsection 19(2), however, the present drafting makes it questionable if a third party appeal is also available under subsection 19(1) as a 'person who is aggrieved by a decision'. Additionally, subsection 19(3) provides for a second appeal against the decision made under subsection 19(1). Note that there is no mention of subsection 19(2).

It is therefore arguable that a second appeal is not available to a third party. If subsection 19(1) was all inclusive subsection 19(2) would not exist. This indicates that the only appeal available to a third party is under subsection 19(2). Second, subsection 19(3) mentions only 19(1), whereas subsection 19(6) specifically refers to an appeal made under 19(1) or 19(2).

² Unfortunately, due to the 'notwithstanding' found in ss. 11(3), the 48 hours limit provided by 7(1) in situation where the life or liberty of a person is at stake, is pushed aside.

³ RTI Act, s. 11(4). Since there is no provision regarding time extension in the current RTI Act, a decision must be taken within the 40-day time limit found in s. 11(4).

⁴ RTI Act, s. 11(2). In Canada, if the head of the government institution is not satisfied with the third party representations and decides to disclose the information, the third party's only option to prevent disclosure is to file an application for judicial review pursuant to section 44 of the ATIA within 20 days of having been notified of the head's decision.

Third, when an appeal relates to third party information, subsection 19(4) extends an opportunity for the third party to be heard. Though unusual, this limited right to appeal is consistent with the purpose of the legislation: providing citizens a meaningful right of access while still providing for exemptions. The absence of a second appeal for third parties shows that Parliament chose to put an emphasis on openness.

As of July 2006, the Central Government of India has not adopted any rules with regard to the third party exemption or notification, but has adopted some which deal with appeals to the Central Information Commission (Central Information Commission (Appeal Procedure) Rules, 2005).

The Principles

The major principles of transparency in the conduct of public administration and in contractual relations between the government and third parties merit examination.

A. Why is Transparency Paramount?

The goal of transparency in public administration is to prevent any clandestine arrangements whereby government officials and private firms collaborate to keep information secret (McMahon, 2006). The recent Canadian Sponsorship Scandal is an excellent example of the potential malfeasance transparency can prevent. The Scandal arose from the federal government's program to promote Canada at cultural or sporting events in Quebec. The program began 1996 but when it was disclosed in 2004 as corrupt, a Commission of Inquiry led by Justice John Gomery was established. In his first report released in 2005, Justice Gomery wrote:

The Commission of inquiry found: [...] a veil of secrecy surrounding the administration of the Sponsorship Program and an absence of transparency in the contracting process; [...] (Government of Canada, 2005a, p5)

There was an atmosphere of secrecy and only the inner circle was informed of decisions (p23).

In his second report of February 2006, Justice Gomery insisted on the need for transparency, noting that "An appropriate access to information regime is a key part of the transparency that is an essential element of modern public administration." (Government of Canada,

2005b, p179) He even cited the private sector as being more transparent than the public sector:

The Commission wishes to emphasize a key concept that may be learned from the private sector: greater transparency promotes accountability and better management. The best managers are those whose administrative practices are transparent and who accept that they are accountable not only to their superiors but also to the shareholders of the corporation (p178).

Coincidentally, about the same time as the Sponsorship Program was created, John C. Pearson offered the following opinion:

While it is true all legitimate government business is conducted on behalf of the public, it does not follow all government business is best conducted in public. Indeed, the public interest is best served by government following commercial practices established by the marketplace. Commercial confidences customarily observed should be respected (Pearson, 1994, p275).

In light of the serious consequences of the Sponsorship Scandal, Mr. Pearson's opinion deserves comment. Commercial confidences customarily observed amongst private organizations cannot generally apply and do not guarantee the public interest when one of the parties is a public authority. Government officials should inform potential business associates that confidentiality will not attach to the transaction. Contracting third parties must understand that the State acts as a fiduciary on behalf of its citizens and the citizens have a right to know what the contract's terms are. Government business conducted on behalf of the public must be conducted in public. As Justice Kelen writes in *Canada Post Corp. v. Canada* (National Capital Commission):

The intention of Parliament in exempting financial and commercial information from disclosure applied to confidential information submitted to the government, not negotiated amounts for goods or services. Otherwise, every contract amount with the government would be exempt from disclosure, and the public would have no access to this important information (*Canada Post Corp. v. Canada*, 2002).

