

GOA STATE INFORMATION COMMISSION

Kamat Towers, seventh Floor, Patto, Panaji, Goa

Shri Prashant S. P. Tendolkar,

State Chief Information Commissioner,

Complaint No. 26/2018/CIC

Adv. Aires Rodrigues,

TI- B30, Ribandar Retreat,

Ribandar-Goa.

403006.

....Complainant

V/s

Secretary to Governor,

Goa Raj Bhavan,

Dona Paula,

Panaji-Goa.

....Opponent

FILED ON: 01/06/2018

DECIDED ON: 15/10/2018

ORDER

1. This is a complaint filed by the complainant u/s 18(1)(a) of The Right To Information Act 2005 (hereinafter referred to as ACT for short).

2. The case of the complainant in brief is that the respondent i.e. Goa Raj Bhavan, despite being a “Public authority” in terms of section 2(h) of the Act, has not appointed a Public Information Officer (PIO) and has also not made the mandatory disclosures under section 4(1) of the RTI Act. According to complainant respondent is covered under the definition of public authority and the failure to appoint a PIO is illegal, very high-handed, malafide and without reasonable cause. That with the

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exception of Goa all other Raj Bhavans across the country and even the Rastrapathi Bhavan are complying with the Act and that instead of strengthening the Transparency law, the respondent has allowed it to be weakened and that this veil of secrecy be lifted and that it be made open to public scrutiny the affairs and working of the respondent.

Further according to complainant since no PIO has been appointed under the Act for the Governor's secretariat, contention of the respondent that the applicant has no locus standie is wrong. According to him the point for determination is whether the Governor of Goa is a public authority, and consequently needs its secretariat to appoint a PIO under the Act.

By referring to orders passed by Hon'ble High Court of Bombay in Writ Petition no. 478/08 and Writ petition No. 237/11, dated 14/11/2011 it is held that the Governor of Goa was a public authority and that in view of SLP no. 33124/2011 the impugned judgment would not be enforced and not to be treated as a precedent in any other case and that question of law was kept open. According to complainant keeping the question of law open would not mean that the commission can ignore the reasoning in the said judgment and order of the Bombay High Court in the State of Goa. According to him as Bombay High Court order has not been set aside, its reasoning continues to operate and this reasoning should be adopted by the

Commission to hold that the Governor is a public authority.

By referring to case No. CIC/SA/A/2015/000748 (*Aditya Jain V/s. Lieutenant Governor Secretariat*), complainant submitted that the Commission adopted the reasoning of the Bombay High Court order and noted that the Governor of Delhi had appointed a PIO and directed to furnish the information sought.

According to complainant under section 2(h) of the RTI Act, “public authority” includes any authority or body or institution of self-government established or constituted by or under the Constitution and hence the post of President and that of the Government is created by the Constitution, the President and the Governor are covered by clause (h) of the definition of the ‘public authority’. That though the President and the Governor have been specifically included in the definition of ‘competent authority’ or are authorities mentioned in sub-clauses (iv) of section 2(e) of the RTI Act, it would not exclude them from the definition of “public authority” and that any of the authorities mentioned in clauses (i) to (v) of section 2(e) which defines “competent authority” also fall within any of the clauses (a) to (d) of the definition of “public authority”. Hence such authorities would both be the “competent authority” as well as the “public authority”.

By referring to the case of *Secretary General, Supreme Court of India vs. Subhash Chandra Agarwal*, (L. P. A. No.501/2009 decided on 12th January, 2010,

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the Chief Justice of India, who according is a “competent authority” under section 2(e) (ii) of the RTI Act) was also held to be the “public authority”.

With the above contentions the complainant has prayed this commission for an inquiry into the complainant’s complaint on the alleged failure of the Respondent to appoint a PIO and to make public Information under Section 4(1) of the Act and also for an order directing the Respondent to forthwith appoint a PIO and to also make the mandatory disclosures under Section 4(1) of the act.

3) Respondent resisted the complaint briefly on the ground that it is not a legal entity and certainly not a ‘public authority’ in terms of the Act and hence the Complaint against the present Respondent is not maintainable. According to respondent, Complainant does not disclose that the he is a person covered under any of the clauses of Section 18(1) and hence lacks the locus standie to file the complaint.

According to respondent Governor enjoys immunity under Article 361 of the Constitution of India and is not answerable to any Court and that the Governor is a ‘competent authority’ under the Act and not a ‘public authority’ hence this commission lacks jurisdiction. It is further according to respondent that the Complaint is based on an erroneous interpretation of the provisions of the Act. According to respondent the allegations about non compliance are made against the ‘Goa Raj Bhavan’ which is not a legal entity hence

seeking reliefs against the Governor of Goa is impermissible in law.

