Key findings of research on the performance of adjudicators of the RTI Act: Information Commissions (ICs), High Courts & the Supreme Court

By

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Key findings of research undertaken by RAAG & SNS[1]

I. Introduction

The Right to Information (RTI) Act has undoubtedly been one of the most empowering legislations for the citizens of India. It has been used extensively by people on a range of issues – from holding the government accountable for delivery of basic rights and entitlements to questioning the highest offices of the country. The law has initiated the vital task of redistributing power in a democratic framework.

Under the RTI Act, information commissions are mandated to safeguard and facilitate people's fundamental right to information. Consequently, ICs are widely seen as being critical to the RTI regime. Unfortunately, the experience in India, also captured in two national studies on the implementation of the RTI Act undertaken by RaaG in 2008 and 2014, has been that the functioning of information commissions is a major bottleneck in the effective implementation of the RTI Act. In addition to problems like huge backlogs of cases in commissions, a significant problem that plagues ICs across the country is the poor quality of orders. Many orders of ICs have been challenged in high courts and the Supreme Court, which have given judgments having a profound impact on shaping the contours of the RTI legislation.

This paper discusses the key findings of research undertaken by Research, Assessment, & Analysis Group (RaaG) & Satark Nagrik Sangathan (SNS) on the performance of adjudicators of the RTI Act: the Supreme Court, High Courts & Information Commissions (ICs), and the action points arising from there. The research findings presented in this paper are part of a forthcoming study by RaaG & SNS.

II. Methodology

The findings are mainly based on an analysis of orders of the Supreme Court (SC), high courts (HCs) and information commissions (ICs) pertaining to the RTI Act and related matters. In addition, websites of all ICs were analysed to determine the status of proactive disclosures by ICs.

In this process, all of the Supreme Court orders related to the RTI Act (about 27), and a sample of nearly 300 high court orders from across the country were analysed..

In addition, almost 2000 orders of the Central Information Commission and the state information commissions of Bihar, Assam and Rajasthan were randomly sampled and analysed for the purpose of the study. A randomised sample of orders of all four commissions for 2013-2014 and a sample of orders of the CIC and Assam SIC for 2016 were covered. The orders were segregated into appeals, complaints, and combined appeals and complaints. These were further categorised into whether the appeals and complaints were fully or partly upheld or were fully denied. Apart from these, appeals and complaints in which the IC did not adjudicate on the issues raised in the appeals or complaints- for instance those cases in which the matter was remanded back to the PIO or FAA- were categorised as "others".

All the IC orders were analysed in terms of their completeness, legal competency and compliance with the provisions of the law. Where appeals and complaints were party or fully rejected, the section of the law/reasons relied on for denial was recorded and it was examined whether the rejection was in keeping with the provisions of the RTI Act and whether the orders were well reasoned. In addition, it was assessed whether the subsidiary directions that formed part of the order were in keeping with the provisions of the law including - whether penalty was imposed in the cases in which it was imposable, whether PIO was directed to give information free of cost after expiry of time frame etc.

The information gathered from the IC websites and the sample of orders was used to develop a statistical profile of the commissions in terms of the number of appeals or complaints received and disposed by the ICs, the number of pending appeals or complaints, the estimated waiting time for the disposal of an appeal, availability of annual reports of ICs, frequency of violations penalised by ICs, loss to public exchequer in terms of penalty foregone and percentage of orders suffering from one or more deficiency etc.

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III. Key Findings & action points

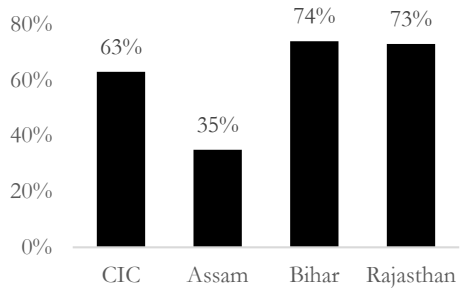
1. Quality of orders

Findings

The Supreme Court, in numerous orders, has cautioned against the tendency of adjudicators to give cryptic, unreasoned orders. In 2012, the SC in Manohar s/o Manikrao Anchule vs. State of Maharashtra (Civil Appeal No. 9095 of 2012), categorically, and in great detail, laid down that judicial, quasi-judicial, and even administrative orders must contain detailed reasoning for their decisions.

Despite the dictum of the SC, **more than 60% of the IC orders analysed contained deficiencies in terms of not recording critical facts.** Rajasthan and Bihar SICs were the worst performers with 74% and 73% of the orders respectively, not describing the information that was sought (chart 1). In fact, many of the orders comprised just 2-3 lines recording only the decision of the IC, without any reference to the background or the relevant facts of the case like dates, details of information sought, decision of PIO/ FAA and the grounds for the decision of the IC and the basis thereof.

