REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10044 OF 2010

CENTRAL PUBLIC INFORMATION OFFICER,
SUPREME COURT OF INDIA ….. APPELLANT(S)

VERSUS

SUBHASH CHANDRA AGARWAL ….. RESPONDENT(S)

W I T H

CIVIL APPEAL NO. 10045 OF 2010

A N D

CIVIL APPEAL NO. 2683 OF 2010

J U D G M E N T

SANJIV KHANNA, J.

This judgment would decide the afore-captioned appeals preferred by the Central Public Information Officer ('CPIO' for short), Supreme Court of India (appellant in Civil Appeal Nos. 10044 and 10045 of 2010), and Secretary General, Supreme Court of India (appellant in Civil Appeal No. 2683 of 2010), against the common respondent – Subhash Chandra Agarwal, and seeks

to answer the question as to *'how transparent is transparent enough'*[1] under the Right to Information Act, 2005 ('RTI Act' for short) in the context of collegium system for appointment and elevation of judges to the Supreme Court and the High Courts; declaration of assets by judges, etc.

2. Civil Appeal No. 10045 of 2010 titled ***Central Public Information Officer, Supreme Court of India*** v. ***Subhash Chandra Agarwal*** arises from an application moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India on 6th July, 2009 to furnish a copy of the complete correspondence with the then Chief Justice of India as the Times of India had reported that a Union Minister had approached, through a lawyer, Mr. Justice R. Reghupathi of the High Court of Madras to influence his judicial decisions. The information was denied by the CPIO, Supreme Court of India on the ground that the information sought by the applicant-respondent was not handled and dealt with by the Registry of the Supreme Court of India and the information relating thereto was neither maintained nor available with the Registry. First appeal filed by Subhash Chandra Aggarwal was

[1] Heading of an article written by Alberto Alemanno: "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection" reproduced in Michal Bobek (ed.) Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts (Oxford University Press 2015).

dismissed by the appellate authority vide order dated 05th September, 2009. On further appeal, the Central Information Commission ('CIC' for short) vide order dated 24th November, 2009 has directed disclosure of information observing that disclosure would not infringe upon the constitutional status of the judges. Aggrieved, the CPIO, Supreme Court of India has preferred this appeal.

3. Civil Appeal No. 10044 of 2010 arises from an application dated 23rd January, 2009 moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India to furnish a copy of complete file/papers as available with the Supreme Court of India inclusive of copies of complete correspondence exchanged between the concerned constitutional authorities with file notings relating to the appointment of Mr. Justice H.L. Dattu**,** Mr. Justice A.K. Ganguly and Mr. Justice R.M. Lodha superseding seniority of Mr. Justice A. P. Shah, Mr. Justice A.K. Patnaik and Mr. Justice V.K. Gupta, which was allegedly objected to by the Prime Minister. The CPIO vide order dated 25th February, 2009 had denied this information observing that the Registry did not deal with the matters pertaining to the appointment of the judges to the Supreme Court of India. Appointment of judges to the Supreme Court and the High Courts are made by the President of India as per the procedure

prescribed by law and the matters relating thereto were not dealt with and handled by the Registry of the Supreme Court. The information was neither maintained nor available with the Registry. First appeal preferred by Subhash Chandra Agarwal was rejected vide order dated 25th March, 2009 by the appellate authority. On further appeal, the CIC has accepted the appeal and directed furnishing of information by relying on the judgment dated 02nd September, 2009 of the Delhi High Court in Writ Petition (Civil) No. 288 of 2009 titled ***Central Public Information Officer, Supreme Court of India*** v. ***Subhash Chandra Agarwal & Another***. The CIC has also relied on the decision of this Court in ***S.P. Gupta*** v. ***Union of India & Others***[2] to reach its conclusion. Aggrieved, the CPIO, Supreme Court of India has preferred the present appeal stating, inter alia, that the judgment in Writ Petition (Civil) No. 288 of 2009 was upheld by the Full Bench of the Delhi High Court in LPA No. 501 of 2009 vide judgment dated 12th January, 2010, which judgment is the subject matter of appeal before this Court in Civil Appeal No.2683 of 2010.

4. Civil Appeal No. 2683 of 2010 arises from an application dated 10th November, 2007 moved by Subhash Chandra Agarwal

[2] (1981) Supp SCC 87

seeking information on declaration of assets made by the judges to the Chief Justices in the States, which application was dismissed by the CPIO, Supreme Court of India vide order/letter dated 30th November, 2007 stating that information relating to declaration of assets of the judges of the Supreme Court of India and the High Courts was not held by or was not under control of the Registry of the Supreme Court of India. On the first appeal, the appellate authority had passed an order of remit directing the CPIO, Supreme Court of India to follow the procedure under Section 6(3) of the RTI Act and to inform Subhash Chandra Agarwal about the authority holding such information as was sought. The CPIO had thereafter vide order dated 07th February, 2008 held that the applicant should approach the CPIO of the High Courts and filing of the application before the CPIO of the Supreme Court was against the spirit of Section 6(3) of the RTI Act. Thereupon, Subhash Chandra Agarwal had directly preferred an appeal before the CIC, without filing the first appeal, which appeal was allowed vide order dated 06th January, 2009 directing:

> "… in view of what has been observed above, the CPIO of the Supreme Court is directed to provide the information asked for by the appellant in his RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble Judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice."

5. Aggrieved, the CPIO, Supreme Court of India had filed Writ Petition (Civil) No. 288 of 2009 before the Delhi High Court, which was decided by the learned Single Judge vide judgment dated 02nd September, 2009, and the findings were summarised as:

> "84. […]
> Re Point Nos. 1 & 2 *Whether the CJI is a public authority and whether the CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;*
>
> *Answer*: The CJI is a public authority under the Right to Information Act and the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is a "public authority" under the Act and is covered by its provisions.
>
> Re Point No. 3: *Whether asset declaration by Supreme Court Judges, pursuant to the 1997 Resolution are "information", under the Right to Information Act, 2005.*
>
> *Answer*: It is held that the second part of the respondent's application, relating to declaration of assets by the Supreme Court Judges, is "information" within the meaning of the expression, under Section 2 (f) of the Act. The point is answered accordingly; the information pertaining to declarations given, to the CJI and the contents of such declaration are "information" and subject to the provisions of the Right to Information Act.
>
> Re Point No. 4: *If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act*
>
> *Answer*: The petitioners' argument about the CJI holding asset declarations in a fiduciary capacity, (which would be breached if it is directed to be disclosed, in the manner sought by the applicant) is insubstantial. The CJI does not hold such declarations in a fiduciary capacity or relationship.

Re Point No. 5: *Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act.*

Answer: It is held that the contents of asset declarations, pursuant to the 1997 resolution—and the 1999 Conference resolution—are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); they are not otherwise subject to disclosure. As far as the information sought by the applicant in this case is concerned, (i.e. whether the declarations were made pursuant to the 1997 resolution) the procedure under Section 8(1)(j) is inapplicable.

Re Point No. (6): *Whether the lack of clarity about the details of asset declaration and about their details, as well as lack of security renders asset declarations and their disclosure, unworkable.*

Answer: These are not insurmountable obstacles; the CJI, if he deems it appropriate, may in consultation with the Supreme Court Judges, evolve uniform standards, devising the nature of information, relevant formats, and if required, the periodicity of the declarations to be made. The forms evolved, as well as the procedures followed in the United States—including the redaction norms—under the Ethics in Government Act, 1978, reports of the US Judicial Conference, as well as the Judicial Disclosure Responsibility Act, 2007, which amends the Ethics in Government Act of 1978 to: (1) restrict disclosure of personal information about family members of Judges whose revelation might endanger them; and (2) extend the authority of the Judicial Conference to redact certain personal information of judges from financial disclosure reports may be considered."

6. On further appeal by the CPIO, Supreme Court of India, LPA No. 501 of 2009 was referred to the Full Bench, which has vide its decision dated 12th January, 2010 dismissed the appeal. This

judgment records that the parties were ad-idem with regard to point Nos. 1 and 2 as the CPIO, Supreme Court of India had fairly conceded and accepted the conclusions arrived at by the learned Single Judge and, thus, need not be disturbed. Nevertheless, the Full Bench had felt it appropriate to observe that they were in full agreement with the reasoning given by the learned Single Judge. The expression 'public authority' as used in the RTI Act is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for the Chief Justice of India. While the Chief Justice of India is designated as one of the competent authorities under Section 2(e) of the RTI Act, the Chief Justice of India besides discharging his role as 'head of the judiciary' also performs a multitude of tasks assigned to him under the Constitution and various other enactments. In the absence of any indication that the office of the Chief Justice of India is a separate establishment with its own CPIO, it cannot be canvassed that "the office of the CPIO of the Supreme Court is different from the office of the CJI" (that is, the Chief Justice of India). Further, neither side had made any submissions on the issue of 'unworkability' on account of 'lack of clarity' or 'lack of security' vis-à-vis asset declarations by the judges. The Full

Bench had, thereafter, re-casted the remaining three questions as under:

> "(1) Whether the respondent had any "right to information" under Section 2(j) of the Act in respect of the information regarding making of declarations by the Judges of the Supreme Court pursuant to 1997 Resolution?
>
> (2) If the answer to question (1) above is in affirmative, whether CJI held the "information" in his "fiduciary" capacity, within the meaning of the expression used in Section 8(1)(e) of the Act?
>
> (3) Whether the information about the declaration of assets by the Judges of the Supreme Court is exempt from disclosure under the provisions of Section 8(1)(j) of the Act?"

The above questions were answered in favour of the respondent-Subhash Chandra Aggarwal as the Full Bench has held that the respondent had the right to information under Section 2(j) of the RTI Act with regard to the information in the form of declarations of assets made pursuant to the 1997 Resolution. The Chief Justice did not hold such declarations in a fiduciary capacity or relationship and, therefore, the information was not exempt under Section 8(1)(e) of the RTI Act. Addressing the third question, the Bench had observed:

> "116. In the present case the particulars sought for by the respondent do not justify or warrant protection under Section 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8(1)(j).

> We concur with the view of the learned single Judge that the contents of asset declarations, pursuant to the 1997 Resolution, are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); that they are not otherwise subject to disclosure. Therefore, as regards contents of the declarations, information applicants would have to, whenever they approach the authorities, under the Act satisfy them under Section 8(1)(j) that such disclosure is warranted in "larger public interest."

7. The afore-captioned three appeals were tagged to be heard and decided together vide order dated 26th November, 2010, the operative portion of which reads as under:

> "12. Having heard the learned Attorney General and the learned counsel for the respondent, we are of the considered opinion that a substantial question of law as to the interpretation of the Constitution is involved in the present case which is required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced."

8. This order while referring the matter to a larger bench had framed the following substantial questions of law as to the interpretation of the Constitution, which read as under:

> "1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the Judiciary?
>
> 2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?
>
> 3. Whether the information sought for is exempt under Section 8(1)(j) of the Right to Information Act?"

