

CENTRAL INFORMATION COMMISSION

Appeal No. CIC/WB/C/2007/00500 dated 26-10-2007

Right to Information Act 2005 – Section 18

Appellant: Shri Kuldip Nayar, Ex-M.P.

Respondent: Ministry of Defence (MoD)

FACTS

By an application of 7-12-05 Shri Kuldip Nayar, Ex-M.P. of Vasant Vihar, New Delhi wrote to the CPIO, Ministry of Defence seeking the following information:

“May I request you to make me available a copy of the Report by the Retired Lt. Gen Henderson-Brooks on the China-India War in 1962. This is now 43 years old and should have been formally available in the Archives of India, some 30 years after it was submitted to the Government of India. I hope I can now use my right given under the new law on ‘Right to Information’ to get copy.”

To this he received a reply dated 7-2-2006 from Shri S.K. Yagnik, Director (G) and CPIO as follows:

“In this connection, Army Hqrs have informed that the document is presently classified and contains information which is sensitive. In view of the above, your request for making available the copy of the document is regretted.”

Not satisfied with this response Shri Kuldip Nayar moved a complaint before us on 18-2-06 with the following prayer:

“The matter may be sensitive at a particular time and I can understand even for some years but not after 44 years. In America, the papers relating to Vietnam were disclosed.

Could you kindly intervene to help me to get the report.”

It seems that this complaint was not registered in this Commission because we received a further letter of 14-8-07 from Shri Kuldip Nayar addressed to the Chief Information Commissioner personally, on which the Chief Information Commissioner has noted “treat this as a complaint and seek comments”.

It seems that no action was taken by the Registry on this direction because a further reminder was received on 15-10-07 upon which Joint Registrar, CIC has noted "*urgently*". Thereafter, a third letter of 15-2-08 (*wrongly typed as 15-2-07*) was submitted by complainant to this Commission to which also no response was sent and which was, therefore, followed by his letter of 4-4-08 addressed to the Chief Information Commissioner by name on which Chief Information Commissioner has noted "*which Ministry does this concern? If Defence, please put up urgently, if MEA, IC (K) may please see*".

It is only thereafter that the complaint notice was issued to the Ministry of Defence, CPIO, Director (G) Shri S.K. Yagnik seeking his comments. These comments were received from Ms. Geetanjali Gupta Kundra the then CPIO in a letter of 13-6-08 in which she has submitted as follows:

- “2. In this connection, your kind attention is drawn to Para 8 (1) (a) of the Right to Information act 2005 which states that ‘Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen 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 office.’ Since the report contained information, which was considered sensitive therefore, same, was regretted.
3. It is also stated that Government have submitted similar reply to the Parliament (Rajya Sabha unstarred question no. 141 dated 27th Feb 2008) in connection with the issue raised by the Hon’ble Member of Parliament, Shri Rajiv Chandrashekhar seeking information on making Henderson report public as under:-
 - (a) Whether the Hunderson (*sic*) Brook Report on 1962 Indo-Sino war still remains classified and unreleased; and if so
 - (b) Whether the Government would not think that is in public interest that this report be declassified and made available to the citizens.
4. In reply it was reiterated by the Hon’ble Raksha Mantri that considering the sensitivity of the information contained in the report and its security implications, the report has not been recommended to be declassified in the National Security Interest. Copy of the reply furnished in the Parliament is enclosed.”

Attached to this report is a copy of an answer to Rajya Sabha Unstarred Question No. 141 answered on 27-2-2008.

To this, complainant Shri Kuldip Nayar submitted a rejoinder of 3-7-08 pleading as follows:

“The Henderson Brooks report on 1962 Indo-China war is already 46 years old. I do not know how the disclosure 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.”

Thereafter, the matter was heard on 6-11-2008. Following are present:

Complainant:

Shri Kuldip Nayar.

Respondents

Shri S.K. Yagnik, Director, Border Road Development Board
Shri V. Rajaram, Under Secretary, Ministry of Defence.