By further referring to Art. 361 of the Constitution of India respondent submitted that the Governor is not 'answerable' to any Court for anything done or purported to be done by the Governor or his office and that in so far as the Governor and his Office are concerned, the immunity is absolute. In support of said contentions the advocate for respondent has relied upon judgment passed by Hon'ble Supreme Court in the case of ***Rameshwar Prasad (VI) V/s Union of India (2006(2)SCC1)***

According to respondent in the cabinet system of the Government, with an elected head of the State, the Governor is the formal and constitutional head of the Government and that the Governor does not perform routine functions of governance. That the information generated in course of the discharge of routine governance functions is available with the concerned department and information pertaining to the exercise on rare occasions of Constitutional functions by the Governor is concerned has its limitations and is not absolute. It is further according to respondent, the Governor is the appointing authority of the State Information Commissioner and is also vested with the power to recommend for its removal and that the reporting requirements under Sec. 25 are not workable vis-à-vis the position of the Governor. According to respondent, Sec. 25 manifests the very spirit of the scheme contemplated under the RTI Act, where the body /authority is supposed to be under some Government

ministry/department and accordingly the reporting requirements have been postulated but the Governor is not subject to, or falling under any Department/ministry of the Government.

Respondent further contends that the President/Governor are not authorities under the Constitution, but are recognized as the Constitutional and Formal head of the Union/State and that the Constitutional head cannot, per definition, be an authority and that if it is held that this Commission can entertain a complaint against the Respondent then by virtue of Section 18(3), the commission will be empowered to summon and exercise all such powers like a Civil Court against the Governor and that allowing such exercise would militate against the very constitutional mandate spelt out under Article 361.

According to respondent the Secretary to the Governor is not similar to a Secretary of any Government. According to respondent, nature of services rendered by a Secretary to the Governor is vitally different from the scope of work of a Secretary who heads a Governmental department. Further that though an attempt is made to project that the Complaint is under Section 18(1)(a), the same is not the case since the basic requirement of that clause is not spelt out in the complaint and that the Complainant has no locus standie to file and maintain the present Complaint.

By referring to the order, dated 30/1/2018 of the Apex Court, it is the contention of respondent that the Judgment of the Hon'ble Bombay High Court, Panaji Bench, in Writ Petition No.478/2008 & WP 237/2011 is not to be enforced and is not to be used as a precedent.

Regarding the relief of penalty as sought by complainant, respondent contends that such relief is not at all attracted as the penalty can be imposed only in limited circumstances which are specifically mentioned in Section 20 and that the present situation does not fit within any of those circumstances, even by assuming the contentions raised by the Complainant as correct.

4. The complainant appeared in person .Respondent was represented by Adv. P. Dangui. In addition to written submissions oral arguments were heard. Clarifications were also sought from the parties.

5. Perused the records and considered the pleadings and submissions of the parties. Considering the rival contentions of the parties the points which arise for my determination are:

- a) Whether Complainant has locus standee to file present complaint?*
- b) Whether Goa Raj Bhavan is a public Authority under The Right to Information Act 2005?*
- c) Whether in view of article 361 of The Constitution of*

India the state Governor has absolute immunity against The Right to Information Act 2005?

d) Whether, being a “competent Authority” Governor cannot be a “public Authority” as well?

6. For considering point no.(1) as arisen above it would be necessary to analyze the provisions of section 18(1)(a) of the act. Said section reads:

“18. Powers and function of Information Commissions.____

(1) Subject to the provision of this Act, it shall be the duty of the Central Information Commission or a State Information Commission, as the case may be, to receive and inquire into complaint from any person,____

*(a) who has been **unable to submit a request** to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior office specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;(emphasis supplied)*

b)-----.”

The complainant herein has approached this commission with a grievance that the Goa Raj Bhavan has not appointed a Public Information Officer (PIO).On careful consideration of the said provision it is seen that the prerequisite for filing of a complaint under this section is that the complainant in the first instance

should have an application made and his failure to file such application due to non appointment of PIO grants him the right to file complaint under section 18(1)(a) .

In the present complaint, the complainant has neither produced such application purportedly filed nor there is any averment in the complaint to state that he had in fact an application to be filed to the respondent. Thus having not made out a case showing his requirement of filing application, the complainant cannot be held to be an aggrieved person. The **point (a)** has to be answered in the negative.

7) In respect of point (b) it is the contention of the respondent that Raj Bhavan is not a legal entity and hence not coming under the purview of the act.

It is to be noted that Raj Bhavan is the official residence and also the secretariat of the State Governor. The residential section cannot be amenable for public scrutiny as it does not involve any public activity. However the complainant in Para (2) of his written submissions has clarified the point to be determined by this commission. According to him what is required to be determined is whether Governor of Goa is a public Authority and consequently needs its secretariat to appoint PIO.