Government transparency and access to information allows citizens to supervise government activity and hold government accountable. It is critical to a properly-governed procurement policy. In *High-Rise Inc. v. Canada* (Minister of Public Works & Government Services) the

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.

Federal Court of Appeal of Canada held that maintaining confidentiality during the bidding process prevents bidder collusion and ensures competitive pricing. However, relying on *Gamma* (1994, para 8)⁵, the Court of Appeal stated that different considerations arise when the contract is awarded and public funds are committed. No public benefit was fostered by maintaining the confidentiality of amounts paid or payable by government pursuant to contractual obligations with third parties. In short, the Court of Appeal stated that transparency is a way of holding government accountable.

B. Contractual relations between the government and private parties

This is the third party exemption question: should contractual information between the government and private parties be subject to public scrutiny? Discussion will be limited only to contractual relations entered into by third parties of their own free will⁶.

Due to the particular wording of the Canadian exemption, some contractual information is not always "supplied to a government institution by a third party". The courts have found that negotiated rates (*Halifax Development Ltd. v. Canada*, 1995) or terms of negotiated contracts (*Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004) are not information supplied by a third party but negotiated terms or amounts, thereby closing the possibility of raising paragraph 20(1)(b) of the ATIA as a ground of refusal. The RTI has similar wording but also provides that information relating to a third party is subject to the exemption, meaning all information – including that generated by the State related to a third party – is subject to the third party exemption. In Canada, paragraphs 20(1)(c) and 20(1)(d) cover information supplied by a third party, but for these exemptions to apply, probable prejudice must be demonstrated. The scope of the Indian exemption is similar to its Canadian counterpart.

⁵ "One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability."

⁶ Note that section 20 exemption covers information provided by a third party to a government institution.

Discussion of the Issues and Suggestions for the Implementation of the RTI Act in light of the Canadian Experience

Examining the following issues, which in the last 20 years have proved to be potential traps or dead-end solutions in Canada, may give India a head-start in the implementation and application of the RTI Act. Suggestions to help third parties and public authorities work with the RTI Act will also be made

A. Who counts as a third party?

While similar to Canadian legislation, Indian legislation includes 'public authorities' in its definition of third party, which could make a big difference. In subsection 3(1) of the ATIA 'third party' expressly excludes any government institutions⁷.

In India, Parliament disregarded the Parliamentary Standing Committee's recommendation and adopted the Government's Bill which includes public authorities in the definition of third party. If the intention was the 'optimum use of limited fiscal resources', Parliament may have missed the bulls-eye. Since the processing public authority must notify any third party to which the information relates, it is easy to imagine a report prepared for one department, in which 10 other departments are expressly referred, resulting in a burdensome and time-consuming procedure. In light of subsection 6(3) of the RTI⁸ this notification process appears to be a waste of time, since pursuant to subsection 6(3) a request will be transferred if another public authority has more interest in it. A similar disposition is found in the Canadian legislation. Section 8 of the ATIA allows a government institution to transfer the request if "the head of the institution considers that another government institution has a greater interest in the record."

⁷ ATIA, ss. 3(1): "in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution." with Government Institution' defined as "any department or ministry of state of the Government of Canada listed in Schedule I or any body or office listed in Schedule I [of the ATIA]."

⁸ RTI Act, ss. 6(3): Where an application is made to a public authority requesting for an information,-

(i) which is held by another public authority; or
(ii) the subject matter of which is more closely connected with the functions of another public authority, the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:

Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.