9. We have heard Mr. K.K. Venugopal, Attorney General of India, Mr. Tushar Mehta, Solicitor General of India on behalf of the Supreme Court of India and Mr. Prashant Bhushan**,** learned advocate for Subhash Chandra Agarwal. The appellants have contended that disclosure of the information sought would impede the independence of judges as it fails to recognise the unique position of the judiciary within the framework of the Constitution which necessitates that the judges ought not to be subjected to 'litigative public debate' and such insulation is constitutional, deliberate and essential to the effective functioning of the institution. Right to information is not an unfettered constitutional right, *albeit* a right

available within the framework of the RTI Act, which means that the right is subject, among other conditions, to the exclusions, restrictions and conditions listed in the Second Schedule and in Sections 8 to 11 of the RTI Act. In support, the appellants have relied upon ***Re Coe's Estate Ebert et al*** v. ***State et. al***[3], ***Bhudan Singh and Another*** v. ***Nabi Bux and Another***[4], ***Kailash Rai*** v. ***Jai Ram***[5] and ***Dollfus Mieg et Compagnie S.A.*** v. ***Bank of England***[6]. Information sought when exempt under Section 8 of the RTI Act cannot be disclosed. Information on assets relates to personal information, the disclosure of which has no bearing on any public activity or interest and is, therefore, exempt under Section 8(1)(j) of the RTI Act. Similarly, information of prospective candidates who are considered for judicial appointments and/or elevation relates to their personal information, the disclosure of which would cause unwarranted invasion of an individual's privacy and serves no larger public interest. Further, the information on assets is voluntarily declared by the judges to the Chief Justice of India in his fiduciary capacity as the *pater familias* of the judiciary. Consultations and correspondence between the office of the Chief Justice of India and other constitutional functionaries are made on

[3] 33 Cal.2d 502
[4] 1969 (2) SCC 481
[5] 1973 (1) SCC 527
[6] (1950) 2 All E.R. 611

the basis of trust and confidence which ascribes the attributes of a fiduciary to the office of the Chief Justice. Information relating to the appointment of judges is shared among other constitutional functionaries in their fiduciary capacities, which makes the information exempt under Section 8(1)(e) of the RTI Act. The respondent, on the other hand, has by relying on the dicta in ***State of U.P.*** v. ***Raj Narain and Others***[7] and ***S. P. Gupta*** (supra) argued that disclosure of the information sought does not undermine the independence of the judiciary. Openness and transparency in functioning would better secure the independence of the judiciary by placing any attempt made to influence or compromise the independence of the judiciary in the public domain. Further, the citizens have a legitimate and constitutional right to seek information about the details of any such attempt. Thus, disclosure, and not secrecy, enhances the independence of the judiciary. No legitimate concerns exist which may inhibit consultees from freely expressing themselves or which might expose candidates to spurious allegations by disclosing the consultative process for appointing judges. Given the nature of the information sought, disclosure of the information will serve the larger public interest and, therefore, such interest outweighs the

[7] (1975) 4 SCC 428

privilege of exemption granted to personal information under Section 8(1)(j) of the RTI Act. If any personal information is involved, the same could be dealt with on a case-by-case basis by disclosing the information that serves public interest after severing the records as per Section 10 of the RTI Act. There is no fiduciary relationship between the Chief Justice and the judges or among the constitutional functionaries as envisaged under Section 8(1)(e) of the RTI Act which could be a ground for holding back the information. Reliance was placed on the decisions of this Court in ***Central Board of Secondary Education and Another*** v. ***Aditya Bandopadhyay and Others***[8] and ***Reserve Bank of India*** v. ***Jayantilal N. Mistry***[9], to contend that the duty of a public servant is not to act for the benefit of another public servant, that is, the Chief Justice and other functionaries are meant to discharge their constitutional duties and not act as a fiduciary of anyone, except the people. In arguendo, even if there exists a fiduciary relationship among the functionaries, disclosure can be made if it serves the larger public interest. Additionally, candour and confidentiality are not heads of exemption under the RTI Act and, therefore, cannot be invoked as exemptions in this case.

[8] (2011) 8 SCC 497
[9] (2016) 3 SCC 525

10. For clarity and convenience, we would deal with the issues point-wise, *albeit* would observe that Point no. 1 (referred to as point Nos.1 and 2 in the judgment in LPA No. 501 of 2009 dated 12th January, 2010) was not contested before the Full Bench but as some clarification is required, it has been dealt below.

POINT NO. 1: WHETHER THE SUPREME COURT OF INDIA AND THE CHIEF JUSTICE OF INDIA ARE TWO SEPARATE PUBLIC AUTHORITIES?

11. Terms 'competent authority' and 'public authority' have been specifically defined in clauses (e) and (h) to Section 2 of the RTI Act, which read:

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

> (h) "public authority" means any authority or body or institution of self-government established or constituted—
>
> (a) by or under the Constitution;
> (b) by any other law made by Parliament;
> (c) by any other law made by State Legislature;
> (d) by notification issued or order made by the appropriate Government, and includes any—
> (i) body owned, controlled or substantially financed;
> (ii) non-Government organisation substantially financed,
> directly or indirectly by funds provided by the appropriate Government;"

12. Term 'public authority' under Section 2(h) of the RTI Act includes any authority or body or an institution of self-government established by the Constitution or under the Constitution. Interpreting the expression 'public authority' in ***Thalappalam Service Cooperative Bank Limited and Others*** v. ***State of Kerala and Others***[10], this Court had observed:

> "30. The legislature, in its wisdom, while defining the expression "public authority" under Section 2(h), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(h) has used the expressions "means" and "includes". When a word is defined to "mean" something, the definition is prima facie restrictive and where the word is defined to "include" some other thing, the definition is prima facie extensive. But when both the expressions "means" and "includes" are used, the categories mentioned there

[10] (2013) 16 SCC 82

> would exhaust themselves. The meanings of the expressions "means" and "includes" have been explained by this Court in *DDA* v. *Bhola Nath Sharma* (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.
>
> 31. Section 2(h) exhausts the categories mentioned therein. The former part of Section 2(h) deals with:
>
> (1) an authority or body or institution of self-government established by or under the Constitution,
> (2) an authority or body or institution of self-government established or constituted by any other law made by Parliament,
> (3) an authority or body or institution of self-government established or constituted by any other law made by the State Legislature, and
> (4) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate Government."

13. Article 124 of the Constitution, which relates to the establishment and constitution of the Supreme Court of India, states that there shall be a Supreme Court of India consisting of a Chief Justice and other judges. It is undebatable that the Supreme Court of India is a 'public authority', as defined vide clause (h) to Section 2 of the RTI Act as it has been established and constituted by or under the Constitution of India. The Chief Justice of India as per sub-clause (ii) in clause (e) to Section 2 is the competent authority in the case of the Supreme Court. Consequently, in terms of Section 28 of the RTI Act, the Chief Justice of India is empowered

to frame rules, which have to be notified in the Official Gazette, to carry out the provisions of the RTI Act.

14. The Supreme Court of India, which is a 'public authority', would necessarily include the office of the Chief Justice of India and the judges in view of Article 124 of the Constitution. The office of the Chief Justice or for that matter the judges is not separate from the Supreme Court, and is part and parcel of the Supreme Court as a body, authority and institution. The Chief Justice and the Supreme Court are not two distinct and separate 'public authorities', *albeit* the latter is a 'public authority' and the Chief Justice and the judges together form and constitute the 'public authority', that is, the Supreme Court of India. The interpretation to Section 2(h) cannot be made in derogation of the Constitution. To hold to the contrary would imply that the Chief Justice of India and the Supreme Court of India are two distinct and separate public authorities, and each would have their CPIOs and in terms of sub-section (3) to Section 6 of the RTI Act an application made to the CPIO of the Supreme Court or the Chief Justice would have to be transferred to the other when 'information' is held or the subject matter is more closely connected with the 'functions' of the other. This would lead to anomalies and difficulties as the institution, authority or body is one. The Chief Justice of India is the head of

the institution and neither he nor his office is a separate public authority.

15. This is equally true and would apply to the High Courts in the country as Article 214 states that there shall be a High Court for each State and Article 216 states that every High Court shall consist of a Chief Justice and such other judges as the President of India may from time to time deem it appropriate to appoint.

POINT NO. 2: INFORMATION AND RIGHT TO INFORMATION UNDER THE RTI ACT

16. Terms 'information', 'record' and 'right to information' have been defined under clauses (f), (i) and (j) to Section 2 of the RTI Act which are reproduced below:

> "(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;
>
> xx xx xx
>
> (i) "record" includes—
>
> (a) any document, manuscript and file;
>
> (b) any microfilm, microfiche and facsimile copy of a document;
>
> (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(d) any other material produced by a computer or any other device;

(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

17. 'Information' as per the definition clause is broad and wide, as it is defined to mean "material in any form" with amplifying words including records (a term again defined in widest terms vide clause (i) to Section 2 of the RTI Act), documents, emails, memos, advices, logbooks, contracts, reports, papers, samples, models, data material held in electronic form, etc. The last portion of the definition clause which states that the term 'information' would include *'information relating to any private body which can be accessed by a public authority under any other law for the time being in force'* has to be read as reference to 'information' not presently available or held by the public authority but which can be accessed by the public authority from a private body under any

other law for the time being in force. The term – 'private body' in the clause has been used to distinguish and is in contradistinction to the term – 'public authority' as defined in Section 2(h) of the RTI Act. It follows that any requirement in the nature of precondition and restrictions prescribed by any other law would continue to apply and are to be satisfied before information can be accessed and asked to be furnished by a private body.

18. What is explicit as well as implicit from the definition of 'information' in clause (f) to Section 2 follows and gets affirmation from the definition of 'right to information' that the information should be accessible by the public authority and 'held by or under the control of any public authority'. The word 'hold' as defined in Wharton's Law Lexicon, 15th Edition, means to have the ownership or use of; keep as one's own, but in the context of the present legislation, we would prefer to adopt a broader definition of the word 'hold' in Black's Law Dictionary, 6th Edition, as meaning; to keep, to retain, to maintain possession of or authority over. The words 'under the control of any public authority' as per their natural meaning would mean the right and power of the public authority to get access to the information. It refers to dominion over the information or the right to any material, document etc. The words 'under the control of any public

authority' would include within their ambit and scope information relating to a private body which can be accessed by a public authority under any other law for the time being in force subject to the pre-imposed conditions and restrictions as applicable to access the information.

19. When information is accessible by a public authority, that is, held or under its control, then the information must be furnished to the information seeker under the RTI Act even if there are conditions or prohibitions under another statute already in force or under the Official Secrets Act, 1923, that restricts or prohibits access to information by the public. In view of the *non-obstante* clause in Section 22[11] of the RTI Act, any prohibition or condition which prevents a citizen from having access to information would not apply. Restriction on the right of citizens is erased. However, when access to information by a public authority itself is prohibited or is accessible subject to conditions, then the prohibition is not obliterated and the pre-conditions are not erased. Section 2(f) read with Section 22 of the RTI Act does not bring any modification or amendment in any other enactment, which bars or

[11] Section 22 of the RTI Act reads:
"22. Act to have overriding effect. -The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

prohibits or imposes pre-condition for accessing information of the private bodies. Rather, clause (f) to Section 2 upholds and accepts the said position when it uses the expression – "which can be accessed", that is the public authority should be in a position and be entitled to ask for the said information. Section 22 of the RTI Act, an overriding provision, does not militate against the interpretation as there is no contradiction or conflict between the provisions of Section 2(f) of the RTI Act and other statutory enactments/law. Section 22 of the RTI Act is a key that unlocks prohibitions/limitations in any prior enactment on the right of a citizen to access information which is accessible by a public authority. It is not a key with the public authority that can be used to undo and erase prohibitions/limitations on the right of the public authority to access information. In other words, a private body will be entitled to the same protection as is available to them under the laws of this country.

20. Full Bench of the Delhi High Court in its judgment dated 12th January 2010 in LPA No. 501 of 2009 had rightly on the interpretation of word 'held', referred to Philip Coppel's work *'Information Rights'* (2nd Edition, Thomson, Sweet & Maxwell

2007)[12] interpreting the provisions of the Freedom of Information Act, 2000 (United Kingdom) in which it has been observed:

> "**When information is "held" by a public authority**
>
> For the purposes of the Freedom of Information Act 2000, information is "held" by a public authority if it is held by the authority otherwise than on behalf of another person, or if it is held by another person on behalf of the authority. The Act has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person. Putting to one side the effects of s.3(2) (see para.9-009 below), the word "held" suggests a relationship between a public authority and the information akin to that of ownership or bailment of goods.
>
> Information:
> - that is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it;
>
> - that is accidentally left with a public authority;
>
> - that just passes through a public authority; or
>
> - that "belongs" to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises,
>
> will, it is suggested, lack the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before it can be said that the public authority can be said to "hold" the information. …"

Thereafter, the Full Bench had observed:

> "59. Therefore, according to Coppel the word "held" suggests a relationship between a public authority and

[12] Also, see Philip Coppel, *'Information Rights'* (4th Edition, Hart Publishing 2014) P. 361-62

> the information akin to that of an ownership or bailment of goods. In the law of bailment, a slight assumption of control of the chattel so deposited will render the recipient a depository (see Newman v. Bourne and Hollingsworth (1915) 31 T.L.R. 209). Where, therefore, information has been created, sought, used or consciously retained by a public authority will be information held within the meaning of the Act. However, if the information is sent to or deposited with the public authority which does not hold itself out as willing to receive it and which does not subsequently use it or where it is accidentally left with a public authority or just passes through a public authority or where it belongs to an employee or officer of a public authority but which is brought by that employee or officer unto the public authority's premises it will not be information held by the public authority for the lack of the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before the public authority can be said to hold the information… ."