Chart 1: Order does not describe information sought



The phenomenon of ICs not passing speaking orders is problematic for several reasons. First, information seekers, the concerned public authorities and people have no way of finding out the rationale for the decisions of ICs. In fact, even the RTI Act explicitly makes it obligatory for public authorities under section 4(1)(d) of the Act, to proactively "provide reasons for its administrative or quasi-judicial decisions to affected persons". Therefore, passing a non-speaking order, which only records the decision of the IC without providing the reasons for its decisions or other relevant details, is a violation of peoples' right to information and goes against the fundamental principles of transparency.

Second, orders of ICs are often challenged before the courts. The tests of legality, fairness and reasonableness become exponentially more difficult to pass when orders don't speak for themselves and lack essential information, facts and reasoning. This is especially problematic as information commissions are usually not made a party in legal challenges to their orders before the court, and therefore deficiencies in orders burden the information seekers with the task of defending orders of the ICs before courts. Studies have shown that the RTI Act is extensively used by the poor and marginalised- a 2014 study found that all of the rural applicants, and more than half the urban applicants, randomly selected to be interviewed for the study, were living below the poverty line. Vague use of language, insufficient or incorrect recording of facts and not recording basis of orders, weigh in favour of the petitioner assailing the order of the commission. The study found that in several cases, orders of ICs were set aside by courts due to lack of reasoning or because orders were ultra vires of the Act.

Third, deficient orders prevent effective public scrutiny and accountability of the institution of information commissions and the performance of information commissioners.

Finally, deficient orders have little value in terms of furthering the cause of transparency outside the scope of the limited order. Rather than the decision itself, it is the enunciation of reasons, logic and basis of the decision which create public awareness and lead to public debates about enhancing the scope of transparency and accountability in the country.

Action points

a) Information commissions need to adopt appropriate formats for their orders to ensure that the reasons for their decisions and all the relevant information is contained in each order, and that their orders meet with all relevant statutory requirements. A suggested format is appended in annexure 1.
b) Civil society groups, including academic, research and professional institutes, must take on the task of periodically reviewing the performance of information commissions, especially the quality of their

orders, and raise publicly relevant issues both involving criticism of the commissions and support for them where that is required.

2. Backlogs in Information Commissions

Findings

The legal maxim "Justice delayed is justice denied" is perhaps most pertinent for the RTI Act today. The study found that the collective backlog in the disposal of appeals and complaints in the **16 information commissions**, for which data was available, was alarming as **1,87,974 cases were pending on December 31, 2015.**

Even more worrying was the fact that a comparison with the data in the earlier RaaG report on pendency as of December 31, 2013, showed that there was a rising trend. The **pendency in the Assam SIC went up by 240%, while Odisha and Punjab went up by more than 60%. The pendency in Kerala SIC went up by 49%, while the CIC saw a rise of 43%.**

The huge backlog in the disposal of appeals and complaints by the commissions is one of the most serious problems being faced by the transparency regime in India. The high levels of pendency in ICs result in applicants having to wait for many months, even years, for their appeals and complaints to be heard.

Using the monthly disposal rate of ICs, and the number of appeals and complaints pending, the time it would take for an appeal or complaint filed on January 1, 2016 to be heard by the IC was computed (assuming appeals and complaints were heard in a chronological order). The analysis presented in table 1 shows that a matter filed on January 1, 2016 would come for hearing in the **Assam state IC after 30 years - in the year 2046! In West Bengal after 11 years, and in Kerala after 7 years!** The comparative data from the 2014 study is also presented in the table.

Table 1: Estimated time for a new appeal/complaint to be heard by the IC

	IC	Time before new appeal is heard (as of Jan 1, 2014)	Time before new appeal is heard (as of Jan 1, 2016)
1.	ASS	2 years & 8 months	30 years
2.	WB	17 years & 10 months	11 years & 3 months
3.	KER	2 years & 3 months	7 years & 4 months
4.	ODI	9 months	2 years & 9 months
5.	RAJ	3 years & 4 months	2 years & 3 months
6.	CHH	1 year & 3 months	2 years
7.	CIC	1 year & 1 month	1 year & 10 months
8.	KAR	1 year & 2 months	1 years & 8 months
9.	UP	1 year & 4 months	1 year & 2 months
10.	MAH	1 year & 1 month	8 months
11.	HP	2 months	5 months
12.	PUN	3 months	4 months
13.	HAR	3 months	2 months
14.	MEG	No pendency	2 months
15.	NAG	1 month	no pendency
16.	SIKK	-	no pendency
17.	AP	1 year & 6 months	NA
18.	ARU	4 months	NA
19.	BIH	NA	NA
20.	GOA	NA	NA
21.	GUJ	9 months	NA
22.	JHA	NA	NA
23.	MP	60 years & 10 months	NA
24.	MAN	NA	NA
25.	MIZ	-	NA
26.	TN	NA	NA
27.	TRI	-	NA
28.	UTT	3 months	NA

