

CENTRAL INFORMATION COMMISSION
Block IV, 5th Floor, Old JNU Campus
New Delhi 110067

Appeal No. CIC/AT/A/2008/00027 & 33

dated February 6, 2009

Name of the Appellant:	Ms. J.D. Sahay Chief Commissioner of Income Tax-I Ahmedabad.
Public Authority:	Ministry of Finance Department of Revenue, New Delhi
Date of Hearing	05.09.2008
Date of Decision	06.02.2009

FACTS OF THE CASE:

1. The appellant applied for empanelment/appointment to the post of Member, CBDT twice on 10.5.2006 and 21.11.2006 but was not selected. Aggrieved by non-selection, the appellant by her two RTI Applications, submitted on 10.8.2007 and 17.8.2007 sought certain information which could throw light on the reason for her non-selection. Vide RTI application dated 10.8.2007, the appellant applied for copies of Reporting and Reviewing Officers' comments/gradation in the last 10 ACRs for the year ending 31.3.96 to the year ending 31.3.06 which was taken into account while panel formation was done by the COS which met for the purpose of deciding the names of Chief Commissioners for selection and appointment as Member, CBDT while by application dated 17.8.2007, the appellant applied for copies of —

- (i) note-sheet entries relating to empanelment
- (ii) Minutes of meeting of Committee of Secretaries (COS) held between April, 2006 and August, 2007;
- (iii) Copy of letter, if any, addressed to Finance Minister on the subject;
- (iv) Copy of any letter address IB/CVC/ACC on the subject;
- (v) Whether Chairman, CBDT was co-opted by the COS at any time?

2. CPIO by his reply dated 17.9.2007 rejected her application dated 10.8.2007 on the ground that the information sought for is personal and confidential in nature and, therefore, exempted from disclosure under Section 8(1)(j) of the RTI Act". CPIO by another reply dated 18.9.2007 also rejected the appellant's RTI application dated 17.8.2007 stating inter-alia as under:

"information sought at paras 14(a)(b)(d) and (e) should not be disclosed simply because the final decision in this matter vests with the ACC and also secret/confidential in nature, therefore, exempted from disclosure under Section 8(1)(i) of the RTI Act, 2005. There is 'Nil' report in respect of para 14(c)".

3. The appellant against the aforesaid two orders of the CPIO submitted two appeals dated 13/10/2007 and 15.10.2007, which were also dismissed by the First Appellate Authority by identical orders each dated 7.11.2007.

4. The appellant approached this Commission and filed two appeals on 17.12.2007 and 20.12.2007. In her appeal petition dated 20.12.2007, the appellant made following submissions:

- (i) Both CPIO and Appellate Authority erred in denying her the information and the decision was announced without hearing her. Hence grave injustice has been done to her;

- (ii) Information has been used against her without disclosing the comments/gradation to her at any time. This is gross injustice done to her;
- (iii) The plea regarding secret and confidential nature of information does not hold force because the information relates to the appellant and that she is not seeking information in respect of any other person.
- (iv) The procedure and technique followed to determine any cut-off point should be disclosed to the aspirants. The action relating to the determination and application of cut-off points being a critical factor for an aspirant, should be put in public domain.

7. The appellant filed written submission on 21.5.2008 and reiterated her earlier submissions. She also stated that rejection of her application dated 10.8.2007 by the CPIO and her appeal dated 13.10.2007 by the Appellate Authority was not justified. She enclosed a copy of the judgment of the Supreme Court of India and relying on the judgment submitted that as per judgment of the Hon'ble Supreme Court of India, in Appeal No.7631 of 2002 in "Dev Dutt Vs. Union of India, the Hon'ble Court has ordered that every entry (adverse or good) in the ACR of every employee under the State whether he is in civil, judicial, police or other service, must be communicated to him.

8. In her written submissions filed on 22.5.2008, the appellant made following additional submissions:

- (i) Section 8(1)(i) of the RTI Act does not apply to a decision already taken if the matter is complete or over. Since the COS has already decided her case and the matter is already complete, invoking of section 8(1)(i) is not justified.
- (ii) The information sought by her is in public interest and as per CIC decision in Appeal Case No.CIC/OK/A/2006/00046 (decided on

2.5.2006), 'public interest' includes disclosure of information that leads towards greater transparency and accountability in the working of a public authority. The other decisions of the CIC she relied in this context are: Appeal No.CIC/WB/A/2006/00469 & 00394 and Appeal No.CIC/OK/A/2006/00266, 058,066 & 0315 dated 23.4.2007.