Therefore, the word "hold" is not purely a physical concept but refers to the appropriate connection between the information and the authority so that it can properly be said that the information is held by the public authority.[13]

21. In ***Khanapuram Gandaiah*** v. ***Administrative Officer and Others***[14], this Court on examining the definition clause 2(f) of the RTI Act had held as under:

> "10. […] This definition shows that an applicant under Section 6 of the RTI Act can get any information which

[13] *New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection*, [2011] UKUT 185 AAC
[14] (2010) 2 SCC 1

> is already in existence and accessible to the public authority under law. ...
>
> xx xx xx
>
> 12. […] the Public Information Officer is not supposed to have any material which is not before him; or any information he could (*sic* not) have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force. …"

The aforesaid observation emphasises on the mandatory requirement of accessibility of information by the public authority under any other law for the time being in force. This aspect was again highlighted by another Division Bench in ***Aditya Bandopadhyay*** (supra), wherein information was divided into three categories in the following words:

> "59. The effect of the provisions and scheme of the RTI Act is to divide "information" into three categories. They are:
>
> (*i*) Information which promotes *transparency and accountability* in the working of every public authority, disclosure of which may also help in containing or discouraging corruption [enumerated in clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].
>
> (*ii*) Other information held by public authority [that is, all information other than those falling under clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].
>
> (*iii*) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force.

> Information under the third category does not fall within the scope of the RTI Act. Section 3 of the RTI Act gives every citizen, the right to "information" held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon the public authorities to suo motu *publish and disseminate such information* so that they will be easily and readily accessible to the public without any need to access them by having recourse to Section 6 of the RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category."

The first category refers to the information specified in clause (b) to sub-section (1) to Section 4 which consists of as many as seventeen sub-clauses on diverse subjects stated therein. It also refers to clause (c) to sub-section (1) to Section 4 by which public authority is required to publish all relevant facts while formulating important public policies or pronouncing its decision which affects the public. The rationale behind these clauses is to disseminate most of the information which is in the public interest and promote openness and transparency in government.

22. The expressions 'held by or under the control of any public authority' and 'information accessible under this Act' are restrictive[15] and reflect the limits to the 'right to information'

[15] See '*Central Board of Secondary Education* v. *Aditya Bandopadhyay'* (2011) 8 SCC 497

conferred vide Section 3 of the RTI Act, which states that subject to the provisions of the RTI Act, all citizens shall have the right to information. The right to information is not absolute and is subject to the conditions and exemptions under the RTI Act.

23. This aspect was again highlighted when the terms 'information' and 'right to information' were interpreted in ***Thalappalam Service Cooperative Bank Limited*** (supra) with the following elucidation:

> "63. Section 8 begins with a non obstante clause, which gives that section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (*a*) to (*j*). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(*j*) of the RTI Act. Right to be left alone, as propounded in *Olmstead* v. *United States* is the most comprehensive of the rights and most valued by civilised man.
>
> xx xx xx
>
> 67. The Registrar of Cooperative Societies functioning under the Cooperative Societies Act is a "public authority" within the meaning of Section 2(h) of the Act. As a public authority, the Registrar of Cooperative Societies has been conferred with lot of statutory powers under the respective Act under which he is

functioning. He is also duty-bound to comply with the obligations under the RTI Act and furnish information to a citizen under the RTI Act. Information which he is expected to provide is the information enumerated in Section 2(f) of the RTI Act subject to the limitations provided under Section 8 of the Act. The Registrar can also, to the extent law permits, gather information from a Society, on which he has supervisory or administrative control under the Cooperative Societies Act. Consequently, apart from the information as is available to him, under Section 2(f), he can also gather those information from the society, to the extent permitted by law. The Registrar is also not obliged to disclose those information if those information fall under Section 8(1)(j) of the Act. No provision has been brought to our knowledge indicating that, under the Cooperative Societies Act, a Registrar can call for the details of the bank accounts maintained by the citizens or members in a cooperative bank. Only those information which a Registrar of Cooperative Societies can have access under the Cooperative Societies Act from a society could be said to be the information which is "held" or "under the control of public authority". Even those information, the Registrar, as already indicated, is not legally obliged to provide if those information falls under the exempted category mentioned in Section 8(j) of the Act. Apart from the Registrar of Co-operative Societies, there may be other public authorities who can access information from a co-operative bank of a private account maintained by a member of society under law, in the event of which, in a given situation, the society will have to part with that information. But the demand should have statutory backing.

68. Consequently, if an information which has been sought for relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual, the Registrar of Cooperative Societies, even if he has got that information, is not bound to furnish the same to an applicant, unless he is satisfied that the larger public

> interest justifies the disclosure of such information, that too, for reasons to be recorded in writing."

Thus, the scope of the expressions 'information' and 'right to information' which can be accessed by a citizen under the RTI Act have to be understood in light of the above discussion.

POINT NO. 3: SECTIONS 8, 9, 10 AND 11 OF THE RTI ACT

24. To ensure transparency and accountability and to make Indian democracy more participatory, the RTI Act sets out a practical and pragmatic regime to enable citizens to secure greater access to information available with public authorities by balancing diverse interests including efficient governance, optimum use of limited fiscal operations and preservation of confidentiality of sensitive information. The preamble to the RTI Act appropriately summarises the object of harmonising various conflicts in the following words:

> " xx xx xx
>
> AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;
>
> AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

> AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;
>
> xx xx xx"

25. An attempt to resolve conflict and disharmony between these aspects is evident in the exceptions and conditions on access to information set out in Sections 8 to 11 of the RTI Act. At the outset, we would reproduce Section 8 of the RTI Act, which reads as under:

> "8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
>
> (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
>
> (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
>
> (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
>
> (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

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

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

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

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

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

> disclosure outweighs the harm to the protected interests.
>
> (3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:
>
> Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

Sub-section (1) of Section 8 begins with a *non-obstante* clause giving primacy and overriding legal effect to different clauses under the sub-section in case of any conflict with other provisions of the RTI Act. Section 8(1) without modifying or amending the term 'information', carves out exceptions when access to 'information', as defined in Section 2(f) of the RTI Act would be denied. Consequently, the right to information is available when information is accessible under the RTI Act, that is, when the exceptions listed in Section 8(1) of the RTI Act are not attracted. In terms of Section 3 of the RTI Act, all citizens have right to information, subject to the provisions of the RTI Act, that is, information 'held by or under the control of any public authority', except when such information is exempt or excluded.

26. Clauses in sub-section (1) to Section 8 can be divided into two categories: clauses (a), (b), (c), (f), (g), (h) and (i), and clauses (d), (e) and (j). The latter clauses state that the prohibition specified would not apply or operate when the competent authority in clauses (d) and (e) and the PIO in clause (j) is satisfied that larger public interest warrants disclosure of such information.[16] Therefore, clauses (d), (e) and (j) of Section 8(1) of the RTI Act incorporate qualified prohibitions and are conditional and not absolute exemptions. Clauses (a), (b), (c), (f), (g), (h) and (i) do not have any such stipulation. Prohibitory stipulations in these clauses do not permit disclosure of information on satisfaction of the larger public interest rule. These clauses, therefore, incorporate absolute exclusions.

27. Sub-section (2) to Section 8 states that notwithstanding anything contained in the Official Secrets Act, 1923 or any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests. The disclosure under Section 8(2) by the public authority

[16] For the purpose of the present decision, we do not consider it appropriate to decide who would be the 'competent authority' in the case of other public authorities, if sub-clauses (i) to (v) to clause (e) of Section 2 are inapplicable. This 'anomaly' or question is not required to be decided in the present case as the Chief Justice of India is a competent authority in the case of the Supreme Court of India.

is not a mandate or compulsion but is in the form of discretionary disclosure. Section 8(2) acknowledges and empowers the public authority to lawfully disclose information held by them despite the exemptions under sub-section (1) to Section 8 if the public authority is of the opinion that the larger public interest warrants disclosure. Such disclosure can be made notwithstanding the provisions of the Official Secrets Act. Section 8(2) does not create a vested or justiciable right that the citizens can enforce by an application before the PIO seeking information under the RTI Act. PIO is under no duty to disclose information covered by exemptions under Section 8(1) of the RTI Act. Once the PIO comes to the conclusion that any of the exemption clauses is applicable, the PIO cannot pass an order directing disclosure under Section 8(2) of the RTI Act as this discretionary power is exclusively vested with the public authority.

28. Section 9 provides that without prejudice to the provisions of Section 8, a request for information may be rejected if such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

29. Section 10 deals with severability of exempted information and sub-section (1) thereof reads as under:

> "10. *Severability.*– (1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

30. Section 11, which deals with third party information, and incorporates conditional exclusion based on breach of confidentiality by applying public interest test, reads as under:

> "11. (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:
>
> Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.
>
> (2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part

> thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.
>
> (3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.
>
> (4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision."

We shall subsequently interpret and expound on Section 11 of the RTI Act.

31. At the present stage, we would like to quote from ***Aditya Bandopadhyay*** (supra) wherein this Court, on the aspect of general principles of interpretation while deciding the conflict between the right to information and exclusions under Section 8 to 11 of the RTI Act, had observed:

> "61. Some High Courts have held that Section 8 of the RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that, therefore, Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and

accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The Preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

62. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act, that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.

63. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of Section 3 and the definitions of “information” and “right to information” under clauses (*f*) and (*j*) of Section 2 of the Act. If a public authority has any information in the

> form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide "advice" or "opinion" to an applicant, nor required to obtain and furnish any "opinion" or "advice" to an applicant. The reference to "opinion" or "advice" in the definition of "information" in Section 2(*f*) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act."

Paragraph 63 quoted above has to be read with our observations on the last portion of clause (f) to Section 2 defining the word 'information', *albeit*, on the observations and findings recorded, we respectfully concur. For the present decision, we are required to primarily examine clauses (e) and (j) of sub-section (1) to Section 8 and Section 11 of the RTI Act.

Point No. 3 (A): Fiduciary Relationship under Section 8(1)(e) of the RTI Act

32. Clause (e) to Section 8(1) of the RTI Act states that information made available to a person in his fiduciary relationship shall not be disclosed unless the competent authority is satisfied that the

larger public interest warrants the disclosure of such information. The expression *'fiduciary relationship'* was examined and explained in ***Aditya Bandopadhyay*** (supra), in the following words:

> "39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.
>
> 40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or

> disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.
>
> 41. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(*e*) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a shareholder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body."

This Court held that the exemption under section 8(1)(e) of the RTI Act does not apply to beneficiaries regarding whom the fiduciary holds information. In other words, information available with the public authority relating to beneficiaries cannot be withheld from or denied to the beneficiaries themselves. A

fiduciary would, ergo, be duty-bound to make thorough disclosure of all relevant facts of all transactions between them in a fiduciary relationship to the beneficiary. In the facts of the said case, this Court had to consider whether an examining body, the Central Board of Secondary Education, held information in the form of evaluated answer-books of the examinees in fiduciary capacity. Answering in the negative, it was nevertheless observed that even if the examining body is in a fiduciary relationship with an examinee, it will be duty-bound to disclose the evaluated answer-books to the examinee and at the same time, they owe a duty to the examinee not to disclose the answer-books to anyone else, that is, any third party. This observation is of significant importance as it recognises that Section 8(1)(j), and as noticed below - Section 11, encapsulates another right, that is the right to protect privacy and confidentiality by barring the furnishing of information to third parties except when the public interest as prescribed so requires. In this way, the RTI Act complements both the right to information and the right to privacy and confidentiality. Further, it moderates and regulates the conflict between the two rights by applying the test of larger public interest or comparative examination of public interest in disclosure of information with possible harm and injury to the protected interests.

33. In ***Reserve Bank of India*** (supra) this Court had expounded upon the expression *'fiduciary relationship'* used in clause (e) to sub-section (1) of Section 8 of the RTI Act by referring to the definition of *'fiduciary relationship'* in the Advanced Law Lexicon, 3rd Edition, 2005, which reads as under:

> "57. [...] *Fiduciary relationship*. — A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the fiduciary relationship. Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer."