The Canadian experience is that Crown Corporations - such as Canada Post Corporation (CPC) - which are not listed in Schedule I and therefore not considered third parties under the ATIA - are free to actively prevent disclosure of their information. This has resulted in many CPC review applications being filed in Federal Court; imagine the chaos if all government institutions were considered third parties. If the goal of access to information is to facilitate access; any procedure used to delay access must be carefully analyzed.

What, then, can be done in India to ensure the system does not become congested with relentless notices to other public authorities? Clearly, any options chosen must be clearly state that the notification process must not become a way to delay access.

An obvious option is to modify the definition of third party to exclude other public authorities, using section 30 of the RTI Act. Subsection 30(1) provides that:

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to be necessary or expedient for removal of the difficulty.

Since subsection 6(3) of the RTI Act mandates that the request be transferred if the subject matter is more closely connected with the functions of another public authority, it must be assumed that the authority processing the request is the one most concerned with the information sought. Therefore it has the power to decide if the information should be disclosed without the need for representations from other public authorities.

Rules could be adopted to control the notification process. Presently, the public authority processing the request has only 40 days to locate the records, expedite the notification process (which must be initiated within 5 days from receipt) and issue its decision. This time frame makes it difficult, if not impossible, to meet the obligations of the RTI Act. The process could be facilitated by authorizing the CPI Officer to notify verbally any third parties that are public authorities.

B. What information counts as third party and what are the impacts on the Notification Process?

1. Should personal information be included?

To properly apply the notification process, the CPI Officer must understand what is meant by "third party information". Is "personal information" third party information? If the name of

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.

an individual appears in a document, can it be said that this information relates to him/her? From section 11 of the RTI Act, it is not clear if the notification process will apply to the release of personal information.

At the Canadian federal level, the third party notification process (found in sections 27, 28 and 29) only deals with commercial information or information that could be harmful if disclosed. It allows a third party to make representation regarding the nature of the information and the magnitude of injury it may suffer resulting from the disclosure, and, if the disclosure is based on section 20(6) of the ATIA, to demonstrate that such injury outweighs the public interest. A third party will be notified only if the head of a government institution intends to disclose the information in response to a request (section 27) or if the head of a government institution intends to disclose on the recommendation of the Information Commissioner as a result of a complaint (paragraph 29(1)(b)).

In Canada, an interesting distinction between the federal and many provincial statutes is that the federal notification process deals only with commercial information: an individual whose information does not fall within section 20 of the ATIA will not receive notice if the head of a government institution intends to release that information. Canada also has privacy legislation with which the government must comply; there is no privacy legislation applicable to public authorities in India. Some Canadian provinces have included individuals in the definition of third party, and in the case of the potential release of personal information, have mandated a notice to the individual concerned (Alberta Freedom of Information and Protection of Privacy Act, 2000)

Based on interpretation of the RTI Act, a third party whose personal information is to be disclosed should also receive a notice for the following reasons:

- a. third party is any person other than the requester;
- b. there shall be no obligation to give any citizen information which relates to personal information; and,
- c. notification is required when the CPI Officer intends to disclose information which relates or has been supplied by a third party.

As there is no suggestion that the notification process is limited to commercial third parties, it appears that a notice will be sent to anyone whose personal information is to be disclosed to an access requester. Since there is no privacy legislation in India, this notification is critical, since this it would be the only protection afforded an individual before disclosure, allowing the third party to justify the non-disclosure and to balance the public interest in disclosure.

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.

2. The Indian Legislation contemplate broader notification

There is a subtle but very important difference between the Canadian and Indian notification processes. Use of the words “relating to” in subsection 11(1) of the RTI extends the notification process further than is provided in Canada, perhaps because the Canadian process does not extend to personal information, as does the Indian Act.

The minimal requirement for notification in the Indian Statute regarding information ‘which relates to a third party’ seems to indicate that ‘personal information’ is subject to notification, providing greater protection to all third parties. In Canada, notice to a third party will be sent only if the head of the government institution intends to disclose information that falls in section 20, whereas in the RTI Act it seems sufficient for the name of a third party to appear in a document for a notice to be required. This may make it more difficult for the CPI Officer to notify all the individuals and organizations concerned within the time limits. It could be argued that the Indian notification is broad because it is required if the information ‘relates to’ a third party. Conversely, it may also be construed as being very narrow because the notice is required only if the information ‘has been treated as confidential by the third party’.

