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When does a Private body become a Public authority under the RTI Act?

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The parliament enacted the RTI Act in 2005 and it is a very important tool for attaining more transparency in the system as now ordinary citizens could access information more easily. An aware citizen poses questions before the government and its functionaries, thereby, holding the authorities accountable and keeping the spirit of democracy alive. The RTI Act applies only to public authorities, i.e., a body of Government *but in some instances, a body that is not primarily covered under the definition of State and is incorporated under a different statute like the Indian Trust Act may come within the purview of the RTI ACT. This article aims to analyze* when a private body exactly becomes a public authority under the RTI Act *by shedding some light on the interpretation of Section 2(h) of the RTI Act and related landmark cases pronounced by the courts.*

Keywords: *public authority, rti, private body.*

INTRODUCTION

A successful democracy posits an "aware" citizenry as a diversity of opinions, views, ideas, and ideologies is essential to enable the citizen to arrive at an informed judgment on all issues

touching them.[1] Since the power of the executive Government to affect the lives of the people is growing and there has been a tremendous expansion of welfare and social service functions by the State[2], it has become more and more important to bring transparency and accountability to the country.

The right to information was explicitly held to be our fundamental right under Article 19(1)(a) of the Constitution even before the enactment of the Right to Information Act, 2005 (hereinafter, RTI Act).[3] The legislature enacted the RTI Act to promote transparency, arrest corruption, and hold the government and its instrumentalities accountable to the governed.[4] Section 2(h) of the RTI Act defines the term "public authority" wherein all such bodies and institutions which are created under the Constitution or by the Legislature or any other body which acts as an agency or an instrumentality of the government come within the purview of the RTI Act. The courts have interpreted the RTI Act multiple times to understand the nature of the definition, i.e., whether it is an exhaustive or an inclusive definition but there remains lucidity when it comes to determining whether the body is under substantial control of the government or not.

INTERPRETATION OF SECTION 2(h) OF THE RTI ACT

The expression "authority" in its etymological sense means a body invested with the power to command or give an ultimate decision, enforce obedience, or have a legal right to command and be obeyed.[5] The right to freedom of speech and expression includes the right to receive and impart information, and if the term "authority" is interpreted narrowly by allowing the State to adopt a strategy of carrying out its functions through the instrumentality of agency of a corporation and excluding the same, there would be considerable erosion of the effectiveness of the fundamental rights.[6]

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[1] *Secretary Ministry of Information and Broadcasting, Govt of India & Ors v Cricket Association of Bengal & Ors* (1995) 2 SCC 161
[2] *Ramana Dayaram Shetty v International Airport Authority of India & Ors* (1979) 3 SCR 1014
[3] *State of UP v Raj Narain* (1975) 4 SCC 428
[4] *Shri Rajendra Kumar Arya v Dy Commissioner of Police* 2009 SCC OnLine CIC 3272
[5] *Ramana Dayaram Shetty v International Airport Authority of India & Ors* (1979) 3 SCR 1014
[6] *Ajay Hasia Etc v Khalid Mujib Sehravardi & Ors* 1981 AIR 487

The definition of "public authority" is to be construed harmoniously, and sub-clauses (i) & (ii) of clause (d) of section 2 (h) must be read separately since the subsequent part of the provision adds a new category of public authority within the scope of the RTI Act.[7] The term "includes" denotes legislative intent to widen the ambit and scope of the thing defined.[8] When it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.[9]

The court in the case of *Reserve Bank v Peerless General Finance*[10] held, "*…Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted.*". The legislature enacted the RTI Act to promote transparency and to hold the government and its instrumentalities accountable to the governed[11] because the court's obligation is to liberally interpret a provision, particularly one that is useful, in order to give a wider interpretation rather than a narrow reading that would essentially contradict every objective of the law.[12]

The phrase "means" is used to denote that the definition is complete and definitive, and no other meaning can be attributed to the expression other than what is stated in the definition.[13] On the other hand the phrase "includes" broadens the expression's reach and indicates that, beyond the meaning provided in the definition clause, other elements may be included while bearing in mind the language's nature and the provision's original intent.[14]