Thereafter, the Court had outlined the contours of the fiduciary relationship by listing out the governing principles which read:

> "58. [...] (*i*) *No conflict rule* — A fiduciary must not place himself in a position where his own interest conflicts with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.
>
> (*ii*) *No profit rule* — A fiduciary must not profit from his position at the expense of his customer, the beneficiary.
>
> (*iii*) *Undivided loyalty rule* — A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts

> with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.
>
> (*iv*) *Duty of confidentiality* — A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person."

34. Fiduciary relationships, regardless of whether they are formal, informal, voluntary or involuntary, must satisfy the four conditions for a relationship to classify as a fiduciary relationship. In each of the four principles, the emphasis is on trust, reliance, the fiduciary's superior power or dominant position and corresponding dependence of the beneficiary on the fiduciary which imposes responsibility on the fiduciary to act in good faith and for the benefit of and to protect the beneficiary and not oneself. Section 8(1)(e) is a legal acceptance that there are ethical or moral relationships or duties in relationships that create rights and obligations, beyond contractual, routine or even special relationships with standard and typical rights and obligations. Contractual or non-fiduciary relationships could require that the party should protect and promote the interest of the other and not cause harm or damage, but the fiduciary relationship casts a positive obligation and demands that the fiduciary should protect the beneficiary and not promote personal self-interest. A

fiduciary's loyalty, duties and obligations are stricter than the morals of the market place and it is not honesty alone, but the *punctilio* of an honour which is the most sensitive standard of behaviour which is applied {See – Opinion of Cardozo, J. in ***Meinhard*** v. ***Salmon***[17]}. Thus, the level of judicial scrutiny in cases of fiduciary relationship is intense as the level of commitment and loyalty expected is higher than non-fiduciary relationships. Fiduciary relationship may arise because of the statute which requires a fiduciary to act selflessly with integrity and fidelity and the other party, that is the beneficiary, depends upon the wisdom and confidence reposed in the fiduciary. A contractual, statutory and possibly all relationships cover a broad field, but a fiduciary relationship could exist, confined to a limited area or an act, as relationships can have several facets. Thus, relationships can be partly fiduciary and partly non-fiduciary with the former being confined to a particular act or action which need not manifest itself in entirety in the interaction and relationship between two parties. What would distinguish non-fiduciary relationship from fiduciary relationship or an act is the requirement of trust reposed, higher standard of good faith and honesty required on the part of the fiduciary with reference to a particular transaction(s) due to moral,

[17] (1928) 164 N.E. 545, 546

personal or statutory responsibility of the fiduciary as compared to the beneficiary, resulting in dependence of the beneficiary. This may arise due to superior knowledge and training of the fiduciary or the position he occupies.

35. Ordinarily the relationship between the Chief Justice and judges would not be that of a fiduciary and a beneficiary. However, it is not an absolute rule/code for in certain situations and acts, fiduciary relationship may arise. Whether or not such a relationship arises in a particular situation would have to be dealt with on the tests and parameters enunciated above.

<u>Point No. 3 (B)</u>: Right to Privacy under Section 8(1)(j) and Confidentiality under Section 11 of the RTI Act

36. If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonised with the need for personal privacy, confidentiality of information and effective governance. The RTI Act captures this interplay of the competing rights under clause (j) to Section 8(1) and Section 11. While clause (j) to Section 8(1) refers to personal information as distinct from information relating to public activity or interest and seeks to exempt disclosure of such information, as well as such information which, if disclosed, would cause unwarranted invasion of privacy

of an individual, unless public interest warrants its disclosure, Section 11 exempts the disclosure of 'information or record…which relates to or has been supplied by a third party and has been treated as confidential by that third party'. By differently wording and inditing the challenge that privacy and confidentiality throw to information rights, the RTI Act also recognises the interconnectedness, yet distinctiveness between the breach of confidentiality and invasion of privacy, as the former is broader than the latter, as will be noticed below.

37. Breach of confidentiality has an older conception and was primarily an equitable remedy based on the principle that one party is entitled to enforce equitable duty on the persons bound by an obligation of confidentiality on account of the relationship they share, with actual or constructive knowledge of the confidential relationship. Conventionally a conception of equity, confidentiality also arises in a contract, or by a statute.[18] Contractually, an obligation to keep certain information confidential can be effectuated expressly or implicitly by an oral or written agreement, whereas in statutes certain extant and defined relationships are imposed with the duty to maintain details, communication

[18] See Prince Albert v. Strange, (1849) 1 Mac.&G 25, and Lord Oliver of Aylmerton, Spycatcher: Confidence, Copyright and Contempt, Israel Law Review (1989) 23(4), 407 [as also quoted in Philip Coppel, Information Rights, Law and Practice (4th Edition Hart Publishing 2014)].

exchanged and records confidential. Confidentiality referred to in the phrase 'breach of confidentiality' was initially popularly perceived and interpreted as confidentiality arising out of a pre-existing confidential relationship, as the obligation to keep certain information confidential was on account of the nature of the relationship. The insistence of a pre-existing confidential relationship did not conceive a possibility that a duty to keep information confidential could arise even if a relationship, in which such information is exchanged and held, is not pre-existing. This created a distinction between confidential information obtained through the violation of a confidential relationship and similar confidential information obtained in some other way. With time, courts and jurists, who recognised this anomaly, have diluted the requirement of the existence of a confidential relationship and held that three elements were essential for a case of breach of confidentiality to succeed, namely – (a) information should be of confidential nature; (b) information must be imparted in circumstances importing an obligation of confidentiality; and (c) that there must be unauthorised use of information (See ***Coco v. AN Clark (Engineers) Ltd.***[19]). The "artificial"[20] distinction was emphatically abrogated by the test adopted by Lord Goff of

[19] [1969] RPC 41
[20] Campbell v. Mirror Group Newspapers Limited (2004) UKHL 22

Chieveley in ***Attorney-General*** v. **Guardian *Newspaper Limited (No. 2)***[21], who had observed:

> "a duty of confidence arises when confidential information comes to the knowledge of a person... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

Lord Goff, thus, lifted the limiting constraint of a need for initial confidential relationship stating that a 'duty of confidence' would apply whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Therefore, confidential information must not be something which is a public property and in public knowledge/ public domain as confidentiality necessarily attributes inaccessibility, that is, the information must not be generally accessible, otherwise it cannot be regarded as confidential. However, self-clarification or certification will not be relevant because whether or not the information is confidential has to be determined as a matter of fact. The test to be applied is that of a reasonable person, that is, information must be such that a reasonable person would regard it as confidential. Confidentiality of information also has reference to the quality of information

[21] (1990) 1 AC 109

though it may apply even if the information is false or partly incorrect. However, the information must not be trivial or useless.

38. While previously information that could be considered personal would have been protected only if it were exchanged in a confidential relationship or considered confidential by nature, significant developments in jurisprudence since the 1990's have posited the acceptance of privacy as a separate right and something worthy of protection on its own as opposed to being protected under an actionable claim for breach of confidentiality. A claim to protect privacy is, in a sense, a claim for the preservation of confidentiality of personal information. With progression of the right to privacy, the underlying values of the law that protects personal information came to be seen differently as the courts recognised that unlike law of confidentiality that is based upon duty of good faith, right to privacy focuses on the protection of human autonomy and dignity by granting the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people (See - Sedley LJ in ***Douglas*** v. ***Hello! Ltd***[22]). In ***PJS*** v. ***News Group Newspapers Ltd.***[23], the Supreme Court of the United Kingdom had drawn a

[22] (2001) QB 967
[23] (2016) UKSC 26

distinction between the right to respect private and family life or privacy and claims based upon confidentiality by observing that the law extends greater protection to privacy rights than rights in relation to confidential matters. In the former case, the claim for misuse of private information can survive even when information is in the public domain as its repetitive use itself leads to violation of the said right. The right to privacy gets the benefit of both the quantitative and the qualitative protection. The former refers to the disclosure already made and what is yet undisclosed, whereas the latter refers to the privateness of the material, invasion of which is an illegal intrusion into the right to privacy. Claim for confidentiality would generally fail when the information is in public domain. The law of privacy is, therefore, not solely concerned with the information, but more concerned with the intrusion and violation of private rights. Citing an instance of how publishing of defamatory material can be remedied by a trial establishing the falsity of such material and award of damages, whereas invasion of privacy cannot be similarly redressed, the Court had highlighted the reason why truth or falsity of an allegation or information may be irrelevant when it comes to invasion of privacy. Therefore, claims for protection against invasion of private and family life do not depend upon confidentiality alone. This distinction is important to

understand the protection given to two different rights vide Section 8(1)(j) and 11 of the RTI Act.

39. In ***District Registrar and Collector*** v. ***Canara Bank***[24] this Court had referred to the judgment of the U.S. Supreme Court in ***United States* v. *Miller***[25] on the question of "voluntary" parting with information and under the heading '*Criticism of Miller'* had observed:

> "*48. ...(A) Criticism of Miller*
>
> (i) The majority in Miller laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof. Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'." He observes that the majority in Miller confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for *a secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

[24] (2005) 1 SCC 496
[25] 425 US 435 (1976)

> ‘Yet one can hardly be said to have *assumed a risk* of surveillance in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — *hermit can live* without a *telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.’
>
> He concludes (p. 1400):
>
> ‘In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self.’
>
> (ii) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:
>
> ‘It is beginning to look as if the only way someone living in our society can avoid *‘assuming the risk’* that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*.’… ”

Thereafter, it was noticed that with the enactment of the Right to Financial Privacy Act, 1978 the legal effect of *‘Miller’* was statutorily done away.

40. The right to privacy though not expressly guaranteed in the Constitution of India is now recognized as a basic fundamental

right vide decision of the Constitutional Bench in ***K.S. Puttaswamy and Another*** v. ***Union of India and Others***[26] holding that it is an intrinsic part of the right to life and liberty guaranteed under Article 21 of the Constitution and recognised under several international treaties, chief among them being Article 12 of the Universal Declaration of Human Rights, 1948 which states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. The judgment recognises that everyone has a right to the protection of laws against such interference or attack.

41. In ***K.S. Puttaswamy*** (supra) the main judgment (authored by D.Y. Chandrachud, J.) has referred to provisions of Section 8(1)(j) of the RTI Act to highlight that the right to privacy is entrenched with constitutional status in Part III of the Constitution, thus providing a touchstone on which validity of executive decisions can be assessed and validity of laws can be determined vide judicial review exercised by the courts. This observation highlights the status and importance of the right to privacy as a constitutional right. The ratio as recorded in the two concurring judgments of

[26] (2017) 10 SCC 1

the learned judges (R.F. Nariman and Sanjay Kishan Kaul, JJ.) are similar. It is observed that privacy involves a person's right to his physical body; right to informational privacy which deals with a person's mind; and the right to privacy of choice which protects an individual's autonomy over personal choices. While physical privacy enjoys constitutional recognition in Article 19(1)(d) and (e) read with Article 21, personal informational privacy is relatable to Article 21 and right to privacy of choice is enshrined in Articles 19(1)(a) to (c), 20(3), 21 and 25 of the Constitution. In the concurring opinion, there is a reference to *'The Right to Privacy'* by Samuel Warren and Louis D. Brandeis on an individual's right to control the dissemination of personal information and that an individual has a right to limit access to such information/shield such information from unwarranted access. Knowledge about a person gives another power over that person, as personal data collected is capable of effecting representations in his decision making process and shaping behaviour which can have a stultifying effect on the expression of dissent which is the cornerstone of democracy. In the said concurring judgment, it has been further held that the right to protection of reputation from being unfairly harmed needs to be zealously guarded not only against falsehood but also against certain truths by observing:

> "623. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments."[27]

42. Privacy, it is uniformly observed in ***K.S. Puttaswamy*** (supra), is essential for liberty and dignity. Therefore, individuals have the need to preserve an intrusion-free zone for their personality and family. This facilitates individual freedom. On the question of invasion of personal liberty, the main judgment has referred to a three-fold requirement in the form of – (i) legality, which postulates the existence of law (RTI Act in the present case); (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means to be adopted to achieve them. The third requirement, we would observe, is achieved in the present case by Sections 8(1)(j) and 11 of the RTI Act and the RTI Act cannot be faulted on this ground. The RTI Act also defines the legitimate aim, that is a public interest in the dissemination of information which can be confidential or private (or held in a fiduciary relationship) when

[27] Daniel Solove: "10 Reasons Why Privacy Matters" published on 20th January 2014 and available at https://www.teachprivacy.com/10-reasons-privacy-matters/

larger public interest or public interest in disclosure outweighs the protection or any possible harm or injury to the interest of the third party.