Thus, though the complainant has arrayed Goa Raj Bhavan as a whole as the party respondent, the limited and relevant part of point (b) required to be

determined herein is whether the secretariat of Governor is required to appoint PIO.

8. For considering the limited and relevant part of point **(b)**, to be determined and points **(c)** and **(d)** above, it is seen on going through the records as relied upon by the parties in the pleadings and submissions that such issues/points has arisen before this commission for its determination in Appeal No.10/2008, hereinafter referred to as THE SAID APPEAL. In the said appeal, the appellant therein, by his application, dated 21/03/2007 sought certain information from the Public Information Officer, Joint Secretary to the Governor, hereinafter referred to as PIO. The said application was rejected by PIO on the ground that the information sought was sensitive and secret.

The rejection of request by PIO therein resulted in first appeal to First Appellate Authority (FAA) u/s 19(1) of the Act. Such appeal was also dismissed by the FAA and the order of the PIO was upheld. However the FAA in his order passed thereon also added two more grounds for rejection viz.(i)breach of privilege and (ii) breach of Fiduciary relationship between the Governor and the Union Government. The matter came before this Commission in second appeal u/s 19(3) of the act, being the said appeal no.10 of 2008.

9. In the said appeal, in addition to the grounds which were raised in the first appeal, the PIO as respondent therein also raised additional ground that the Governor

of the State is neither subject nor amenable to the provisions of the Act. However said ground was not pressed later by the respondent therein. This Commission by order dated 30th July 2008, allowed the said appeal and directed the respondent therein, i.e. the Public Information Officer, Jt. Secretary to Governor to furnish the requested information by severing the reports which were held as confidential.

10. Aggrieved by the orders passed by the commission in the said appeal PIO, Joint Secretary to Governor, who was the respondent in said appeal, filed writ petition no.478 of 2008 before the Hon'ble High Court of Bombay at Goa .

11. A similar issue had also arisen in another proceedings being complaint No.613/SCIC/2010, hereinafter referred to as THE SAID COMPLAINT. In the said complaint it was the contention of complainant, who is incidentally also the complainant herein, inter alia that the special secretary to the Governor of Goa, has refused access to or supply information sought by him vide his then application, dated 29/11/2010. That the information was not supplied by the PIO on the ground that the special Secretary to Governor has filed affidavit before the Hon'ble High Court that Governor is not a Public Authority under the Act.

With the said grievance the Complainant had landed before this Commission with said complaint

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No.613/SCIC/2010, u/s 18 of the Act. This Commission after hearing the parties, by its order, dated 31/3/2011 allowed the complaint and referred the application of the complainant to the special Secretary to the Governor as PIO to deal with the same in accordance with the law within the prescribed time which was to start from the date of receipt of said order. In the same order, this Commission has also held that His Excellency Governor of Goa, as not a necessary party to said complaint.

The special Secretary to Governor of Goa, who was the respondent in the said complaint, filed Writ petition no.237 of 2011 before the Hon'ble High Court of Bombay at Goa.

12. By common order, dated 14th November 2011, the Hon'ble High Court of Bombay, Goa Bench at Panaji, dismissed the said writ petition no.478 of 2008 by upholding the order passed by the commission. By same order Hon'ble High Court allowed the writ petition no.237 of 2011 thereby quashing and setting aside the order passed by the commission in said complaint no.613/SCIC/2010.

13.The said common order of the Hon'ble High Court was challenged before The Hon'ble Supreme Court of India vide Special Leave to appeal(C) nos.33124/2011 and 33225/2011, which were dismissed as having infructuous. However the question of law was kept open.

14. Considering the above set of facts and events it is seen that this commission has fully and finally decided

the status of the secretariat of the State Governor as also the extent and nature of immunity under Article 361 Vis a Vis The Right to Information Act 2005. Thus **points (b),(c) and (d)** as arise herein have been already decided. I find no grounds to differ on the findings rendered by this commission in said appeal no.10/2008 and complaint no. 613/SCIC/2010. Thus for this commission it is a *fait accompli*.

15. Regarding the prayer of the complainant to impose penalty, considering the peculiar set of circumstances and my findings on point (a) I find no grounds to invoke the rights under section 20(1) and/or 20(2) of the and hence the said prayer cannot be granted.

16. In the result the complaint is disposed in the light of the findings of this commission in said appeal no.10/2008 and complaint no.613/SCIC/2010. However the request for penalty is dismissed.

Pronounced in the open hearing.

Sd/-
(Shri. P.S.P. Tendolkar)
Chief Information Commissioner
Goa State Information Commission
Panaji -Goa