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[7] *Secretary Ministry of Information and Broadcasting, Govt of India & Ors v Cricket Association of Bengal & Ors* (1995) 2 SCC 161
[8] *State of Bombay v Hospital Mazdoor Sabha* AIR 1960 SC 610
[9] *Dadaji v Sukhdeobabu* (1980) 1 SCC 621; *Reserve Bank of India v Peerless General Finance & Investment Co Ltd* (1987) 1 SCC 424
[10] *Reserve Bank v Peerless General Finance* 1992 AIR 1033
[11] *Shri Rajendra Kumar Arya v Dy Commissioner of Police* 2009 SCC OnLine CIC 3272
[12] *Madan Singh Shekhawat v Union of India & Ors* JT (1999) 6 SC 116
[13] *P Kasilingam v PSG College of Technology & Ors* (1981) 1 SCC 405
[14] *DAV College Trust & Managing v Director of Public Instructions* (2019) 9 SCC 185

The word 'means' has been used in the first part of subsection (h) of Section 2 whereas the word 'includes' has been used in the second part of the said Section and they have not been used together, therefore, it certainly does not denote "mean and include", thereby making it an inclusive definition rather than an exhaustive one.[15]

A BODY SUBSTANTIALLY CONTROLLED OR FINANCED BY THE GOVERNMENT IS A PUBLIC AUTHORITY

The only requirement for a private body to be covered by the term "public authority" is that either it must be a body controlled or substantially financed by the Government.[16] The word "substantial" means "of ample or considerable amount of size; of real significance". It is not synonymous with "dominant" or "majority" rather it is closer to "important" or "of considerable value".[17]

The term "control" is of a very wide connotation and amplitude and includes a large variety of powers that are incidental or consequential to achieve the powers- vested in the authority concerned.[18] . The mere "supervision" or "regulation" as such by a statute or otherwise of a body would not make that body a "public authority" within the meaning of Section 2(h)(d)(i) of the RTI Act.[19] The control over a body by the appropriate Government must be a control of a substantial nature and specifying the manner in which the funds are to be utilized rather will show more control of the Government.[20]

A constitutional position is a public authority and decisions taken by them with respect to the operation of a fund cannot be said to be made in a personal capacity.[21] However, just because a

[15] *Shri Rajendra Kumar Arya v Dy Commissioner of Police* 2009 SCC OnLine CIC 3272
[16] *New Tirupur Area Development Corporation Ltd v State of Tamil Nadu* AIR 2010 Mad 176
[17] *Thalappalam Ser Coop Bank Ltd & Ors v State of Kerala & Ors* 2013 (4) JLJR 362 (SC)
[18] *Corporation of the City of Nagpur Civil Lines, Nagpur & Anr v Ramchandra & Ors* (1981) 2 SCC 714
[19] *Ibid*
[20] *Electronics & Computer Software Export Promotion Council v Central Information Commission & Ors* WP 11434 of 2006
[21] *Prime Ministers National Relief Fund v Aseem Takyar 2018 SCC OnLine Del 9191*

given government official has a position in that role does not automatically imply that the government is in control through the ex officio members.[22]

Regarding substantial financing, there are no hard and fast rules that can be established as it could be either direct or indirect.[23] If a corporation's entire share capital is owned by the government or the state provides financial support sufficient to cover practically all of the corporation's expenses, this would suggest that the organization has a governmental nature.[24] Any benefit that the institutions receive in the form of a subsidy or any other direct or indirect support from various fiscal provisions for fees, duties, taxes, etc. would represent a sizable contribution from the government.[25]

A private entity may be formed via the actions of private parties, but later statutory legislation, an order, or notification from the relevant government may result in the constitution of a governmental agency or instrumentality and the aforementioned body will have the status of an "authority" or an "institution of self-governance."[26] The requirement is only a notification or an order which has the effect of establishing or constituting authority, an institution of self-government, or a body.[27]

AN INSTRUMENTALITY OR AGENCY OF THE GOVERNMENT IS A PUBLIC AUTHORITY UNDER THE RTI ACT

If a body is under the pervasive control of the Government and it is performing essential state functions then it comes within the purview of Article 12.[28] It was held that there is no strict rule that every registered society having any connection with the government, to be declared as

[22] *Army Welfare Housing Organization v Adjutant General's Branch & Ors* (2015) 216 DLT 184
[23] *DAV College Trust & Managing v Director of Public Instructions* (2019) 9 SCC 185
[24] *Ramana Dayaram Shetty v International Airport Authority of India & Ors* (1979) 3 SCR 1014
[25] *Hindu Urban Co v SIC* 2011 SCC OnLine P&H 5581
[26] *National Stock Exchange India Ltd v CIC* WP (Civil) no 4748 of 2007
[27] *Ibid*
[28] *Sabhajit Tewary v Union of India* 1975 AIR 1329