43. Privacy and confidentiality encompass a bundle of rights including the right to protect identity and anonymity. Anonymity is where an individual seeks freedom from identification, even when and despite being in a public space. In ***K.S. Puttaswamy*** (supra) reference is made to ***Spencer*** v. ***R.***[28] which had set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity, to observe:

> "214. […] anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.
>
> xx xx xx
>
> […] The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search."

Privacy and confidentiality, therefore, include information about one's identity.

[28] 2014 SCC Online Can SC 34: (2014) 2 SCR 212: 2014 SCC 43

44. In ***K.S. Puttaswamy*** (supra), it is observed that the Canadian Supreme Court in ***Spencer*** (supra) had stopped short of recognising an absolute right of anonymity, but had used the provisions of Canadian Charter of Rights and Freedoms of 1982 to expand the scope of the right to privacy, used traditionally to protect individuals from an invasion of their property rights, to an individual's "reasonable expectation of privacy". Yet the Court has observed that there has to be a careful balancing of the requirements of privacy with legitimate concerns of the State after referring to an article[29] wherein it was observed that:

> "Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents …"

45. Referring to an article titled *'Reasonable Expectations of Anonymity'*[30] authored by Jeffrey M. Skopek, it is observed that distinction has been drawn between anonymity on one hand and privacy on the other as privacy involves hiding information whereas anonymity involves hiding what makes it personal by giving an example that furnishing of medical records of a patient would amount to an invasion of privacy, whereas a State may

[29] Richard A. Posner, "Privacy, Surveillance, and Law", The University of Chicago Law Review (2008), Vol. 75, 251.
[30] Virginia Law Review (2015), Vol. 101, at pp. 691-762.

have legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic and to obviate serious impact on the population. If the anonymity of the individual/patient is preserved, it would legitimately assert a valid State interest in the preservation of public health.

46. For the purpose of the present case, we are not concerned with the specific connotations of the right to anonymity and the restrictions/limitations appended to it. In the context of the RTI Act, suffice would be to say that the right to protect identity and anonymity would be identically subjected to the public interest test.

47. Clause (j) to sub-section (1) of Section 8 of the RTI Act specifically refers to invasion of the right to privacy of an individual and excludes from disclosure information that would cause unwarranted invasion of privacy of such individual, unless the disclosure would satisfy the larger public interest test. This clause also draws a *distinction* in its treatment of *personal information*, whereby disclosure of such information is exempted if such information has no relation to public activity or interest. We would like to, however, clarify that in their treatment of this exemption, this Court has treated the word 'information' which if disclosed

would lead to invasion of privacy to mean personal information, as distinct from public information. This aspect has been dealt with in the succeeding paragraphs.

48. As per Black's Law Dictionary, 8th Edition, the word *'personal'* means *'of or affecting a* person or *of or constituting personal property'*. In Collins Dictionary of the English Language, the word *'personal'* has been defined as under:

> "1. Of or relating to the private aspects of a person's life.
>
> 2. Of or relating to a person's body, its care or its appearance.
>
> 3. Belonging to or intended for a particular person and no one else.
>
> 4. Undertaken by an individual himself.
>
> 5. Referring to, concerning, or involving a person's individual personality, intimate affairs, etc., esp. in an offensive way.
>
> 6. Having the attributes of an individual conscious being.
>
> 7. Of or arising from the personality.
>
> 8. Of or relating to, or denoting grammatical person.
>
> 9. Of or relating to movable property (Law).
>
> 10. An item of movable property (Law)."

49. In ***Peck*** v. ***United Kingdom***[31], the European Court of Human Rights had held that private life is a broad term not susceptible to exhaustive definition but includes the right to establish and develop relationships with other human beings such that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Recognised facets of an individual's private life include a person's health, ethnicity, personal relationships, sexual conduct; religious or philosophical convictions and personal image. These facets resemble what has been categorised as sensitive personal data within the meaning of the Data Protection Act, 2018 as applicable in the United Kingdom.

50. Gleeson CJ in ***Australian Broadcasting Corporation*** v. ***Lenah Game Meats Pty Ltd***[32] had distinguished between what is public and private information in the following manner:

> "An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private proper property, it has such measure of protection from the public gaze as the characteristics of the property, the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporary

[31] (2003) EMLR 15
[32] (2001) 185 ALR 1

> standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

51. This test had been adopted in several English decisions including decision of the House of Lords in ***Campbell*** v. ***Mirror Group Newspapers Limited***[33] wherein Lord Hope of Craighead had further elucidated that the definition is taken from the definition of 'privacy' in the United States, where the right to privacy is invaded if the matter which is publicised is of a kind that – (a) would be highly offensive to a reasonable person and (b) not of legitimate concern to the public. Law of privacy in ***Campbell*** (supra), it was observed, was not intended for the protection of the unduly sensitive and would cover matters which are offensive and objectionable to a reasonable man of ordinary sensibilities who must expect some reporting of his daily activities. The mind that has to be examined is not that of a reader in general, but that of the person who is affected by the publicising/dissemination of his information. The question is what a reasonable person of ordinary sensibilities would feel if he/she is subjected to such publicity. Only when publicity is such that a reasonable person would feel

[33] (2004) UKHL 22

justified in feeling seriously aggrieved that there would be an invasion in the right to privacy which gives rise to a cause of action.

52. In ***Douglas*** (supra), it was also held that there are different degrees of privacy which would be equally true for information given in confidentiality, and the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction to protect the right to privacy.

53. While clause (j) exempts disclosure of two kinds of information, as noted in paragraph 47 above, that is “personal information” with no relation to public activity or interest and “information” that is exempt from disclosure to prevent unwarranted invasion of privacy, this Court has not underscored, as will be seen below, such distinctiveness and treated personal information to be exempt from disclosure if such disclosure invades on balance the privacy rights, thereby linking the former kind of information with the latter kind. This means that information, which if disclosed could lead to an unwarranted invasion of privacy rights, would mean personal information, that is, which is not having co-relation with public information.

54. In ***Girish Ramchandra Deshpande*** v. ***Central Information Commissioner and Others***[34], the applicant had sought copies of all memos, show-cause notices and censure/punishment awarded to a Government employee from his employer and also details of his movable/immovable properties, details of investment, loan and borrowings from financial institutions, details of gifts accepted by the employee from his family members and relatives at the time of the marriage of his son. In this context, it was observed:

> "12. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show-cause notices and orders of censure/punishment, etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. *On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual.* Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.
>
> 13. The details disclosed by a person in his income tax returns are "personal information" which stand

[34] (2013) 1 SCC 212

> exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information."
>
> (emphasis supplied)

55. In ***Canara Bank*** v. ***C.S. Shyam and Another***[35], the applicant had sought information on parameters with regard to transfer of clerical staff with details of individual employees, such as date of their joining, promotion earned, date of their joining the branch, the authorities who had posted the transfer letters, etc. The information sought was declared to be personal in nature, which was conditionally exempted from disclosure under Section 8(1)(j) of the RTI Act.

56. In ***Subhash Chandra Agarwal*** v. ***Registrar, Supreme Court of India and Others***[36], the applicant (who is also the respondent in the present appeals) had sought information relating to details of medical facilities availed by individual judges of the Supreme Court and their family members, including information relating to private treatment in India and abroad in last three years. This Court had held that the information sought by the applicant was

[35] (2018) 11 SCC 426
[36] (2018) 11 SCC 634

'personal' information and was protected under Section 8(1)(j) of the RTI Act, for disclosure would cause unwarranted invasion of privacy which prohibition would not apply where larger public interest justifies disclosure of such information.

57. In ***R.K. Jain*** v. ***Union of India and Another***[37], the applicant had sought inspection of documents relating to Annual Confidential Reports (ACRs) of a Member of Customs Excise and Service Tax Appellate Tribunal (CESTAT) and follow up action taken by the authorities based on the ACRs. The information sought was treated as personal information, which, except in cases involving overriding public interest, could not be disclosed. It was observed that the procedure under Section 11 of the RTI Act in such cases has to be followed. The matter was remitted to examine the aspect of larger public interest and to follow the procedure prescribed under Section 11 of the RTI Act which, it was held, was mandatory.

58. Reference can also be made to ***Aditya Bandopadhyay*** (supra), as discussed earlier in paragraph 32, where this Court has held that while a fiduciary could not withhold information from the beneficiary in whose benefit he holds such information, he/she

[37] (2013) 14 SCC 794

owed a duty to the beneficiary to not disclose the same to anyone else. This exposition of the Court equally reconciles the right to know with the rights to privacy under clause (j) to Section 8(1) of the RTI Act.

59. Reading of the aforesaid judicial precedents, in our opinion, would indicate that personal records, including name, address, physical, mental and psychological status, marks obtained, grades and answer sheets, are all treated as personal information. Similarly, professional records, including qualification, performance, evaluation reports, ACRs, disciplinary proceedings, etc. are all personal information. Medical records, treatment, choice of medicine, list of hospitals and doctors visited, findings recorded, including that of the family members, information relating to assets, liabilities, income tax returns, details of investments, lending and borrowing, etc. are personal information. Such personal information is entitled to protection from unwarranted invasion of privacy and conditional access is available when stipulation of larger public interest is satisfied. This list is indicative and not exhaustive.

60. In ***Arvind Kejriwal*** v. ***Central Public Information Officer and Another***[38], the Delhi High Court had examined and interpreted Section 11 of the RTI Act in the following manner:

> "12. Section 11(1), (2), (3) and (4) are the procedural provisions which have to be complied with by the PIO/appellant authority, when they are required to apply the said test and give a finding whether information should be disclosed or not disclosed. If the said aspect is kept in mind, we feel there would be no difficulty in interpreting Section 11(1) and the so called difficulties or impartibility as pointed out by the appellant will evaporate and lose significance. This will be also in consonance with the primary rule of interpretation that the legislative intent is to be gathered from language employed in a statute which is normally the determining factor. The presumption is that the legislature has stated what it intended to state and has made no mistake. (See *Prakash Nath Khanna* vs. ***CIT***, (2004) 9 SCC 686; and several judgments of Supreme Court cited in ***B. Premanand and Ors. vs. Mohan Koikal and Ors.***.
>
> 13. Read in this manner, what is stipulated by Section 11(1) is that when an information seeker files an application which relates to or has been supplied by third party, the PIO has to examine whether the said information is treated as confidential or can be treated as confidential by the third party. If the answer is in the possible sphere of affirmative or "maybe yes", then the procedure prescribed in Section 11 has to be followed for determining whether the larger public interest requires such disclosure. When information per se or ex facie cannot be regarded as confidential, then the procedure under section 11 is not to be followed. All information relating to or furnished by a third party need not be confidential for various reasons including the factum that it is already in public domain or in circulation, right of third party is not affected or by law

[38] AIR 2012 Delhi 29

is required to be disclosed etc. The aforesaid interpretation takes care of the difficulties visualised by the appellant like marks obtained in an examination, list of BPL families, etc. In such cases, normally plea of privacy or confidentiality does not arise as the said list has either been made public, available in the public domain or has been already circulated to various third parties. On the other hand, in case the word "or" is read as "and", it may lead to difficulties and problems, including invasion of right of privacy/confidentiality of a third party. For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person. Such examples can be multiplied. Furthermore, the difficulties and anomalies pointed out can even arise when the word "or" is read as "and" in cases where the information is furnished by the third party. For example, for being enrolled as a BPL family, information may have been furnished by the third party who is in the list of BPL families. Therefore, the reasonable and proper manner of interpreting Section 11(1) is to keep in mind the test stipulated by the proviso. It has to be examined whether information can be treated and regarded as being of confidential nature, if it relates to a third party or has been furnished by a third party. Read in this manner, when information relates to a third party and can be prima facie regarded and treated as confidential, the procedure under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and has been prima facie treated by the said third party as confidential, again the procedure prescribed under Section 11(1) has to be followed.

xx xx xx

16. Thus, Section 11(1) postulates two circumstances when the procedure has to be followed. Firstly when the information relates to a third party and can be

> prima facie regarded as confidential as it affects the right of privacy of the third party. The second situation is when information is provided and given by a third party to a public authority and prima facie the third party who has provided information has treated and regarded the said information as confidential. The procedure given in Section 11(1) applies to both cases."