NA implies 'not available'

Unfortunately, the SIC of Madhya Pradesh which had the longest waiting time as per the previous report- 60 years- did not provide information regarding appeals and complaints pending and disposed on its website and therefore, it was not possible to analyse whether there has been any improvement in its functioning. In West Bengal, though, the waiting period reduced by 6 years in comparison to the 2014 data, yet as it stands at 11 years, it is still a matter of grave concern. **In 9 of the 16 ICs for which data was available for 2016, the waiting time for a hearing was more than 1 year**.

This is especially problematic for marginalized sections of the Indian population who use the RTI law to try and access information about their basic entitlements like subsidized rations, old age pensions, medical facilities in hospitals and minimum wages. It is a daunting task for them to approach the information commission in case of denial of requisite information. If there are inordinate delays in the commissions, the law becomes meaningless for them in terms of ensuring their right to information.

Often the huge pendency and the concomitant long waiting time are a result on non-appointment of commissioners in the IC. The assessment found that several ICs were non-functional or were functioning at reduced capacity as the posts of commissioners, including that of the chief information commissioner were vacant during the period under review. The Assam SIC was without a chief from January 1, 2012 till December 2014 . In fact, the commission did not have a single commissioner from 16th March, 2014 to December, 2014 and therefore no appeals or complaints were heard in this period. The Manipur SIC was non- functional for more than a year from March 2013 to May 2014, as there was no commissioner. The SIC was without a chief for more than four years- from 2011 till 2015. The SIC of Goa was defunct for most of 2015, as after the retirement of the sole commissioner in January 2015, no new appointments were made till January 2016. In Rajasthan, the information commission was not functioning for almost 13 months, from January 2012 to December 2013, while the Madhya Pradesh IC was not functioning for over a year between 2013 and 2014.

Further, even where there are adequate number of commissioners, often a reasonable number of cases are not disposed every month due to the tardy functioning of commissioners.

Action points

a) There needs to emerge, through a broad consensus, agreement on the number of cases a commissioner should be expected to deal with every month. Given an agreement on the maximum time within which appeals and complaints should ordinarily be dealt with – hopefully not more than 45 days - the required strength of commissioners in each commission can be assessed on an annual basis. The agreed to norms must also be made public, so that appellants and complainants know what to expect. Further details about the number of appeals and complaints disposed by each commissioner needs to be made available on the website of the IC and also in the annual reports.
b) Wherever a commissioner is due to demit office in the regular course of time (by way of retirement), the government must ensure that the process of appointment of new commissioners is initiated well in advance so that there is no gap between previous commissioner demitting office and a new one joining in.
c) There also needs to be a review of the structure and processes of ICs. Perhaps looking at the process followed by the information commission (ICO) of UK, in order to reduce pendency and waiting time, the structure needs to be infused with trained cadre of officers to facilitate the processing of appeals and complaints. At the initial stages each case could be handled by a case officer who after examining the case, seeks the response of the PIO on the specific grounds of the appeal or complaint. Based on the response of the PIO, the case officer should forward the matter to the enforcement section if she believes that the information has been provided and the grounds for the appeal or complaint, in so far as disclosure of information are concerned, have been satisfied, and the information seeker confirms the same in writing. Here a commissioner would examine the matter for violations of the RTI Act and accordingly initiate and follow through with the penalty and compensation provisions. In all other matters where either adjudication on information disclosure is required or where there is no written confirmation by the information seeker about the receipt of information or where the PIO does not respond to the IC's communication, the matter would be heard by a commissioner. After giving directions on information disclosure and initiating penalty proceedings by issuing a show case notice in case of violations, the matter would be forwarded to the enforcement section for follow-up. This would streamline the process as the first communication from the IC would be within 30 days of an appeal/complaint being filed with the IC and not after several months or years of waiting. Also, the correspondence with the PIO prior to the hearing would potentially make the hearing more efficient as the composite position in terms of the grounds for the appeal or complaint and the response of the PIO would already be ready. Further, this would help reduce the waiting time to access information as the assessment found that in a significant proportion of cases, information was provided in the intervening period between the filing of an appeal with the IC and the matter being heard by the IC. In all such cases, based on a written confirmation by the information seeker that information indeed has been provided, the matter would directly be forwarded to the enforcement section for looking into the issue of violations and penalties. By having an IC exclusively looking at enforcement, it will ensure that the directions are adequately monitored and taken to a logical conclusion.