Difficulties in the determination of the first requirement (that the information relates to or has been supplied by a third party) are not anticipated because (1) the language used to define ‘third party’ is broad and vague, and based on experience, (2) Canadian courts have given a broad interpretation to the term ‘third party’ (Canada Post Corp. v. Canada (Minister of Public Works), 1993; Rubin v. Canada (Minister of Health), 2003). However, the second requirement (that the information has been treated as confidential by the third party) raises the question of how the CPI Officer will determine the ‘information has been treated as confidential by the third party’ without the benefit of the third party’s representations? In Canada, notification is usually sent to obtain representations which will help determine if the information has been treated confidentially⁹. To minimize the impact these provisions might

⁹ Reception of the request initiates the process. The government institution has 30 days to give a response to the requester. Once the records have been collected, that information has been identified as being potential s. 20 information and that the head intends to disclose the records, a notice will be sent to the third party, if he can be reasonably located (s. 27). The third party will have 20 days to make his representations (s. 28). It is possible for the head of the government institution to extend the 30-day time limit to respond to the request, if the consultations with the third party go beyond the limit. The extension of time must be notified before the 30-day time limit is over. (See para. 9(1)(c) of the ATIA) Upon reception of the representations, if the head still intends to disclose the requested records, he will give notice to the third party that the records will be disclosed to the requester unless the third party brings, within 20 days, an application for judicial review under section 44 of the Act.

have on the communication of information it is suggested that the term 'which relates to' found in subsection 11(1) of the RTI Act be explained or defined in the Rules.

C. Who decides?

Maja Daruwala, CHRI Director (Letter from Maja Daruwala, 2005) has raised the issue that three authorities have been given concurrent powers to determine what can be disclosed in the public interest¹⁰. Sections 8(1)(d), 8(2), 8(3) and 11(1) of the RTI Act all contain a public interest override clause. This raises two questions: who will make the determination and what will be the criteria for their application?

1. Who will make the determination?

The trio of decision makers seems an obvious practical error, which could be amended forthwith pursuant to section 30 of the RTI Act by removing competent authority from all decisions. These should ultimately reside with the Public Information Officer, as seems the intent pursuant to sections 5, 6, 7 and 11. While paragraph 8(d) mentions the competent authority, subsection 11(1) mentions the CPI Officer; clearly this is a legislative oversight. With regard to the third party exemption, subsections 7(7) and 11(3) leave little doubt that the decision rests with the CPI Officer.

2. What will the criteria be?

In a research paper prepared for the Canadian Access to Information Review Task Force, Barbara McIsaac notes that due to a lack of direction and guidance in the application of discretionary exemptions the perception is "that when there is any doubt about what to do the doubt is resolved in favour of invoking the exemption." (McIsaac, 2001). The Task Force concluded that "The exercise of discretion inherently implies a consideration of the factors

¹⁰ "Section 8(2) of the RTI Act provides for a public interest override even where information requested is covered by one or more of the exemptions in s 8(1). Section 8(2) explicitly provides that the decision making power as to what is in the public interests vest with the "public authority". [...] However in three categories of exempt information listed in Sec. 8(1) [8(1)(d), (e) and (j)], three more entities namely, the competent authority, the Public Information Officer and the appellate authority have been given specific powers to determine whether information needs to be disclosed in public interest. [...] PIOs and Appellate Authorities will need clarification as to how Sec. 8(2) will be reconciled with Sec. 8(1)(d), (e) and (j) as different entities have been provided concurrent jurisdiction on the same subject. It is also necessary to clarify whether the release of information can be secured upon the order of the Departmental Appellate Authority or the appropriate Information Commissioner based on the merits of the case or this has to wait until the competent authority concurs with their decision. Furthermore it needs to be clarified whether the PIO has the power to communicate with the appropriate competent authority seeking permission for release of the information rather than issue a rejection order outright. If yes will the deadline of 30 days continue to apply to this case considering the usual delays that may occur while in taking decisions on such controversial matters."