61. We would clarify that Section 11 is not merely procedural but also a substantive provision which applies when the PIO intends to disclose information that relates to or has been supplied by a third party and has been treated as confidential by that third party. It requires the PIO to issue notice to the third party who may make submission in writing or orally, which submission has to be kept in view while taking a decision. Proviso to Section 11(1) applies in all cases except trade or commercial secrets protected by law. Pertinently, information including trade secrets, intellectual property rights, etc. are governed by clause (d) to sub-section (1) of Section 8 and Section 9 of the RTI Act. In all other cases where the information relates to or has been supplied by the third party and treated as confidential by that third party, disclosure in terms of the proviso may be allowed where the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. Confidentiality is protected and preserved in law because the public interest requires such

protection. It helps and promotes free communication without fear of retaliation. However, public interest in protecting confidentiality is subject to three well-known exceptions. The first exception being a public interest in the disclosure of iniquity for there cannot be any loss of confidentiality involving a wrongdoing. Secondly, there cannot be any public interest when the public has been misled. Thirdly, the principle of confidentiality does not apply when the disclosure relates to matters of public concern, which expression is vastly different from news value or news to satiate public curiosity. Public concern relates to matters which are an integral part of free speech and expression and entitlement of everyone to truth and fair comment about it. There are certain circumstances where the public interest in maintaining confidentiality may be outweighed by the public interest in disclosure and, thus, in common law, it may not be treated by the courts as confidential information. These aspects would be relevant under the proviso to Section 11(1) of the RTI Act.

62. Proviso to Section 11(1) of the RTI Act is a statutory recognition of three exceptions and more when it incorporates public interest test. It states that information, otherwise treated confidential, can be disclosed if the public interest in disclosure outweighs the possible harm and injury to the interest of such a third party. The

expression ‘third party’ has been defined in clause (n) to Section 2 to mean a person other than the citizen making a request for information and includes a public authority. Thus, the scope of ‘information’ under Section 11 is much broader than that of clause (j) to Section 8 (1), as it could include information that is personal as well as information that concerns the government and its working, among others, which relates to or is supplied by a third party and treated as confidential. Third-party could include any individual, natural or juristic entity including the public authority.

63. Confidentiality in case of personal information and its co-relation with the right to privacy and disclosure of the same on the anvil of the public interest test has been discussed above. We now proceed to look at confidentiality of information concerning the government and information relating to its inner-workings and the difference in approach in applying the public interest test in disclosing such information, as opposed to the approach adopted for other confidential/personal information. The reason for such jurisprudential distinction with regard to government information is best expressed in ***Attorney General (UK)*** v. ***Heinemann***

Publishers Pty Ltd.[39] wherein the High Court of Australia had observed:

> "[…] the relationship between the modern State and its citizens is so different in kind from that which exists between private citizens that rules worked out to govern contractual, property, commercial and private confidences are not fully applicable where the plaintiff is a government or one of its agencies. Private citizens are entitled to protect or further own interests… [whereas] governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which equity determines whether it will protect information which a government or governmental body claims is confidential."

The High Court of Australia had earlier in ***Commonwealth*** v. ***John Fairfax and Sons Ltd.***[40] observed:

> "The question, then when the executive government seeks the protection given by equity, is: What detriment does it need to show?
>
> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.

[39] (1987) 10 NSWLR 86 at 191.
[40] (1980) 147 CLR 39 at 51.

> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."

The above principles have also been reiterated and relied upon by the courts in the United Kingdom [*See* ***Coco*** (supra),

Attorney General v. Jonathan Cape Ltd.[41]]. In ***Guardian Newspapers*** (supra), Lord Keith of Kinkel had observed:

> "The position of the Crown, as representing the continuing government of the country may, however, be regarded as being special. In some instances disclosure of confidential information entrusted to a servant of the Crown may result in a financial loss to the public. In other instances such disclosure may tend to harm the public interest by impeding the efficient attainment of proper governmental ends, and the revelation of defence or intelligence secrets certainly falls into that category. The Crown, however, as representing the nation as a whole, has no private life or personal feelings capable of being hurt by the disclosure of confidential information. In so far as the Crown acts to prevent such disclosure or to seek redress for it on confidentiality grounds, it must necessarily, in my opinion, be in a position to show that the disclosure is likely to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstances of each case. In a question with a Crown servant himself, or others acting as his agents, the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice."

64. In ***R.K. Jain*** v. ***Union of India***[42], this Court, while examining Section 123 of the Evidence Act, 1872, had paraphrased the earlier judgment of the Constitution Bench of this Court penned down by Fazal Ali, J. in ***S.P. Gupta*** (supra) (the first Judge's case) in which the question of privilege against disclosure of correspondence between the Chief Justice of Delhi High Court,

[41] [1976] QB 752
[42] (1993) 4 SCC 119

Chief Justice of India and the Law Minister of the Union had arisen, in the following words:

> "41. [...] in a democracy, citizens are to know what their Govt. is doing. No democratic Govt. can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Govt. It is only if the people know how the Govt. is functioning and that they can fulfill their own democratic rights given to them and make the democracy a really effective participatory democracy. There can be little doubt that exposure to public scrutiny is one of the surest means of running a clean and healthy administration. By disclosure of information in regard to the functioning of the Govt. must be the rule and secrecy can be exceptionally justified only where strict requirement of public information was assumed. The approach of the court must be to alleviate the area of secrecy as much as possible constantly with the requirement of public interest bearing in mind all the time that the disclosure also serves an important aspect of public interest."

65. In ***R.K. Jain*** (1993) (supra), reference was also made to Articles 74(2) and 75(3) of the Constitution, to observe:

> "21...Article 74(2) precludes this Court from enquiring into the nature of the advice tendered to the President and the documents are, therefore, immuned from disclosure. The disclosure would cause public injury preventing candid and frank discussion and expression of views by the bureaucrats at higher level and by the Minister/Cabinet Sub-committee causing serious injury to public service. Therefore, Cabinet papers, minutes of discussion by heads of departments; high level documents relating to the inner working of the government machine and all papers concerned with the government policies belong to a class documents which in the public interest they or contents thereof must be protected against disclosure.
>
> xx xx xx

> 30. Collective responsibility under Article 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his/her consideration or shall become known to him/her as Minister except as may be required for the "due discharge of his/her duty as Minister". The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Article 75(3) but also from its pragmatism.
>
> xx xx xx
>
> 34. Equally every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favourable or unfavourable, every other member will keep it secret. Maintenance of secrecy by an individual's contribution to discussion, or vote in the Cabinet guarantees most favourable and conducive atmosphere to express view formally…"

It was held that the Ministers and the government servants were required to maintain secrecy and confidentiality in the performance of the duties of the office entrusted by the Constitution and the laws. Elucidating on the importance of confidentiality, it was observed:

> "34. [...] Confidentiality and collective responsibility in that scenario are twins to effectuate the object of frank and open debate to augment efficiency of public service or effectivity of collective decision to elongate public interest. To hamper and impair them without any compelling or at least strong reasons, would be detrimental to the efficacy of public administration. It would tantamount to wanton rejection of

> the fruits of democratic governance, and abdication of an office of responsibility and dependability. Maintaining of top secrecy of new taxation policies is a must but leaking budget proposals a day before presentation of the budget may be an exceptional occurrence as an instance."

66. Thereafter, reference was made to the decision of the House of Lords in ***Burmah Oil Ltd v. Governor And Company Of The Bank Of England And Another***[43] wherein the Lords had rejected the notion that "any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off chance that they might have to be produced in a litigation as grotesque" to hold that this contention would be utterly insubstantial ground to deny access to the relevant document. In ***Burma Oil Ltd.*** (supra), it was held that the candour doctrine stands in a different category from that aspect of public interest, which, in appropriate circumstances, may require that the *'sources and nature of information confidentially tendered'* should be withheld from disclosure. Several other cases were also referred expressing the same ratio [See – ***Butters Gas and Oil Co.*** v. ***Hammer***[44]; ***Air Canada*** v. ***Secretary of State for***

[43] [1980] AC 1090
[44] 1982 AC 888 (H.L.)

Trade[45]; and ***Council of Civil Service Unions*** v. ***Minister for the Civil Service***[46]].

67. Having held so, the Bench in ***R.K. Jain*** (1993) (supra) had proceeded to observe:

> "48. In a democracy it is inherently difficult to function at high governmental level without some degree of secrecy. No Minister, nor a Senior Officer would effectively discharge his official responsibilities if every document prepared to formulate sensitive policy decisions or to make assessment of character rolls of co-ordinate officers at that level if they were to be made public. Generally assessment of honesty and integrity is a high responsibility. At high co-ordinate level it would be a delicate one which would further get compounded when it is not backed up with material. Seldom material will be available in sensitive areas. Reputation gathered by an officer around him would form the base. If the reports are made known, or if the disclosure is routine, public interest grievously would suffer. On the other hand, confidentiality would augment honest assessment to improve efficiency and integrity in the officers.
>
> 49. The business of the Govt., when transacted by bureaucrats, even in personal, it would be difficult to have equanimity if the inner working of the Govt. machinery is needlessly exposed to the public. On such sensitive issues it would hamper to express frank and forthright views or opinions. therefore, it may be that at that level the deliberations and in exceptional cases that class or category or documents get protection, in particular, on policy matters. Therefore, the court would be willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved.

[45] 1983 2 AC 394 (H.L.)
[46] 1985 AC 374 (H.L.)

xx xx xx

> 54. […] In President Nixon's case, the Supreme Court of the United States held that it is the court's duty to construe and delineate claims arising under express powers, to interpret claims with respect to powers alleged to derive from enumerated powers of the Constitution, In deciding whether the matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of the court as ultimate interpreter of the Constitution…"

68. At the same time, it was held:

> "55. [...] Article 74(2) is not a total bar for production of the records. Only the actual advice tendered by the Minister or Council of Ministers to the President and the question whether any and if so, what advice was tendered by the Minister or Council of Ministers to the President, shall not be enquired into by the court. In other words the bar of Judicial review is confined to the factum of advice, its extent, ambit and scope but not the record i.e. the material on which the advice is founded. In S.P. Gupta's case this Court held that only the actual advice tendered to the President is immuned from enquiry and the immunity does not extend to other documents or records which form part of the advice tendered to the President.
>
> 56. There is discernible modern trends towards more open government than was prevalent in the past. In its judicial review the court would adopt in camera procedure to inspect the record and evaluate the balancing act between the competing public interest and administration of justice. It is equally the paramount consideration that justice should not only be done but also would be publicly recognised as having been done. Under modern conditions of responsible government, Parliament should not always be relied on as a check on excess of power by the Council of

> Ministers or Minister. Though the court would not substitute its views to that of the executive on matters of policy, it is its undoubted power and duty to see that the executive exercises its power only for the purpose for which it is granted. Secrecy of the advice or opinion is by no means conclusive. Candour, frankness and confidentiality though are integral facets of the common genus i.e., efficient governmental functioning, per se by means conclusive but be kept in view in weighing the balancing act. Decided cases show that power often was exercised in excess thereof or for an ulterior purpose etc. Sometimes the public service reasons will be decisive of the issue, but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed, and the likely injury to the cause of justice must also be assessed and weighed. Its weight will vary according to the nature of the proceedings in which disclosure is sought, level at which the matter was considered; the subject matter of consideration; the relevance of the documents and that degree of likelihood that the document will be of importance in the litigation. In striking the balance, the court may always, if it thinks it necessary, itself inspect the documents. It is, therefore the constitutional, legitimate and lawful power and duty of this Court to ensure that powers, constitutional, statutory or executive are exercised in accordance with the Constitution and the law. This may demand, though no doubt only in limited number of cases, yet the inner workings of government may be exposed to public gaze. The contentions of Attorney General and Solicitor General that the inner workings of the government would be exposed to public gaze, and that some one who would regard this as an occasion without sufficient material to ill-informed criticism is no longer relevant. Criticism calculated to improve the nature of that working as affecting the individual citizen is welcome."