'state'.[29] An authority under Article 12 has the power to make rules that would have statutory effect.[30]

The creation of the corporation by any legislation or under a statute is irrelevant for the purposes of Articles 12 and 226 of the Constitution, and the test is whether it is an instrumentality or agency of the government rather than how it was established.[31] When determining whether a corporation should be classified as a government instrumentality or agency, it is important to consider if the corporation's operations are important to the public and closely tied to governmental functions.[32] It must be understood that the term shouldn't be used broadly enough to include any autonomous body that has some connection to the government.[33]

When a body acts in the public interest and is recognized by the general populace as having the legal right to do so, it is said to be carrying out "public functions".[34] Therefore, bodies perform public functions when they get involved or act in social or economic events in the public interest.[35]Public funds are those that the government collects from its residents by the imposition of taxes, duties, cess, service fees, etc[36] and the subscribers of the trust/fund are entitled to know if their contributions are being used properly in accordance with the Trust's objectives or not.[37] It will be in the larger public interest to include certain charitable trusts, institutions, and other organizations under the RTI Act which are given exemption under different statutory provisions like the Income Tax Act, 1961.[38]

The Supreme Court summarised the relevant test laid down in the case of *International Airport Authority* (supra), in *Ajay Hasia v Khalid Mujib Sehravardi (supra)*, and these tests can be

[29] *Pradeep Kumar Biswas v the Indian Institute of Chemical Biology* (2002) 5 SCC 111
[30] *Rajasthan Electricity Board v Mohan Lal* 1967 AIR 1857
[31] *Ajay Hasia Etc v Khalid Mujib Sehravardi & Ors* 1981 AIR 487
[32] *Ramana Dayaram Shetty v International Airport Authority of India & Ors* (1979) 3 SCR 1014
[33] *Ibid*
[34] *Indian Olympic Association v Veeresh Malik & Ors* 2010 SCC OnLine Del 35; *Binny Ltd & Anr v VV Sadasivan* (2005) 6 SCC 657
[35] Daly, *Leading Works in Public Law: de Smith's Judicial Review of Administrative Action* (Sweet & Maxwell 1998)
[36] *President's Secretariat v Nitish Kumar Tripathi* 2012 SCC OnLine Del 3268
[37] *Rajendra Shah v CBDT* File No CIC/LS/A/2010/000095
[38] *Rakesh Aggarwal v CBDT* File No IC/LS/A/2009/00190

conclusively relied upon to check whether a body is a public authority or not, which are as follows: -

"9. —(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.

(2) Where the financial assistance of the State is so much as to meet the almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character.

(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government, If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government."

THE SPLIT VERDICT ON PMNRF

Though the position on whether a body is to be considered a "public authority" or not under the RTI Act has been explained in various instances but there still exists some lucidity on the issue especially when a constitutional functionary is involved. In *PMNRF v Aseem Takyar (supra)*, the question for consideration before the bench was whether the Prime Minister's National Relief Fund (hereinafter, PMNRF) is a "public authority" within the ambit of Section 2(h) of the RTI Act or not.

The divisional bench arrived at a split verdict wherein, Justice, Ravindra S. Bhat, relied on the *Thalappalam case (supra)* and *New Tirupur Area Development Corporation Ltd v State of T.N. (supra)* and held that the PMNRF is a trust which is owned and controlled by the appropriate government. The rationale behind such a decision was that whilst the PMNRF does not receive funds from the Union or the State Governments, it is still managed in the Prime Minister's office in compliance with the public policy. It was highlighted that the prestige that the prime minister's office holds and the confidence they foster, has evidently provided that such raised sums would be utilized in discretion for a variety of circumstances. This court notes that the RTI Act has a non-obstinate clause given under Section 22 of the RTI Act which supersedes all other laws.; The result is that any restriction or obstacle in any statute to the supply of information is excessive and must be ignored. The court held that the applicant's request for information disclosure is justified.

Justice, Sunil Gaur, delivered the dissenting opinion where he also relied upon the *Thalappalam case (supra)* and *Army Welfare Housing case (supra)* and held that the trust cannot be considered a "Public Authority" under Section 2(h)(d) of the RTI Act because PMNRF is just supervised or regulated by the government, and since it is neither owned nor significantly controlled nor funded by the government, it will not be wise to put the trust under the purview of the RTI Act. Additionally, it was held that even though the PM and Deputy PM oversee the PMNRF in their ex-officio capacities, that fact alone does not prove that the government owns the entire trust. The appellant trust is registered under the Indian Trusts Act of 1882 and it has no government character, and contributions made to it are tax-exempt just like the one made to a private trust.