relevant in each particular case, including any anticipated harm from disclosure.” (Government of Canada, 2002, 43) It added that “in exercising discretion, institutions should consider the fact that information usually becomes less sensitive over time” (p43-44) and that “The application of exemptions should not be a matter of intricate legal reasoning, but of basic questions asked consistently at all stages in the process: Are there good reasons for withholding the information in this case? How soon can it be made available without causing harm to one of the interests protected by the Act?” (p43-44).

The Government should identify criteria to assist CPI Officers when making their decisions, including such factors as:

- a. the general purpose of the legislation;
- b. the wording of the discretionary exemption and the interests which the exemption attempts to protect;
- c. the nature of information;
- d. the commercial context;
- e. the potential uses/misuses of information;
- f. the “subjective”, contractual, expectation of confidentiality;
- g. the reasons for promoting non-disclosure of information?
- h. the whether the requester’s request could be satisfied by severing the record (s. 10 of the RTI Act) and by providing the requester with as much information as reasonably practicable;
- i. the historical practice of the institution respecting the release of similar types of records (the RTI Act is not intended to limit disclosure of information that was available to the public before it came into force);
- j. the age of the record;
- k. the public interest in disclosing the record.

In Canada, exceptions to the third party exemption can also be found in subsection 20(2), (3) and (4) [environmental testing]; 20(5) [consent for disclosure]; and, 20(6) [public interest override]. The latter exemption has rarely, if ever, been utilized and is not easy to apply since it bestows the discretion on heads of government institutions to disclose third party information, which otherwise must be exempt, on a mandatory basis by invoking a public interest “override” (Treasury Board of Canada, 2002). In another research report prepared for the Access to Information Review Task Force, Rankin and Chapman write that “experience shows that the public interest override has been applied sparingly, even in jurisdictions like British Columbia, where the override provision is broad and applies to all exemptions.” (Rankin & Chapman, 2001) The Task Force opined that a general public interest override is unnecessary because “[D]iscretionary exemptions already imply a balancing of the public

interest in protecting the information, and the public interest in disclosure, and the mandatory exemptions, for third party and personal information already include specific overrides.” (Government of Canada, 2002, p43).

D. What are the procedural time limits?

It seems that this issue is really just another oversight, or legislative ‘typo’. As previously identified, the time limits are very short and some provisions lack clarity. First reading of the Act seems to indicate a notification will be required each time a CPI Officer intends to disclose information (including personal information)¹¹ or records which relates to or has been supplied by a third party. While it is reasonable to require notice where a third party’s personal information is involved, it is very difficult to imagine how the CPI Officer will locate the documents, identify and notify any third parties, and determine if the information has been treated confidentially by the third party, within five days of the receipt of the request. Hence the need for guidelines. A possible solution could have the Rules state that to be considered to ‘have been treated in a confidential manner’, a third party that provides information to a public authority must notify the public authority at the initial time of communication, that the information is treated as confidential and that without such notice, the information will not be treated as confidential. The rules could also provide that if the information is personal, or is a trade secret, it should be deemed information treated in a confidential manner by the third party.

1. When can a requester file a complaint?

Under section 7, a response must be given to the requester within 30 days of receipt of the request, but section 11 provides that, if a third party is notified, a decision must be made within 40 days. How, then, will a requester be aware of the third party consultation if s/he receives no notice? A notice for time extension could be sent, or made via telephone, to the requester indicating that the process may now take up to 40 days. If a decision is not received within that time, an appeal may be filed.

2. How much time should an appeal take?

In its current version the RTI Act subsection 19(6) refers to 19(1) and 19(2). There is reference to a 30-day time limit to dispose of the first appeal found in subsection 19(1) but

¹¹ The definition of “information” at paragraph 2(f) is very wide.

no limit for the second appeal found in subsection 19(3). This may be an oversight: subsection 19(6) should have referred to subsection 19(1) and 19(3). This oversight could be amended as follows, 19(6) should read:

“An appeal under sub-section (1) or sub-section (2), or a second appeal under sub-section (3), shall be disposed within thirty days of the receipt of the appeal, or second appeal, or...”