69. The aforesaid passages highlight the relevance of confidentiality in the government and its functioning. However, this is not to state

that plea of confidentiality is an absolute bar, for in terms of proviso to Section 11(1) of the RTI Act, the PIO has to undertake the balancing exercise and weigh the advantages and benefits of disclosing the information with the possible harm or injury to the third party on the information being disclosed. We have already referred to the general approach on the right of access to government records under the heading *"Section 8(1)(j) and Section 11 of the RTI Act"* with reference to the decisions of the High Court of Australia in ***Heinemann Publishers Pty Ltd.*** (supra) and ***John Fairfax and Sons Ltd.*** (supra).

70. Most jurists would accept that absolute transparency in all facets of government is neither feasible nor desirable,[47] for there are several limitations on complete disclosure of governmental information, especially in matters relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. There is also a need to accept and trust the government's decision-makers, which they have to also earn, when they plead that confidentiality in their meetings and

[47] Michael Schudson, 'The Right to Know vs the Need for Secrecy: The US Experience' The Conversation (May 2015) <https://theconversation.com/the-right-to-know-vs-the-need-for-secrecy-the-us-experience-40948>; Eric R. Boot, 'The Feasibility of a Public Interest Defense for Whistleblowing', Law and Philosophy (2019). See generally Michael Schudson, The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975 (Cambridge (MA): Harvard University Press 2015).

exchange of views is needed to have a free flow of views on sensitive, vexatious and pestilent issues in which there can be divergent views. This is, however, not to state that there are no dangers in maintaining secrecy even on aspects that relate to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. Confidentiality may have some bearing and importance in ensuring honest and fair appraisals, though it could work the other way around also and, therefore, what should be disclosed would depend on authentic enquiry relating to the public interest, that is, whether the right to access and the right to know outweighs the possible public interest in protecting privacy or outweighs the harm and injury to third parties when the information relates to such third parties or the information is confidential in nature.

POINT NO. 4: MEANING OF THE TERM 'PUBLIC INTEREST'

71. In ***Union of India*** v. ***Association for Democratic Reforms and Another***[48] recognising the voters' right to know the antecedents of the candidates and the right to information which stems from Article 19(1)(a) of the Constitution, it was held that directions could

[48] (2002) 5 SCC 294

be issued by the Court to subserve public interest in creating an informed citizenry, observing:

> "46. […] The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under:
>
> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 6. Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Article 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest."

Clearly, the larger public interest in having an informed electorate, fair elections and creating a dialectical democracy had outweighed and compelled this Court to issue the directions notwithstanding disclosure of information relating to the personal assets, educational qualifications and antecedents including previous involvement in a criminal case of the contesting candidate.

72. Public interest, sometimes criticised as inherently amorphous and incapable of a precise definition, is a time tested and historical conflict of rights test which is often applied in the right to information legislation to balance right to access and protection of the conflicting right to deny access. In ***Mosley*** v. ***News Group Papers Ltd.***[49] it has been observed:

> "130… It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria."

The RTI Act is no exception. Section 8(1)(j) of the RTI Act prescribes the requirement of satisfaction of *'larger public interest'* for access to information when the information relates to personal information having no relationship with any public activity or interest, or would cause unwarranted invasion of privacy of the individual. Proviso to Section 11(1) states that except in case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. The words '*possible harm or injury'* to the interest of the third party is preceded by the word '*importance*' for the purpose of comparison.

[49] 2008 EWHC 1777 (QB)

'Possible' in the context of the proviso does not mean something remote, far-fetched or hypothetical, but a calculable, foreseeable and substantial possibility of harm and injury to the third party.

73. Comparison or balancing exercise of competing public interests has to be undertaken in both sections, *albeit* under Section 8(1)(j) the comparison is between public interest behind the exemption, that is personal information or invasion of privacy of the individual and public interest behind access to information, whereas the test prescribed by the proviso to Section 11(1) is somewhat broader and wider as it requires comparison between disclosure of information relating to a third person or information supplied and treated as confidential by the third party and possible harm or injury to the third party on disclosure, which would include all kinds of 'possible' harm and injury to the third party on disclosure.

74. This Court in ***Bihar Public Service Commission*** v. ***Saiyed Hussain Abbas Rizwi and Another***[50] has held that the phrase *'public interest'* in Section 8(1)(j) has to be understood in its true connotation to give complete meaning to the relevant provisions of the RTI Act. However, the RTI Act does not specifically identify factors to be taken into account in determining where the public

[50] (2012) 13 SCC 61

interest lies. Therefore, it is important to understand the meaning of the expression 'public interest' in the context of the RTI Act. This Court held 'public interest' to mean the general welfare of the public warranting the disclosure and the protection applicable, in which the public as a whole has a stake, and observed:

> "23. The satisfaction has to be arrived at by the authorities objectively and the consequences of such disclosure have to be weighed with regard to the circumstances of a given case. The decision has to be based on objective satisfaction recorded for ensuring that larger public interest outweighs unwarranted invasion of privacy or other factors stated in the provision. Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy. Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India."

75. Public interest in access to information refers to something that is in the interest of the public welfare to know. Public welfare is widely different from what is of interest to the public. “Something which is of interest to the public” and “something which is in the public interest” are two separate and different parameters. For example, the public may be interested in private matters with which the public may have no concern and pressing need to know. However, such interest of the public in private matters would repudiate and directly traverse the protection of privacy. The object and purpose behind the specific exemption vide clause (j) to Section 8(1) is to protect and shield oneself from unwarranted access to personal information and to protect facets like reputation, honour, etc. associated with the right to privacy. Similarly, there is a public interest in the maintenance of confidentiality in the case of private individuals and even government, an aspect we have already discussed.

76. The public interest test in the context of the RTI Act would mean reflecting upon the object and purpose behind the right to information, the right to privacy and consequences of invasion, and breach of confidentiality and possible harm and injury that would be caused to the third party, with reference to a particular information and the person. In an article ‘*Freedom of Information*

and the Public Interest: the Commonwealth experience' published in the Oxford University Commonwealth Law Journal,[51] the factors identified as favouring disclosure, those against disclosure and lastly those irrelevant for consideration of public interest have been elucidated as under:

> "it is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interests of the public to know and matters which were merely interesting to the public (i.e. which the public would like to know about, and which sell newspapers, but... are not relevant).
>
> Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancement of scrutiny of decision-making; and protecting against danger to public health or safety.
>
> Factors that have been found to weigh against disclosure include: the likelihood of damage to security or international relations; the likelihood of damage to the integrity or viability of decision-making processes: the public interest in public bodies being able to perform their functions effectively; the public interest in preserving the privacy of individuals and the public interest in the preservation of confidences.

[51] Published online on 28th August, 2017

> Factors irrelevant to the consideration of the public interest have also been identified. These include: that the information might be misunderstood; that the requested information in overly technical in nature; and that disclosure would result in embarrassment to the government or to officials."

77. In ***Campbell*** (supra), reference was made to the Press Complaints Commission Code of Practice to further elucidate on the test of public interest which stands at the intersection of freedom of expression and the privacy rights of an individual to hold that:

> "1. Public interest includes:
>
> (i) Detecting or exposing crime or a serious misdemeanour.
>
> (ii) Protecting public health and safety.
>
> (iii) Preventing the public from being misled by some statement or action of an individual or organisation...."

78. Public interest has no relationship and is not connected with the number of individuals adversely affected by the disclosure which may be small and insignificant in comparison to the substantial number of individuals wanting disclosure. It will vary according to the information sought and all circumstances of the case that bear upon the public interest in maintaining the exemptions and those in disclosing the information must be accounted for to judge the right balance. Public interest is not immutable and even time-gap

may make a significant difference. The type and likelihood of harm to the public interest behind the exemption and public interest in disclosure would matter. The delicate balance requires identification of public interest behind each exemption and then cumulatively weighing the public interest in accepting or maintaining the exemption(s) to deny information in a particular case against the public interest in disclosure in that particular case. Further, under Section 11(1), reference is made to the 'possible' harm and injury to the third party which will also have to be factored in when determining disclosure of confidential information relating to the third parties.

79. The last aspect in the context of public interest test would be in the form of clarification as to the effect of sub-section (2) to Section 6 of the RTI Act which does not require the information seeker to give any reason for making a request for the information. Clearly, 'motive' and 'purpose' for making the request for information is irrelevant, and being extraneous cannot be a ground for refusing the information. However, this is not to state that 'motive' and 'purpose' may not be relevant factor while applying the public interest test in case of qualified exemptions governed by the public interest test. It is in this context that this Court in ***Aditya Bandopadhyay*** (supra) has held that beneficiary

cannot be denied personal information relating to him. Similarly, in other cases, public interest may weigh in favour of the disclosure when the information sought may be of special interest or special significance to the applicant. It could equally be a negative factor when the 'motive' and 'purpose' is vexatious or it is a case of clear abuse of law.

80. In the RTI Act, in the absence of any positive indication as to the considerations which the PIO has to bear in mind while making a decision, the legislature had intended to vest a general discretion in the PIO to weigh the competing interests, which is to be limited only by the object, scope and purpose of the protection and the right to access information and in Section 11(1), the 'possible' harm and injury to the third party. It imports a discretionary value judgment on the part of the PIO and the appellate forums as it mandates that any conclusion arrived at must be fair and just by protecting each right which is required to be upheld in public interest. There is no requirement to take a fortiori view that one trumps the other.

POINT NO. 5: JUDICIAL INDEPENDENCE

81. Having dealt with the doctrine of the public interest under the RTI Act, we would now turn to examining its co-relation with

transparency in the functioning of the judiciary in matters of judicial appointments/selection and importance of judicial independence.

82. Four major arguments are generally invoked to deny third-party or public access to information on appointments/selection of judges, namely, (i) confidentiality concerns; (ii) data protection; (ii) reputation of those being considered in the selection process, especially those whose candidature/eligibility stands negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved.[52] These arguments have become subject matter of considerable debate, if not outright criticism at the hands of jurists and authors.[53] Yet there are those who have expressed cynicism about the 'interview' process undertaken by the Judicial Service Commission (JSC) in recommending judges for appointment in South Africa, by pointing out the precariousness and the chilling effect it has on prospective candidates and consequently the best candidates often do not apply.[54] Recently, the majority judgment of the Constitutional Court

[52] See: How Transparent is Transparent Enough?: Balancing Access to Information Against Privacy in European Judicial Selections by Alberto Alemanno in Michal Bobek (ed.), Selecting Europe's Judges, 2015 Edition.

[53] Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom' Osgoode Hall Law Journal (2007) 44, 557.

[54] WH Gravett, 'Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures' 2017 (80) THRHR.

of South Africa in ***Helen Suzman Foundation*** v. ***Judicial Service Commission***[55] by relying upon Rule 53(1)(b) of the Uniform Rules of Court, South Africa,[56] had directed the JSC to furnish the record of its deliberations, rejecting the contrary argument of candour and robustness as that of 'timorous fainthearts'. Debating with candour, the Court observed, is not equivalent to expression of impropriety. The candidates, it was noticed, had undergone gruelling scrutiny in the public interviews, and therefore disclosure of deliberation would not act as a dampener for future candidates. More importantly, the Constitutional Court had distinguished the authority and power with the Courts under Rule 53 to access the deliberation record, with the different right to access information under the Promotion to Access to Information Act, 2000 (PAIA), which was the basis of the minority judgment for rejection of production of the JSC's deliberation record. The majority held that PAIA and Rule 53 serve different purposes, there being a

[55] Case 289/16 decided on 24th April 2018

[56] Rule 53(1)(b) of the Uniform Rules of Court, South Africa states:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) […]

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

difference in the nature of, and purposes, and therefore it would be inapt to transpose PAIA proscriptions on access under Rule 53. The PAIA grants any person or busybody a right to access any information without explaining whatsoever as to why she or he requires the information. This had to be balanced, with the need to incentivise people to furnish private information, where such information is required for facilitating the government machinery, and therefore, considerations of confidentiality are applied as the person furnishing information must be made aware that the information would not be unhesitatingly divulged to others, including busybodies, for no particular reason. This facilitates the exercise of power and performance of functions of the state functionaries. In court matters under Rule 53, concerns of confidentiality could be addressed by imposing stringent and restrictive conditions on the right to access information, including furnishing of confidentiality undertakings for restraining the divulgence of details to third parties.