9. The respondent Department of Revenue in their written submissions dated 4.4.2008, which were forwarded to this Commission vide their letter dated 19.5.2008, submitted that rights provided under the RTI Act are restricted to "Citizens of India" whereas these applications and appeals are from a Government Department itself, viz. DGIT(Inv), Ahmedabad. Hence the case of the appellant is not covered under the RTI Act. Giving chronology of events, the respondents further submitted that —

- (i) the information sought by the appellant was vested with the ACC and also secret/confidential in the nature, therefore, exempted from disclosure under Section 8(1)(i) of the RTI Act.
- (iii) Denial of information by CPIO relating to appellant's application dated 10.8.2007 is fully justified under Section 8(1)(j) of the RTI Act;
- (iv) Information concerning selection process was available with the Department of Revenue in its fiduciary relationship with individuals who were under consideration during the selection. It was therefore, also exempted from disclosure under Section 8(1)(e) of the RTI Act.
- (v) There was also no case made out which could warrant disclosure in larger public interest.

- (vi) The appellant has made all communications relating to her case in her official capacity as Chief Commissioner of Income Tax on the official letter head of the Department.
- (vii) The Appellate Authority is under no obligation to give notice of hearing to the appellant under the RTI Act;
- (viii) No injustice has been done to the appellant since her request is not covered under "information" as defined under the Act.
- (ix) The file dealing with selection of member, Central Board of Direct Taxes (CBDT) contains various secret and personal information which are exempted from disclosure under the provisions of RTI Act.
- (x) The orders of the CPIO and Appellate Authority are in conformity with the CIC's order in case No.CIC/AT/A/2007/000838 and that no other case cited by the applicant, is relevant to the facts and circumstances of this case.
- (xi) The applicant's request regarding supply of copies of the minutes/noting etc, the same is a fresh request for which fresh application is required.

10. Both appeals were heard by Single Bench of the Commission on 28.5.2008. The Single Bench felt that since the case concerns a sensitive issue such as empanelment of officers and disclosure obligation of ACRs and the Commission's directions on such matters could have wider ramifications, the same should be heard by a larger Bench. Consequently, the matter was referred to the Full Bench.

11. Hearing by the Full Bench was fixed for 27.6.2008 which was later adjourned to 5.9.2008. Parties were accordingly informed vide notices dated 9.6.2008 and 24.6.2008. Cabinet Secretariat and Secretary, Department of

Personnel & Training were also invited to attend the hearing and submit their comments.

12. Cabinet Secretariat by their letter dated 23.6.2008 submitted as follows:

“the question of disclosure of ACRs is already under the purview of both the Official Secret Act read with RTI Act and the Department of Personnel & Training as per the Government of India (Allocation of Business) Rules, 1961, the Cabinet Secretariat has no direct role to play in this regard. Therefore, there was no need to file a return submission before the CIC. No written submissions were received from Department of Personnel & Training. However, Ms. Anuradha S. Chogti, Deputy Secretary (RTI), DoPT attended the hearing on 5.9.2008. “

13. The Full Bench of the Commission heard the matter on 5.9.2008. The following were present:

APPELLANTS:

Ms. J.D. Sahay, CCIT-I, Ahmedabad

RESPONDENTS:

1. S/Shri K. Jose Cyriac, AS (Revenue)
2. Mukul Singhal, JS(Revenue)
3. S.K. Tyagi, Director

OTHERS:

1. Ms. Anuradha S. Choagti, Deputy Secretary (RTI), DoPT

14. **ISSUES FOR DETERMINATION:**

- I. Whether the application is liable to be rejected on the ground that it was submitted on official letter head?

- II. Whether the case of the appellant so far as it relates to disclosure of gradation in ACR for the last 10 years is covered by the judgment of the Supreme Court relied on by the appellant?
- III. Whether information can be withheld under any of the exemption clauses cited by the respondent Department of Revenue?

DECISION AND REASONS:

15. The respondent Public Authority has submitted that in the instant case, information has not been asked for by a citizen of India. It has been asked by the appellant in her official capacity as Director General of Income Tax (Inv). A perusal of the RTI request shows that the application has been submitted in Form "A", the description whereof is as follows:

"Application Form for obtaining Information under Section 6(1) of the RTI Act, 2005 [See Rule 3(1)]"

16. The application was submitted in the name of the applicant and it has been signed by her in her personal capacity. Of course, she has referred to letter dated 17.8.2008 which enumerates the information asked for by her. This establishes that the information has been asked by the appellant in her individual capacity. Even assuming that a Government servant uses the letter head of the office for seeking information under Section 6(1) of the RTI Act and pays fees from out of his personal funds, an application submitted under such circumstances cannot be rejected on the ground that the application has been filed not by a citizen but by a Government servant in official capacity. The payment of fee and indication that it is an application under Section 6(1) of the RTI Act is good enough to establish that it is an application submitted by a citizen under the Act and the CPIO is obliged to consider the same.