Conclusion

With the RTI Act, India took a big step towards acquiring more transparency and accountability from its government, but this step does not guarantee any inherent ‘culture of secrecy’ has or will disappear. The Act is not without imperfections, nor without remedies. A culture of openness must be nurtured and encouraged by ministers and management. Awareness of the issues and the development of rules, policies and guidelines are most important and in this vein, the following advice to ‘commercial’ third parties and to public authorities is offered.

Third parties should clearly mark commercially sensitive documents, including current contact information, to help the CPI Officer processing a request, thereby ensuring that notification will be sent. A third party should attach a covering letter to the CPI Officer, mentioning that the documents contain section 8(1)(d) information and that if the CPI Officer intends to disclose such information a notice is required (Drapau & Racicot, 2005, pp5-84). Finally, the person who will be responsible for receiving and responding to the notice must be identified, as the time allotted for the response is only 10 days. When responding to a notice, third parties should make written representations, which evidence may prove useful during the ‘review/appeal’ process. Some specific initiatives proposed by Colin McNairn and Christopher are:

- 1) Following information management procedures that evidence a consistent practice of treating the particular kind of information as confidential;
- 2) Asserting confidentiality for the information when submitting it to a government institution;
- 3) At the same stage, noting the potential for harm, should the information be disclosed. (McNairn & Woodbury, 1992, pp4-15)

Third parties should be informed that any information provided by them is subject to the RTI Act and may ‘potentially’ be released if an access request is made. Public authorities should prepare frequently asked questions (FAQ’s) for the third party. As previously mentioned, it is

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India’s Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.

paramount that administrators in every level of government remember that public and private education is the key to lasting success in implementing FOI legislation.

References

*Marc-Aurèle Racicot is Assistant Adjunct Professor and Information Access and Protection of Privacy (IAPP) Certificate Program Manager at the University of Alberta. He would like to thank Professor Wayne Renke for his guidance and all my friends at Commonwealth Human Rights Initiative (CHRI) for their invaluable comments on earlier versions of this paper.

Access to Information Act (R.S.C. 1985, c. A-1)

(Alberta) Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 as amended, para. 30(1)(b); (Ontario) Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F-31 as amended, section 28.

Bhushan, P (2002) India Approves Freedom of Information Law: The Freedom of Information Bill 2002, National Campaign Committee for the People's Right to Information, December 2002. Available at: www.freedominfo.org/news/india/

Central Information Commission (Appeal Procedure) Rules, 2005 [dated October 28th, 2005: to be published in the Gazette of India, Part II, section 3, subsection (i)] Available online at: www.righttoinformation.gov.in

Canadian Pacific Hotels Corp. v. Canada (Attorney General), 2004 FC 444 at paras. 36-37, in Drapeau and Racicot, p. 1-311; Canada Post Corp. v. Canada (National Capital Commission), 2002 FCT 700 at para. 14, Drapeau and Racicot, p. 1-311.

Canada Post Corp. v. Canada (National Capital Commission), 2002 FCT 700 at para. 14; M.W. Drapeau and M.-A. Racicot, *Federal Access to Information and Privacy Legislation Annotated 2006*, (Toronto: Thomson-Carswell, 2005), p. 1-311.

Canada Post Corp. v. Canada (Minister of Public Works), [1993] 3 F.C. 320 at 328, in which the court found that CPC was a third party because it was neither the person that made the request nor a government institution.

Daruwala, M (2005) Letter from the Director, Commonwealth Human Rights Initiative, addressed to Shri A N Tiwari, Secretary for Personnel, Ministry of Personnel, Shri T K Vishwanathan, Secretary for Legislation, Legislative Department, Ministry of Law and Justice, Shri T Jacob, Joint Secretary, Department of Personnel and Training. New Delhi, August 9, 2005.