83. The United Kingdom's Data Protection Act, 2018 grants class exemption to all personal data processed for the purpose of assessing a person's suitability for judicial office, from certain rights including the right of the data subject to be informed, guaranteed under the European Union General Data Protection

Regulation being given effect to by the Data Protection Act.[57] Similarly, in the context of the European Union, opinions of 'the Article 255 Panel'[58] and 'the Advisory Panel'[59], entrusted with the task of advising on the suitability of candidates as judges to the Court of Justice of the European Union and the European Court of Human Rights are inaccessible to the public and their opinions have limited circulation, as they are exclusively forwarded to the representatives of governments of the member states in the case of European Union[60] and the individual governments in the case of Council of Europe[61], respectively. The Council of the European Union,[62] for instance, in consultation with 'Article 255' Panel, has denied requests for public access to opinions issued by the Panel,[63] in light of the applicable exceptions provided for in Regulation No 1049/2001[64]. Such opinions, the Council has

[57] Schedule 2, Part-2, Paragraph 14.

[58] Article 255, Treaty on the Functioning of the European Union states:
"A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254…"

[59] Set up under Resolution 'Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights', CM/Res (2010) 26 adopted by the Committee of Ministers on 10 November 2010.

[60] CJEU is the judicial branch of the European Union, administering justice in the 28 member states of the international organisation.

[61] Comprising of 47 member European states, Council of Europe adopted the European Convention on Human Rights, which established ECtHR.

[62] One of the seven constituent bodies of the European Union comprising of the ministers from the member states of the European Union.

[63] Reply Adopted by the Council on 12 July 2016 to Confirmatory Application 13/c/01/16 pursuant to Article 7(2) of Regulation (EC) No 1049/2001 for public access to all the opinions issued by the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union.

[64] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

observed, largely include personal data of the candidates, viz. factual elements concerning the candidates' professional experience and qualifications and the Panel's assessment of the candidate's competences and, therefore, access to relevant documents is denied in order to protect the privacy and integrity of the individual.[65] However, a part of these opinions which do not contain personal data and provide a description of the procedure adopted and criteria applied by the Panel have been released as "Activity Reports" in the framework of partial access to such information. Opinions that are unfavourable to the appointment of the candidates will be exempt from disclosure as they can hamper commercial interests of the candidates in their capacity as legal practitioners,[66] whereas positive opinions are exempted from disclosure as such opinions can lead to comparison and public scrutiny of the most and least favoured qualities of the successful candidates, potentially interfering with the proceedings of the Court of Justice.[67] Lastly, disclosure of opinions, the Council has observed, will be exempted if such disclosure could "seriously

[65] Article 4(1)(b), Regulation No 1049/2001
[66] First indent of Article 4(2), Regulation No 1049/2001
[67] Second indent of Article 4(2), Regulation No 1049/2001

undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."[68]

84. More direct and relevant in the Indian context would be the decision of this Court in ***Supreme Court Advocates-on-Record Association*** v. ***Union of India***[69], where a Constitutional Bench of five judges had dealt with the constitutional validity of the National Judicial Appointments Commission. A concurring judgment had dealt with the aspect of transparency in appointment and transfer of judges and the privacy concerns of the judges who divulge their personal information in confidence, to opine as under:

> "949. In the context of confidentiality requirements, the submission of the learned Attorney General was that the functioning of NJAC would be completely transparent. Justifying the need for transparency it was submitted that so far the process of appointment of Judges in the Collegium System has been extremely secret in the sense that no one outside the Collegium or the Department of Justice is aware of the recommendations made by the Chief Justice of India for appointment of a Judge of the Supreme Court or the High Courts. Reference was made to *Renu* v. *District & Sessions Judge*, (2014) 14 SCC 50 to contend that in the matter of appointment in all judicial institutions "complete darkness in the lighthouse has to be removed".
>
> 950. In addition to the issue of transparency a submission was made that in the matter of appointment of Judges, civil society has the right to know who is being considered for appointment. In this regard, it was

[68] Article 4(3), Regulation No 1049/2001
[69] (2016) 5 SCC 1

held in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* (1985) 1 SCC 641 that the people have a right to know. Reliance was placed on *Attorney General* v. *Times Newspapers Ltd.* 1974 AC 273: (1973) 3 WLR 298: (1973) 3 All ER 54 (HL) where the right to know was recognised as a fundamental principle of the freedom of expression and the freedom of discussion.

951. In *State of U.P.* v. *Raj Narain* (1975) 4 SCC 428 the right to know was recognised as having been derived from the concept of freedom of speech.

952. Finally, in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592 it was held that the right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.

953. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.

954. It is possible to argue that information voluntarily supplied by a person who is recommended for appointment as a Judge might not have a right to privacy, but at the same time, since the information is supplied in confidence, it is possible to argue that it

> ought not to be disclosed to third party unconcerned persons. Also, if the recommendation is not accepted by the President, does the recommended person have a right to non-disclosure of the adverse information supplied by the President? These are difficult questions to which adequate thought has not been given and merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat."

85. Earlier, the Constitution Bench of nine judges had in Second Judges' Case, that is ***Supreme Court Advocates on Record Association and Others*** v. ***Union of India***[70] overruled the majority opinion in ***S.P. Gupta*** (supra) (the first Judge's case) and had provided for primacy to the role of the Chief Justice of India and the collegium in the matters of appointment and transfer of judges. Speaking on behalf of the majority, J.S. Verma, J., had with regard to the justiciability of transfers, summarised the legal position as under:

> "480. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.

[70] (1993) 4 SCC 441

The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.

481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busy-bodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* which expanding the concept of locus standi, was adverted to recently by a Constitution Bench in *Krishna Swami v. Union of India* (1992) 4 SCC 605. It is therefore, necessary to spell out clearly the limited scope of judicial review in such matters, t avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the cases of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

86. That the independence of the judiciary forms part of our basic structure is now well established. ***S. P. Gupta*** (supra) (the first Judge's case) had observed that this independence is one amongst the many other principles that run through the entire fabric of the Constitution and is a part of the rule of law under the Constitution. The judiciary is entrusted with the task of keeping the other two organs within the limits of law and to make the rule of law meaningful and effective. Further, the independence of judiciary is not limited to judicial appointments to the Supreme Court and the High Courts, as it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It consists of many dimensions including fearlessness from other power centres, social, economic and political, freedom from prejudices acquired and nurtured by the class to which the judges belong and the like. This wider concept of independence of judiciary finds mention in ***C. Ravichandran Iyer*** v***. Justice A.M. Bhattacharjee and Others***[71], ***High Court of Judicature at Bombay*** v. ***Shashikant S. Patil***[72] and ***Jasbir Singh*** v*.* ***State of Punjab***[73].

[71] (1995) 5 SCC 457
[72] (1997) 6 SCC 339
[73] (2006) 8 SCC 294

87. In ***Supreme Court Advocates' on Record Association*** (2016) (supra) on the aspect of the independence of the judiciary, it has been observed:

> "713. What are the attributes of an independent judiciary? It is impossible to define them, except illustratively. At this stage, it is worth recalling the words of Sir Ninian Stephen, a former Judge of the High Court of Australia who memorably said:
>
> "[An] independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed."
>
> It is this fragile bastion that needs protection to maintain its independence and if this fragile bastion is subject to a challenge, constitutional protection is necessary.
>
> 714. The independence of the judiciary takes within its fold two broad concepts: (*1*) Independence of an individual Judge, that is, decisional independence; and (*2*) Independence of the judiciary as an institution or an organ of the State, that is, functional independence. In a lecture on Judicial Independence, Lord Phillips said:
>
> > "In order to be impartial a Judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State."
>
> xx xx xx
>
> 726. Generally speaking, therefore, the independence of the judiciary is manifested in the ability of a Judge to take a decision independent of any external (or internal) pressure or fear of any external (or internal) pressure and that is "decisional independence". It is also manifested in the ability of the institution to have "functional independence". A comprehensive and composite definition of "independence of the judiciary" is elusive but it is easy to perceive."

It is clear from the aforesaid quoted passages that the independence of the judiciary refers to both decisional and functional independence. There is reference to a report titled *'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights'*[74] which had observed that judges are not elected by the people (relevant in the context of India and the United Kingdom) and, therefore, derive their authority and legitimacy from their independence from political or other interference.

88. We have referred to the decisions and viewpoints to highlight the contentious nature of the issue of transparency, accountability and judicial independence with various arguments and counter-arguments on both sides, each of which commands merit and cannot be ignored. Therefore, it is necessary that the question of judicial independence is accounted for in the balancing exercise. It cannot be doubted and debated that the independence of the judiciary is a matter of ennobled public concern and directly relates to public welfare and would be one of the factors to be

[74] Contributors: Professor Dr. Jutta Limbach, Professor Dr. Pedro Villalon, Roger Errera, The Rt Hon Lord Lester of Herne Hill QC, Professor Dr. Tamara Morschakova, The Rt Hon Lord Justice Sedley, Professor Dr. Andrzej Zoll. <http://www.interights.org/document/142/index.html>

taken into account in weighing and applying the public interest test. Thus, when the public interest demands the disclosure of information, judicial independence has to be kept in mind while deciding the question of exercise of discretion. However, we should not be understood to mean that the independence of the judiciary can be achieved only by denial of access to information. Independence in a given case may well demand openness and transparency by furnishing the information. Reference to the principle of judicial independence is not to undermine and avoid accountability which is an aspect we perceive and believe has to be taken into account while examining the public interest in favour of disclosure of information. Judicial independence and accountability go hand in hand as accountability ensures, and is a facet of judicial independence. Further, while applying the proportionality test, the type and nature of the information is a relevant factor. Distinction must be drawn between the final opinion or resolutions passed by the collegium with regard to appointment/elevation and transfer of judges with observations and indicative reasons and the inputs/data or details which the collegium had examined. The rigour of public interest in divulging the input details, data and particulars of the candidate would be different from that of divulging and furnishing details of the output,

that is the decision. In the former, public interest test would have to be applied keeping in mind the fiduciary relationship (if it arises), and also the invasion of the right to privacy and breach of the duty of confidentiality owed to the candidate or the information provider, resulting from the furnishing of such details and particulars. The position represents a principled conflict between various factors in favour of disclosure and those in favour of withholding of information. Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future.

Questions referred to the Constitution Bench are accordingly answered, observing that it is not possible to answer these questions in absolute terms, and that in each case, the public interest test would be applied to weigh the scales and on balance determine whether information should be furnished or would be

exempt. Therefore, a universal affirmative or negative answer is not possible. However, independence of judiciary is a matter of public interest.

CONCLUSIONS

89. In view of the aforesaid discussion, we dismiss Civil Appeal No.2683 of 2010 and uphold the judgment dated 12th January, 2010 of the Delhi High Court in LPA No. 501 of 2009 which had upheld the order passed by the CIC directing the CPIO, Supreme Court of India to furnish information on the judges of the Supreme Court who had declared their assets. Such disclosure would not, in any way, impinge upon the personal information and right to privacy of the judges. The fiduciary relationship rule in terms of clause (e) to Section 8(1) of the RTI Act is inapplicable. It would not affect the right to confidentiality of the judges and their right to protect personal information and privacy, which would be the case where details and contents of personal assets in the declaration are called for and sought, in which event the public interest test as applicable vide Section 8(1)(j) and proviso to Section 11 (1) of the RTI Act would come into operation.

90. As far as Civil Appeal Nos. 10045 of 2010 and 10044 of 2010 are concerned, they are to be partly allowed with an order of remit to

the CPIO, Supreme Court of India to re-examine the matter after following the procedure under Section 11(1) of the RTI Act as the information relates to third parties. Before a final order is passed, the concerned third parties are required to be issued notice and heard as they are not a party before us. While deciding the question of disclosure on remit, the CPIO, Supreme Court of India would follow the observations made in the present judgment by keeping in view the objections raised, if any, by the third parties. We have refrained from making specific findings in the absence of third parties, who have rights under Section 11(1) and their views and opinions are unknown.

The reference and the appeals are accordingly disposed of.

.....CJI
(RANJAN GOGOI)

.....J.
(N.V. RAMANA)

.....J.
(DR. D.Y. CHANDRACHUD)

.....J.
(DEEPAK GUPTA)

.....J.
(SANJIV KHANNA)

NEW DELHI;
NOVEMBER 13, 2019.