3. Penalty imposition

Findings

The RTI Act empowers the ICs to impose penalties of upto Rs. 25,000 on erring PIOs for violations of the RTI Act. The penalty clause is one of the key provisions in terms of giving the law its teeth and acting as a deterrent for PIOs against violating the law. Despite Section 20 of the RTI Act clearly defining the violations of the law for which PIOs must be penalised, the study found that ICs imposed penalty in only an extremely small fraction of the cases in which penalty was imposable.

Across the sample ICs (excluding Rajasthan[2]), an average of 59% orders recorded one or more violations listed in Section 20 of the RTI Act, based on which the IC should have triggered the process of penalty imposition. Of these 59% cases, only in 24% cases ICs issued notices to the PIOs asking them to show cause why penalty should not be levied. After show cause notices were issued, the subsequent order recording the final directions of the IC in terms of whether or not penalty was imposed, could only be found for 16% of the cases in which show cause notices were issued. **Finally penalty was imposed in only 1.3% of the cases in which it was imposable.**

As a huge proportion of the IC orders were non-speaking or unreasoned or otherwise deficient, the appeals and complaints that have been judged to be such that a penalty was imposable are limited to those where there was a clear case of delay, or where the IC held that the PIO had wrongly denied information. It was impossible to assess whether other violations, for instance obstruction of information or providing incorrect or misleading information existed. Therefore, the results are in fact an underestimation of the real picture.

The non-imposition of penalty has many serious implications as it sends a message that violations of the law will not invite any adverse consequences. This destroys the basic framework of incentives and disincentives built into the RTI law and promotes a culture of impunity.

In terms of amount of penalty foregone by ICs, the analysis of 1469 orders showed that by foregoing penalties in cases where it was imposable, ICs caused a loss of more than Rs. 2.13 crore. Extrapolating this nationally[3], **an estimated loss of Rs. 290 crores is being caused annual by ICs not imposing penalties.**

But, even more important than the revenue lost is the loss of deterrence value that the threat of penalty was supposed to have provided. This has resulted in PIOs denying information, delaying information, not responding at all, or violating other provisions of the RTI Act with impunity, without fear of consequences.

The non-imposition of penalties is perhaps the most vexatious of issues relating to the proper enforcement of the RTI Act. There are numerous HC orders that reiterate that it is mandatory to impose the penalty prescribed in section 20(1) of the RTI Act if a PIO violates the RTI Act in any one or more of the following ways:

i. without any reasonable cause refuses to receive an application
ii. without any reasonable cause delays furnishing information
iii. with mala fide denies the request for information
iv. knowingly gives incorrect information
v. knowingly gives incomplete information
vi. knowingly gives misleading information
vii. destroys information which was the subject of any request
viii. obstructs in any manner the furnishing of information

[2] While the Rajasthan IC was excluded from the penalty analysis due to problems in the data, but an estimate suggests similar figures for the IC.

[3] The number of appeals and complaints disposed by 18 ICs from January 2014 to December 2015 is 3,19,312. Since this figure is only for 18 ICs, even at a conservative estimate, the disposal for all ICs would be upwards of 4 lakh over the 2 year period. Therefore, the estimated cumulative annual disposal of appeals and complaints by ICs across India would be 2 lakh. Since for 1469 cases disposed, loss of Rs 2.13 crore was caused, hence loss in 2 lakh cases can be estimated to be Rs. 290 crore.

Given the settled legal position that the commission's orders must be speaking orders and must contain detailed reasons for the order, whenever an appeal or a complaint provides evidence that one or more of the listed violations has occurred, the commission, after giving the PIO an opportunity to be heard, must either impose the prescribed penalty or give reasons why in its opinion the PIO has been able to establish that the relevant exception is applicable (reasonable cause, no mala fide, or not knowingly, as described above).

This is especially so because sections 19(5) and 20(1) of the RTI Act mandate that the PIOs have the onus to prove that they have not committed a penalisable offence. At the very least where ever there is delay or refusal, or where the IC allows part or all of the information denied earlier by the PIO, the PIO should be required to establish that there was reasonable cause for delay, or that the refusal of part or whole of the information sought was bonafide. Similarly, where incorrect, incomplete or misleading information is provided, the law requires the PIO to prove that this happened without the PIO's knowledge.

The HC of HP in Ved Prakash vs State Information Commissioner (CWP No. 8794 of 2011-J), quoted an earlier HC order holding that just because the asked for information was supplied as a part of the pleadings in an appeal hearing, it did not immunise the PIO from penalty imposition. Further, the HC reiterated that imposition of penalty was mandatory and quoted another HC order to clarify that penalty should invariably be imposed when information is delayed without reasonable cause, and the contention that penalty should be only imposed when there is repeated violation, needs to be rejected.