The then CPIO Shri Yagnik, who is at present Director, Border Road Development Board submitted that as CPIO he received instructions from Army Hqrs. that the information sought was classified as ‘top secret’ and therefore, could not be provided. On the question of delay, however, he submitted that there are 26 CPIOs in the Ministry of Defence and it took time for the application of 7-12-05 to reach his desk. As far as he could remember since he has not seen the original file this was received by him on 20-12-05 after which the clarification had been sought from Army Hqrs upon receiving which the response to applicant was duly sent.

In an interim Decision of 6.11.'08 we accepted the submission of Shri Yagnik that as CPIO he was not in a position to question the classification of the documents sought and has, therefore, only conveyed the non-disclosability of the documents as advised by Army Hqrs. However, in noting this, we are surprised that the Ministry of Defence has opted not to even send an officer senior to the Under Secretary, MoD to represent that Ministry in this hearing. Besides, in this case the judgment of Ravindra Bhat J of the **Delhi High Court in W.P.(C) No.3114/2007 – Shri Bhagat Singh Vs. Chief**

Information Commissioner & Ors is of relevance, since it deals with the application of sec. 8(1):

11. "The Universal Declaration of Human Rights, adopted by the United Nations in 1948, assured by Article 19, everyone the right "to seek, receive and impart information and ideas through any media, regardless of frontiers". In Secretary Ministry of Information and Broadcasting, Govt. of India and others vs. Cricket Association of Bengal and others (1995 (2) SCC 161) the Supreme Court remarked about this right in the following terms:

"The right to freedom of speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an "aware" citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizen to arrive at informed judgment on all issues touching them."

This right to information, was explicitly held to be our fundamental right under Article 19(1)(a) of the Constitution of India for the first time by Justice K.K. Mathew in the State of U.P. vs. Raj Narain, (1975) (4) SCC 428. This view was followed by the Supreme Court on a number of decisions and after public demand, the Right to Information Act, 2005 was enacted and brought into force.

12. The Act is an effectuation of the right to freedom of speech and expression. In an increasingly knowledge based society, information and access to information holds the key to resources, benefits, and distribution of power. Information, more than any other element, is of critical importance participatory democracy. By one fell stroke, under the Act, the make of procedures and official barriers that had previously impeded information, has been swept aside. The citizen and information seekers have, subject to a few exceptions, an overriding right to be given information on matters in the possession of the state and public agencies that are covered by the Act. As is reflected in its preambular paragraphs, the enactment seeks to promote transparency, arrest corruption and to hold the government and its instrumentalities accountable to the governed. This spirit of the Act must be borne in mind while construing the provisions contained therein.
13. **Access to information under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right,**

must therefore is to be strictly construed. It should not be interpreted in manner as to shadow the very right self¹. Under Section 8, exemption from releasing information is granted if it would impede the process of investigation process cannot be a ground for refusal of the information, the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material

Under the above circumstances we cannot accept an argument simply stating that the information sought stands exempted. Since in addition to Section 8 (1) there is also Section 8 (2) that empowers the Public Authority to take a decision in the matter, if it concerns the public interest. This Section reads as follows:

8 (2) Notwithstanding anything 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 public interest in disclosure outweighs the harm to the protected interests.

For this reason the hearing was adjourned to 1st December 2008 at 11.00 a.m. Secretary, Ministry of Defence was directed to ensure suitable representation of his Ministry as well as of Army Hqrs. along with complete relevant records in order to satisfy us that the information sought merits exemption u/s 8 (1) (a).

Besides the above, we have found that the then CPIO Shri S.K. Yagnik's explanation for the delay is still in digression on the time limit mandated u/s 7 (1). He will, therefore, after examining the file show cause as to why he should not be held liable for a penalty of Rs. 250/- per day from the date when the information became due i.e. 7-1-06 to the date when it was actually supplied i.e. 7-2-06. **He may do this in writing by 24th November 2008 as he has already been heard.**

Besides this, we find that there has been an inordinate delay in processing the matter in this Commission. **The Registrar, Shri L.C. Singhi**

¹ Emphasis ours

was, therefore, directed to enquire into this matter and report back to us by the next date of hearing as to who is responsible for: i) not registering the complaint at the time when it was received and (ii) not complying with the clear instructions of the Chief Information Commissioner on correspondence with complainant Shri Kuldip Nayar. He will also recommend appropriate remedial steps needed to be taken including imposition of penalty, if any, due in order to ensure that such delays do not recur.