Drapeau, M and Racicot, M (2005) Federal Access to Information and Privacy Legislation Annotated 2006. Toronto. Thomson-Carswell, pp. 5-84.

Freedom of Information Act, 2002, No. 5 of 2003, The Gazette of India, Registered No. DL-33004/2003.

Government of Canada (2005a) Commission of Inquiry into the Sponsorship Program and Advertising Activities, Who is Responsible? Summary, Report 1, November 2005, p. 5 Available online at: www.gomery.ca/en/phase1report/summary/es_full_v01.pdf

Government of Canada (2005b) Commission of Inquiry into the Sponsorship Program and Advertising Activities, Restoring Accountability – Recommendations, Report 2, February 2006, p. 179 Available online at: www.gomery.ca/en/phase2report/recommendations/CISPAAR_Report_Chapter10.pdf

Government of Canada (2002) Access to Information Review Task Force, Access to Information: Making it Work for Canadians, Report, June 2002 at p. 43 Available online at: www.atirtf-geai.gc.ca

Halifax Development Ltd. v. Canada (Minister of Public Works & Government Services), [1994] F.C.J. No. 2035 (QL)(Fed. T.D.), in Drapeau and Racicot, p. 1-301; Perez Bramalea Ltd. v. Canada (National Capital Commission), [1995] F.C.J. No. 63 (QL)(Fed.T.D.), in Drapeau and Racicot, p. 1-307.

High-Rise Inc. v. Canada (Minister of Public Works & Government Services) (2004) FCA 99 at paras. 40-43.

Joshi, A, Freedom of Information in India, paper presented in Conference on Freedom of Information and Civil Society in Asia, April 2001. Available at: www.foi-asia.org/India/Confreport_India.html

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.

Barbara McIsaac (2001) The Nature and Structure of Exempting Provisions and the Use of the Concept of a Public Interest Override, Report 17, Access to Information Review Task Force, Available online at: www.atirtf-geai.gc.ca/paper-nature1-e.html

McMahon, K (2006) Procurement issues go primetime: Public institutions need to build public confidence, Law Times, Vol. 17, No. 4, January 30, 2006, p.1.

McNairn, C and. Woodbury, C (1992) Government Information: Access and Privacy, (Toronto: Thomson-Carswell), pp. 4-15.

Pearson, J (1994) Access to Confidential Business Information in Government Files, in Yves-Marie Morissette, Wade MacLauchlan and Monique Ouellette, Open Justice / La transparence dans le système judiciaire, Canadian Institute for the Administration of Justice, (Montréal : Les Éditions Thémis, 1994) p. 275.

Rankin, M & Chapman, K (2001) Third Party Provisions, Research Report 19. Available online at: www.atirtf-geai.gc.ca/paper-thirdparty1-e.html

Right To Information Act, 2005, No. 22 of 2005, The Gazette of India, Registered N. DL-(N)04/0007/2003-05 (hereinafter the "RTI Act"), section 31.

Rubin v. Canada (Minister of Health), 2003 FCA 37 at paras. 8-9, in which the court of appeal found that nothing in the ATIA indicate that a foreign government cannot be a third party.

Slough, P and Rodrigues, C (2005) India's Right to Information Movement Makes A Breakthrough. Open Government: a journal on Freedom of Information. Volume 1 Issue 1 Published 21 March 2005 at p. 3. Available at www.opengovjournal.org

Société Gamma Inc. v. Canada (Department of Secretary of State), [1994] F.C.J. No. 589 (QL) (Fed.T.D.) at para. 8

Treasury Board of Canada (2002) Access to Information: Policies and Guidelines, Chapter 2-8 Available online at: www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_121/siglist_e.asp

Racicot, M (2006) Third Party Exemption: Discussion of the Issues and Suggestions for the Implementation of the India's Right to Information Act 2005 in Light of the Canadian Experience. Open Government: a journal on Freedom of Information. Volume 2 Issue 2. Published on 11 December 2006.