In Prem Lata vs. Central Information Commission (W.P. (C) 2458 of 2012), the Delhi High Court held that mala fide did not have to be established each time a penalty was to be imposed - only where a request was denied did the need to determine that there was mala fide become relevant. In other cases other factors became relevant.

In Madhab Kumar Bandhopadhyay vs The State Chief Information Commissioner (W.P. (C) No. 18653(W) of 2009), the HC of Calcutta held that just because the PIO had complied with the orders of the Commission did not mean that penalty was not imposable on him.

The research found that in several cases, even after recording a violation of the RTI Act, the IC let off the PIO with a warning or, during a show cause hearing, accepted an apology from the PIO and did not levy a penalty. These directions are without a legal basis as once the IC has recorded a violation, the IC must proceed with the penalty process. The RTI Act does not provide any basis for letting off PIOs by accepting apologies or issuing warnings. The HC of Punjab & Haryana in May 2016, in Smt. Chander Kanta vs. SIC (CWP No.17758 of 2014) held that either penalty has to be imposed at the stipulated rate or no penalty is to be imposed, presumably after appropriately recording reasons for the same. The HC went on to set aside an order of the SIC in which the PIO had been let off with a warning.

The laxity in imposing penalties is also allowing PIOs to take liberties with the RTI Act at the cost of the public. For example, there is an increasing tendency among PIOs to insist that applicants come and search for the information themselves, even if they live in some distant town or village, and even if the information they want is accurately and specifically indicated, and not scattered. Increasingly PIOs are also refusing information by sending a denial (often a photocopy of a proforma denial) quoting all possible exceptions or, as has been observed on occasion, just citing section 8, or at best section 8(1), and leaving it to the applicant to pick the sub-clause by which she prefers to have her application rejected!

Given that this almost universal violation by information commissions- of non-imposition of penalties- is threatening the very viability of the information regime in India, perhaps the time is right to initiate a public debate on what action the people of India can take to fix accountability.

It needs to be debated with legal luminaries, and perhaps adjudicated on by the Supreme Court, whether commissioners who refuse to impose penalty even where it is clearly required by law, and thereby cause a loss to the exchequer through their deficient orders, are liable to be prosecuted under section 218 of the Indian Penal Code, which states that:

> *"Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing*

it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. (Emphasis added)

Perhaps it also needs to be debated and adjudicated on whether commissioners are liable to be prosecuted under provisions of the Prevention of Corruption Act, specifically section 13(1)(d):

"(1) A public servant is said to commit the offence of criminal misconduct,-

XXX

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;" (Emphasis added)

Action points

a) There needs to be a serious discussion among the ICs to resolve their hesitation about imposing penalties provided in the law.
b) As the RTI Act provides for a mandatory penalty in cases of violation of the Act, every order must specify its findings related to the violations of the Act and the related penal provisions, discussing whether a penalty is imposable, the quantum of penalty and the calculation used to arrive at the figure etc. and in cases where a penalty is not imposed, the reasons for not imposing the same should be explicitly provided.
c) At the same time, a dialogue needs to be initiated between the public and information commissions to discuss non-imposition of penalties. To that end, it is required that groups of interested citizens join hands with the media, legal professionals, and progressive former civil servants and judges, to analyze orders of commissions on a regular and systematic basis, so that a meaningful dialogue can be initiated with commissions on the need and legal justification for imposition of penalties.
d) Meanwhile, considering that penalties imposed on the PIOs, apart from ensuring that PIOs have an incentive to act in accordance with the law, also contribute revenue to the public exchequer, perhaps it is time that the Supreme Court was petitioned.
e) Applicants and complainants must persistently pursue the issue of imposition of penalty where any violation of the RTI Act has taken place. They must insist that the ICs detail in each order the reasons why penalty was not being imposed.

4. Transparency in the functioning of ICs

Findings

Websites of all 28 ICs[4] (1 CIC +27 SICs) were analysed to assess how much information each commission is proactively disclosing about its functioning, and how up-to-date and easily accessible this information is. The assessment found that several ICs performed poorly in terms of being transparent about their own functioning.

The websites of two state information commissions, Goa and Jharkhand, were not accessible at all and displayed an error message.

Eight (31%) of the 26 IC websites analysed did not provide information on the number of appeals and complaints received and disposed in 2014 and 2015. These were the websites of the information commissions of Andhra Pradesh, Arunachal Pradesh, Bihar, MP, Manipur, Tamil Nadu, Tripura and Uttarakhand.

[4] Websites of ICs of J&K and Telangana were not analysed as J&K has its own RTI law and is not bound by the provisions of the RTI Act 2005 and the Telangana SIC is yet to be set up.