LUCIDITY ON THE PM CARES FUND

The decision on Prime Minister's Cares Fund (hereinafter, PM CARES) is also pending before the divisional bench of the Delhi High Court in the case of *Samyak Gangwal v Central Public Information Officer*[39]. PM CARES was set up by Prime Minister Narendra Modi as a charitable trust under the Trust Act, 1882, to provide assistance and relief in the wake of the COVID-19

[39] *Samyak Gangwal v Central Public Information Officer* WP(C) 3430 of 2020

emergency. The fund has been a controversial topic ever since. Previously, the Supreme Court while hearing a Public Interest litigation in the case of *Centre for Public Interest Litigation v Union of India*[40], examined the PM CARES fund and relied upon *Mulla Gulam Ali & Safiabai D. Trust v Deelip Kumar & Co*[41], and held that The PM CARES Fund is a public charitable trust, not a government fund, and the fact that trustees, or a group of persons, are responsible for managing the trust does not diminish the Trust's public nature.

The ex-officio Chairman of the PM CARES Fund is the Prime Minister of India. Ex-officio Trustees of the PM CARES Fund include the Indian government, the Minister of Defence, the Minister of Home Affairs, and the Minister of Finance. The Prime Minister, who serves as the Chairperson of the Board of Trustees, has the authority to propose three nominees for the Board of Trustees who should be distinguished figures in the fields of scholarship, science, medicine, social work, public administration, law, and philanthropy. Any individual chosen to serve as a Trustee must do so in a pro bono capacity. Individual contributions to the PM CARES Fund are hundred percent tax-free under Section 80G of the Income Tax Act, 1961.[42] The Companies Act, 2013 also allows the donations made to the PM CARES Fund by organizations, to qualify as Corporate Social Responsibility (CSR) activity expenditure.

The petitioner has asked that Article 12[43] of the constitution be used in order to proclaim the PM-CARES Fund to be "The State." The petitioner is aggrieved that the fund was established by the Prime Minister, and he and the other Union ministers serve as trustees, but the government has stated that it has no influence over it. Several RTIs have been lodged in connection with this. One activist had already questioned the National Informatics Centre's decision to provide the fund with the "http://pmcares.gov.in" domain name despite the fact that it was a public charitable trust just like the others. Meanwhile, The Union government on 20th September, appointed Ratan Tata, a renowned industrialist, K.T. Thomas, a former Supreme

[40] *Centre for Public Interest Litigation v Union of India* WP (C) 546 of 2020
[41] *Mulla Gulam Ali & Safiabai D Trust v Deelip Kumar & Co* (2003) 11 SCC 772
[42] Income Tax Act 1961, s 80G
[43] Constitution of India, art 12

Court judge, and Kariya Munda, a former deputy speaker of the Lok Sabha, as trustees of the PM CARES Fund.

CONCLUSION

India is a welfare state and it is quite evident from the Directives Principle of State Policy, given under the Constitution. It is no new concept that governments bring out several welfare schemes for the masses and these schemes or funds are administered and controlled by the appropriate government and are always under scrutiny to make sure that the funds are being utilized in the most effective manner. The RTI Act is a powerful tool given to the citizens wherein any individual can access information from a public authority and can hold them accountable. RTI Act is a beneficial legislation that aims to bring out transparency and accountability which are a few of the basic ingredients that makes up a successful democracy, therefore, one must interpret it in such a way so that the objective of the act is fulfilled. The courts have been doing it for quite some time now but there remains some lucidity on certain institutions and funds, especially when a constitutional body like the Prime Minister or the Finance Minister is involved.

The popular notion that flourishes these days is that it is in the larger public interest that funds like the PM Care fund and PMNRF should be put in the public domain despite the fact that they may be created under some different statute like the Indian Trust Act or Societies Registration Act. It is because a constitutional functionary is managing the body but it will open a pandora box if such a decision is made without proper rationale. The courts are fortunately cautious enough to not jump to conclusions without examining the functions and nature of these bodies thoroughly as putting everything under the purview of the RTI Act will defeat the purpose of the enactment. In some cases, it also poses threat to the fundamental right to privacy of an individual as it might lead to arbitrary invasion of privacy because there is a chance that the rights of an individual may get affected in cases where they have some nexus with the body or institution. If a body is found to be an agency or instrumentality of the government then for sure, it qualifies as a "public authority" under the RTI Act.