17. RTI application dated 17.8.2007 whereby the applicant is seeking relevant entries of the meeting/file relating to empanelment and certain other information concerning the process of empanelment has been rejected by the CPIO invoking exemption under Section 8(1)(i) of the RTI Act whereas the disclosure in regard to ACRs which was the subject matter of RTI application dated 10.8.2007 has been denied under Section 8(1)(j) of the RTI Act.

18. The First Appellate Authority in its order dated 7.11.2007 has upheld the decision of CPIO refusing to disclose copies of the file notings and other documents pertaining to empanelment. The First Appellate Authority also invoked Section 8(1)(e) of the RTI Act stating that the information is available with the Department of Revenue in their fiduciary relationship with officers who were under consideration during the selection. The appellant has challenged the impugned order relying upon the Full Bench decision of this Commission dated 23.4.2007 in Appeal No.CIC/OK/A/2006/00266, 058,066 & 0315 dated 23.4.2007. The relevant para 42 which has been relied upon by the appellant reads as under:

“42. However, insofar as the departmental examinees are concerned or the proceedings of Departmental Promotion Committees are concerned, the Commission tends to take a different view. In such cases, the numbers of examinees are limited and it is necessary that neutrality and fairness are maintained to the best possible extent. Disclosure of proceedings or disclosure of the answer sheets not only of the examinees but also of the other candidates may bring in fairness and neutrality and will make the system more transparent and accountable. The Commission, moreover finds that the proceedings of the Departmental Promotion Committees or its Minutes are not covered by any of the exemptions provided for under Section 8(1) and, therefore, such proceedings and minutes are to be disclosed. If a written examination is held for the purpose of selection or promotion, the concerned candidate may ask for a copy of the evaluated answer sheet from the authority conducting such test/examination. The right to get an evaluated answer sheet does not, however, extend to claiming inspection of or getting a copy of the evaluated answer sheets concerning other persons in which case, if the concerned CPIO decides to disclose the information, he will have to follow the

procedure laid down under Section 11 of the Right to Information Act.”

19. Respondents on the other had submitted that the aforesaid Full Bench decision is not relevant in so far as this case is concerned. Respondents have wsubmitted that the more relevant case in this case is CIC//AT//2007/A/0838. But the contention of the respondent is misplaced in view of the fact that the aforesaid decision of the Commission only applies to disclosure of ACR and not DPC.

The issue is accordingly decided in favour of the appellant.

20. Respondent Public Authority in their written submission has argued that file dealing with selection of Members, CBDT contains various secret and personal information about the officials considered for selection. This information is exempted from disclosure in view of the provisions contained in Section 8(1)(e) (g)(h) and (j) of the RTI Act. At the time of hearing, the respondents also stated that what is being asked for are not DPC proceedings but proceedings of a Selection Committee consisting of senior Secretaries. All these proceedings are confidential and marked as such. They also submitted that these minutes are not with them but with the Cabinet Secretariat.

21. The CPIO has denied the request concerning disclosure of ACR for the last 10 years claiming exemption under Section 8(1)(j) of the RTI Act. The Appellate Authority upholding the decision has stated that ACRs have long been kept confidential to put on record “frank comments” of the senior officers in respect of performance of the juniors. The appellant has relied upon the recent decision of the Supreme Court in Appeal No.7631 of 2002 in “Deb Dutt Vs. Uoi” .In this case, the appellant was in service of Border Roads Engineering Service and the DPC meeting did not find him eligible for promotion but his juniors were selected and promoted. In this case, the Supreme Court’s opinion is very clear that ACR must be communicated to all employees working under the

State whether he is civil, judicial, police or other service (except military) so as to enable him to make a representation against his case. Non-communication of the same deprives an employee of an opportunity of making representation against it which may affect his chances of being promoted or from getting some other benefits. The court further stated that object of writing confidential reports and making entries in them is to give opportunity to public servant to improve his performance. In **State of UP Vs. Yamuna Shanker Misra 1997(4)SCC7**, the Court concluded that non-communication of opinion is arbitrary and hence violative of Article 14 of the Constitution of India. In this context, para 14 of the decision is relevant to be quoted:

“14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.”