Ten of the 26 SIC websites accessed did not provide information on the number of appeals/complaints pending at the end of 2014 or 2015. These were the SICs of Andhra Pradesh, Arunachal Pradesh, Bihar, Gujarat, MP, Manipur, Mizoram, Tamil Nadu, Tripura and Uttarakhand.

In seven of the 26 IC websites analysed, the decisions and orders of the commission could not be directly accessed. In some, decisions could only be retrieved by inputting the appeal number, or name of the appellant or complainant was required to access the decisions, while in others there was no link to access the orders and decisions. ICs for which orders could not be accessed directly for 2016 were Gujarat, Haryana, Kerala, Madhya Pradesh, Sikkim, UP and Chhattisgarh.

Further, the performance of many ICs in terms of publishing annual reports and putting them in the public domain was found to be dismal. To ensure periodic monitoring of the functioning of the commissions, section 25 obligates each commission to prepare a *"report on the implementation of the provisions of this Act"* every year, which is to be laid before Parliament or the state legislature.

The analysis of the IC websites revealed that many of the commissions had not posted their annual reports on the web and very few had updated the information. As the analysis was done in September 2016, it would be reasonable to expect that annual reports upto 2015 would be available on the websites. Yet, **21 out of 28 ICs (75%) did not provide the annual report for 2015** (see table 2). In fact, 4 of these, the SICs of MP, Manipur, Tripura and UP, had no information about annual reports on their websites.

Table 2: Availability of Annual Report on IC websites

	IC	Latest year for which report available			IC	Latest year for which report available	
		as on 20.9.2014	as on 20.9.2016			as on 20.9.2014	as on 20.9.2016
1	AP	2012	2013	15	MAH	2013	2014
2	ARU	2007	2007	16	MAN	NA	NA
3	ASS	2009	2015	17	MEG	2012	2014
4	BIH	2012	2012	18	MIZ	2013	2015
5	CHH	2012	2014	19	NAG	2013	2015
6	CIC	2013	2015	20	ODI	2012	2013
7	GOA	2008	Website inaccessible	21	PUN	2008	2011
8	GUJ	2013	2015	22	RAJ	2013	2015
9	HAR	2006	2012	23	SIK	NA	2014
10	HP	2013	2014	24	TN	2008	2011
11	JHA	2011	Website inaccessible	25	TRI	NA	NA
12	KAR	2013	2015	26	UP	NA	NA
13	KER	2011	2011	27	UTT	NA	2014
14	MP	NA	NA	28	WB	2009	2014

NA implies 'not available'

Transparency is key to promoting peoples' trust in public institutions. By failing to disclose information on their functioning, ICs continue to evade real accountability to the people of the country whom they are supposed to serve. In addition, answerability to the Parliament and state legislatures is also compromised when annual reports are not submitted as required.

Action points

a) Each information commission must ensure that all relevant information must be displayed on its website. This includes up-to-date and real-time information about the receipt and disposal of appeals and complaints, and copies of orders passed by commissions. The information should be updated at least weekly, if not daily.
b) Information commissions must also ensure that, as legally required, they submit their annual report to the Parliament/state assemblies in time. The relevant standing committees of Parliament and legislative assemblies should treat the submission of annual reports by ICs as an undertaking to the house and demand them accordingly.

5. IC orders in violation of the RTI Act

Findings

The assessment found that there is a growing tendency among PIOs and adjudicators to exempt information from disclosure citing sections of the RTI Act that do not allow for such exemptions. From among the 252 appeals of CIC, Assam and Bihar, where part or full information was denied, **50% denials**

were in violation of the RTI Act, i.e. the IC denied information on grounds which are not provided for in the RTI Act.

Two sections of the RTI Act that were often misused to deny information were section 7(9) (disproportionate diversion of resources), and section 11(1) (third party information) - neither of which can by themselves be used to deny information. Section 7(9) allows for information to be provided in a different form from the one in which it is sought if providing information in the form sought for would disproportionately divert the resources of the public authority or would be detrimental to the safety of the record. Despite this, the section was found to be regularly cited by PIOs and ICs to altogether deny information.

Similarly, wherever information pertained to a third party, ICs were found to often uphold denial of information on the premise that the third party had not consented to the disclosure of information. This despite the fact that Section 11 does not allow for 'veto' power to the third party and clarifies that the decision regarding disclosure is to be finally made by the PIO while keeping in view the submission of the third party. In fact, the provision is worded in such a manner that the third party rights would be invoked only if the PIO had decided to disclose the information, i.e. reached a conclusion that the information was not exempt under the RTI Act. In order to prevent disclosure, the third party would have to make a case for how the information was indeed exempt under Section 8 or 9. And even if it succeeded in proving the same, the PIO would still be obligated to consider if public interest in the disclosure of information would outweigh any possible harm or injury to the interests of such third party.