Consequently, upon our decision of 6-11-2008 the complaint was heard on 22nd January, 2009. The following were present:

Complainant:

Shri Kuldip Nayar

Respondents:

Col. Raj Shukla, Director, MOD TE

Lt. Col. S. Basu, GSO-1, MOD TE

Shri S. Yagnik, Director, BDDDB

Ms. Gitanjali Gupta Kundra, DS (Q)

In the meantime we received a confidential missive from Shri Bimal Julka, JS and 1st Appellate Authority in which he has submitted as follows:

“As regards the merit of the present complaint, it is informed that the matter has been reviewed from time to time, in consultation with the Army Headquarters and till date it has been the consistent stance of the Ministry not to declassify the report”.

The reasons have also been given but were held in confidence for the time being. To be able to satisfy ourselves on the authenticity of the grounds pleaded for exemption from disclosure this Commission decided that it will require to enquire into this matter under the authority vested in us u/s 18 sub Section (2) of the RTI Act 2005. We therefore decided that in pursuance of this we require to examine the “Henderson Brooks Report”.

Subsequently on a request for deferment, received from respondents, through a letter from Dy. Secretary (General) Ministry of Defence dated 20.2.09, the inspection was finally undertaken on 7.3.09. The following are present:

Respondents (from MOD)

Shri Bimal Julka, Jt. Secretary

Col. Raj Shukla, Director (M.O.)

Maj. Gen. N. C. Marwah, ADG (MO)

Shri Pankaj K. P. Shreyaskar, Dy. Secy. & Jt. Registrar, assisted the Commission.

It was submitted by Col. Raj Shukla that the report prepared by Lt. Gen. Henderson Brooks and Brig. Prem Bhagat was a part of internal review conducted on the orders of the then Chief of Army Staff Gen. Choudhary. Reports of internal review are not even submitted to Govt. let alone placed in the public domain. Disclosure of this information will amount to disclosure of the army's operational strategy in the North-East and the discussion on deployments has a direct bearing on the question of the demarcation of the Line of Actual Control between India and China, a live issue under examination between the two countries at present. The Director General, Military Operations, therefore, submitted that the report falls clearly within the exemption of disclosures laid down in sec. 8(1)(a) of the RTI Act read with Sec. 8(3). After a presentation by Col Shukla we then inspected the original report, which had been placed before us, including the conclusion contained in pages 199 to 222 of the main report.

DECISION NOTICE

We have examined the report specifically in terms of its bearing on present national security. There is no doubt that the issue of the India-China Border particularly along the North East parts of India is still a live issue with ongoing negotiations between the two countries on this matter. The disclosure of information of which the Henderson Brooks report carries considerable detail on what precipitated the war of 1962 between India and China will seriously compromise both security and the relationship between India & China, thus having a bearing both on internal and external security. We have examined the report from the point of view of severability u/s 10(1). For reasons that we consider unwise to discuss in this Decision Notice, this Division Bench agrees that **no part of the report might at this stage be disclosed.**

On the other hand we find that the report expected from Registrar on the internal failure in processing Shri Kuldip Nayyar's complaint in the Commission has not thus far been submitted. He will now ensure its submission within seven working days of the date of issue of the Decision Notice

Reserved in the hearing, this decision is announced in the open Chamber on this 19th day of March, 2009. Notice of this decision be given free of cost to the parties.

(ML Sharma)
Information Commissioner

(Wajahat Habibullah)
Chief Information Commissioner

19.3.2009

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.

(Pankaj Shreyaskar)
Joint Registrar
19.3.2009