22. The Supreme Court in this decision held that the decision of the Supreme Court in earlier case of **U.P. Jal Nigam Vs. Prabhat Chandra AIR1996SC1661 and Union of India Vs. S.K. Goel AIR2007 SC 1199** cannot prevail over the seven Judges Bench decision of the Supreme Court in **Menaka Gandhi Vs. UOI** in which it was held that arbitrariness violates Article 14 of the Constitution. The court further held that fairness and transparency in public administration requires that all entries whether poor, fair, average, good or very good in the ACR whether in civil, judicial, police or any other State service except military must be communicated to him within a reasonable period so that he can make a representation for its upgradation. The Apex Court held that in their opinion this is

the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

23. The object of RTI Act is also to bring in transparency and accountability in the working of Public Authorities. RTI Act confers a right on the citizen to access information held by a Public Authority and every Public Authority is obliged to facilitate this right. ACRs do contain an objective assessment of an officer and non-communication of the same has been held to be arbitrary by the Court and as such violative of Article 14 of the Constitution of India.

24. The appellant in this case has demanded copies of the ACRs for the last 10 years and has explained the resultant civil consequence to her as a result of grading in the ACR. On behalf of Union of India, it has been submitted that after the pronouncement of the Supreme Court decision, the Cabinet Secretariat has called a meeting and considered the whole issue. The GOI has also consulted Attorney General and review petition has been filed against the decision vide diary No.25080/2008. Admittedly, there is no stay granted by the Hon'ble Court. At the time of hearing, the respondent Public Authority wanted some time to file further documents. No documents have been filed till date. There is nothing on record even to show that the review petition has been admitted.

25. In regard to the disclosure of Annual Confidential Report, it has been our view that what is contained therein is undoubtedly 'personal information' about that employee. Accordingly, in 'Shri Gopal Kumar Vs. Maj. Gen. Gautam Dutt, DGW, Army HQ' (Appeal No.CIC/AT/A/2006/00069 dated 13.7.2006), a Division Bench of Commission has held that ACRs are protected from disclosure because arguably such disclosure seriously harm interpersonal relationship in a given organization. Further, the ACR notings represent an interaction based on trust and confidence between the officers involved in

initiating, reviewing or accepting the ACRs. These officers could be seriously embarrassed and even compromised if their notings are made public. There are, thus, reasonable grounds to protect all such information through a proper classification under the Official Secrets Act. This decision of the Commission has been followed in several other decisions also and the Commission has held that the disclosure of ACR is exempt under Section 8(1)(e) of the Right to Information Act, 2005 unless the Competent Authority is satisfied that a larger public interest warrants disclosure of such information.

26. Even in the case of Gopal Kumar supra decided by the Division Bench of this Commission, we have recognized that there are forceful arguments for a system of open assessment of employees working for an organization. But, that should be a conscious decision of the organization concerned and must be part of an overall systemic change. Till that happens, confidentiality of annual assessment of the employees of an organization should be allowed to be maintained, if that is the norm in that organization.

27. The appellant has forcefully submitted that in view of the decision of the Hon'ble Apex Court in Dev Dutt Vs. Union of India, the disclosure of ACR cannot be held to be any more exempted. However, the decision of the Hon'ble Apex Court is to be implemented by the concerned Public Authorities and in case any applicant is aggrieved with action or inaction of the concerned Public Authority, he can take up the matter with the Hon'ble Apex Court. It will not be appropriate on the part of the Commission to issue any direction or orders so as to ensure compliance of the Hon'ble Apex Court's order as it is only for the concerned authorities to implement the same. However, as to whether there is a need to change the hitherto held view of the Commission in regard to disclosure of ACR, a Full Bench of the Commission is already considering the matter in a couple of appeal/complaint cases and the matter is, therefore, still *sub-judice*. At this stage, it will not, therefore, be appropriate to pass any comment in regard to this matter.

28. As regards the documents concerning DPC, the concerned Public Authority is directed to make available information in terms of request of the appellant but there shall be no obligation to disclose details concerning 3rd parties. The respondent Public Authority may suitably use the severability clause in Section 10(1) of the Right to Information Act.

The appeal petition stands disposed of accordingly.

Announced on this the 6th day of February, 2009. Notice of this decision be given free of cost to the parties.

(Wajahat Habibullah)
Chief Information Commissioner

(Prof. M.M. Ansari)
Information Commissioner

(A.N. Tiwari)
Information Commissioner

Authenticated true copy. Additional copies of orders shall be supplied against application and payment of the charges, prescribed under the Act, to the CPIO of this Commission.

(D.C. Singh)
Asst Registrar