Though less often, "sub-judice" was also cited as a basis for denying information, perhaps as a misunderstanding of section 8(1)(b), which actually exempts from disclosure "*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*."

The most disturbing trend was of inventing exemptions that were not a part of the RTI Act. This was despite the fact that there are many court orders that caution against this very form of interpretive adventurism (see Manohar s/o Manikrao Anchule vs. State of Maharashtra (Civil Appeal No. 9095 of 2012), Chief Information Commissioner versus State of Manipur and Another (Civil Appeal Nos.10787-10788 of 2011), and Thalappalam Ser. Coop. Bank Ltd Versus State of Kerala (Civil Appeal No. 9017 OF 2013)).

For instance, in several cases ICs denied information because it pertained to previous years, or because information sought was voluminous, or because PIOs claimed that records could not be traced or because the IC determined that the information seeker had no good reason for seeking information. None of these are valid grounds for denial of information and in fact Section 6(2) specifically states that the information seeker is not required to disclose reasons for seeking information.

Another common problem found in the assessment was ICs condoning denial of information relating to 'reasons' for decisions of public authorities. There is nothing in the RTI Act that even remotely suggests that "reasons" are exempt from disclosure. In fact, to the contrary, section 4, subsection (1)(d) explicitly obliges public authorities to proactively provide "*reasons for its administrative or quasi-judicial decisions to affected persons*". Therefore, wherever reasons are a part of the record held by a public authority, they have to be disclosed subject to the exemptions laid down in the Act.

The sample of IC orders were also examined to determine whether the subsidiary directions contained in the order regarding penalty imposition, providing delayed information free of cost (Section 7(6)) etc. were in keeping with the provisions of the law. **The percentage of orders in which the subsidiary directions were not in compliance with the RTI Act, was more than 65%**.

Action points

a) Whereas the Supreme Court needs to continue stressing the need for improving the quality of judicial orders, both the Supreme Court and the various high courts need to ensure that all their judgments dealing with or even mentioning the poor quality and factual inadequacies of IC orders are formally brought to the notice of all ICs, especially when they are not parties to the case and as such might not feel obliged to study and comply with them unless formally notified.

b) It needs to be stressed and clarified that only information which is exempt under Sections 8 or 9 of the RTI Act can be legally denied. Denial of information on any other grounds is akin to introducing new exemptions in the Act, which the SC has held to be an illegal practice.
c) Newly appointed information commissioners must be provided an opportunity to orient themselves to the law and case law. Incumbent commissioners should have an opportunity to refresh their knowledge and understanding and to discuss their experiences and thinking with commissioners from other commissions, and with experts from outside the information commissions. Towards this end, it might be desirable to link up with national institutions like the National Judicial Academy, in Bhopal, and request them to organize orientation and refresher workshops, the latter over the weekend, in order to minimize disruption of work. This is similar to the workshops being organized by them for High Court judges. Other state and national institutions could also be identified for this purpose and support could be sought from international agencies to organize regular physical and internet interactions between information commissioners in India and in other countries of the region which have similar laws.

6. Not adjudicating on appeals and complaints

Findings

Despite the RTI Act specifically obligating information commissions to receive complaints and appeals, and to dispose them in accordance with the law and with the exercise of the various powers given to them for the purpose, the assessment found that ICs sent back a large number of complaints and appeals to PIOs and FAAs for consideration or reconsideration, without any adjudication. **A large proportion (80%) of the complaints made to the ICs under S. 18 were referred back to the PIOs or FAAs, without examining the facts of the case or holding a hearing in the matter**. In the case of the Central Information Commission, 81% of the complaints were referred to the FAA and 9% to the PIO.

This is despite the fact that there is no provision in the RTI Act which mandates this or even permits it.

The remanding of complaints to FAAs is at complete variance with the law, as the law does not require the filing of a first appeal in the process of filing a complaint.

Apart from being without a legal basis, the practice of remanding appeals or complaints to PIOs or FAAs without adjudication also undermines the adjudicatory process of the law and sets the clock back for the information seeker by several months or even years.

Action points

a) ICs must discuss among themselves and recognise the legal infirmities in sending back appeals and complaints to PIOs and FAAs. They must themselves resolve not to do this.
b) Perhaps what would help is a definitive and unambiguous order of the Supreme Court outlawing the referral of appeals and complaints to PIOs and FAAs by the ICs. It should reiterate the need for the ICs to follow the due process prescribed by law, and adjudicate and give orders and directions on all appeals and complaints. The SC could be moved to that end.

7. Powers of commissions

Findings

The ICs have various powers provided to them by the RTI Act. These include the power to initiate an inquiry on any matter brought before it in a complaint [S. 18(2)], some of the powers of a civil court while inquiring into any matter [S. 18(3)], and the power to examine, as part of an inquiry, any record to which the RTI Act applies [S. 18(4)].

Under section 19(7) the decision of the commission on an appeal against an order of the PIO or FAA is reiterated to be final, and in section 19(8) the IC has the powers to "require" the PA "*to take any such steps as may be necessary to secure compliance with the provisions of this Act*…". It also has the power to award compensation to a complainant and to impose "any of the penalties provided under this Act".

Section 20(1) empowers the IC to impose penalties in response to both appeals and complaints. Section 20(2) empowers the IC to recommend disciplinary action against a PIO for "persistent" violation of one or more provision of the Act.

The generality of the powers given under Section 19(8) have been reinforced by at least two judicial orders, both of which seem to suggest that the list given in 19(8)(a)(i to vi), is only indicative and not exhaustive, and no specific barriers are put by the law on the scope or applicability of this power.

However despite this, the lack of powers of ICs has often been invoked as one of the reasons for the poor implementation of the RTI Act. The absence of contempt powers and inability to penalise officials other than the PIO have been cited as reasons for allowing non-compliance by PIOs and PAs with orders of the ICs orders and the RTI Act to go unchallenged and unpunished. Similarly violations of Section 4 are not acted upon by ICs by citing that compliance with section 4 is the obligation of the PA and not of a PIO – and the ICs do not have powers to penalize PAs (only PIOs can be penalized under the law).

Fortunately, remedies are available for both these challenges through SC orders and by invoking other laws. In Sakiri Vasu v State of Uttar Pradesh and Ors. (AIR 2008 SC 907 : 2008 AIR SCW 309 : (2008)2 SCC 409), the SC held that it is well settled that once a statute gives a power to an authority to do something, then it includes the implied power to use all reasonable means to achieve that objective, also known as the doctrine of implied powers:

> *"18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.*
>
> *xxx*
>
> *20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein.*
>
> *21. An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Thus in ITO, Cannanore v. M.K. Mohammad Kunhi AIR 1969 SC 430, this Court held that the income tax appellate tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.*
>
> *22. Similar examples where this Court has affirmed the doctrine of implied powers are Union of India v. Paras Laminates , Reserve Bank of India v. Peerless General Finance and Investment Company Ltd. [1996]1SCR58 , Chief Executive Officer and Vice Chairman Gujarat Maritime Board v. Haji Daud Haji Harun Abu (1996)11SCC23 , J.K. Synthetics Ltd. v. Collector of Central Excise 1996 (86) ELT472(SC) , State of Karnataka v. Vishwabharati House Building Co-op Society [2003] 1SCR 397 etc."*

The Supreme Court has held that all authorities have "implied powers" to do what is required to meet with their legal obligations. By implication, the SC has held that the information commissions can penalise PIOs for non-compliance even after a case has been closed and that not just a PIO but any responsible official can be penalized for violation of the RTI Act. As the IC is empowered by the RTI Act to impose penalties explicitly on PIOs for violations of the RTI Act, it can also impose it on whoever else might be in violation of the RTI Act by invoking the doctrine of "implied power". This would mean that there is no legal reason why the IC cannot impose a penalty on, say the HoD of the PA or whoever else is responsible, for not complying with its lawful orders and directions, and for violating the RTI Act.

For non-cooperative PAs which disregard IC orders, including recovery of penalties ordered by ICs, remedies seem to be available under other applicable laws. For example, where the PA refuses to recover the penalty imposed by the IC, the head of the PA can be cited under section 217 of the IPC which says:

> ***"217. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture —***
>
> *Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or*

knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Further, where other lawful directions of the IC have been disregarded by a public authority, recourse can be taken to section 187 or 188 of the IPC which state:

"187. Omission to assist public servant when bound by law to give assistance —

Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

"188. Disobedience to order duly promulgated by public servant —

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes to tender to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Explanation** — It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm."*

Also section 166 of the IPC can be invoked, which says:

"166. Public servant disobeying law, with intent to cause injury to any person —

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

Action points

a) The practice adopted by some ICs of keeping a case open till its interim orders are complied with, and only closing the case after such compliance, could be adopted by all ICs as it allows them to put pressure on the PIO till their directions and orders are obeyed.
b) Where PAs or officials other than PIOs are found to be violating the RTI Act or the directions of ICs, relevant provisions of the Indian Penal Code and also the doctrine of implied powers can be invoked by the ICs to ensure compliance.
c) In case of non-compliance with orders of the ICs or violations of the Act by the PA or officials other than the PIOs, the ICs can take action by invoking the doctrine of implied powers.