

CENTRAL INFORMATION COMMISSION
Appeal No.CIC/WB/A/2006/00460 dated 29.7.2006
Right to Information Act 2005 – Section 19

Appellant - Shri Subhash Chander Agrawal
Respondent - President's Sectt. &
Department of Justice, Ministry of Law & Justice

Facts:

By an application of 25.11.2006 Shri Subhash Chander Agrawal of Dariba, Delhi applied to Shri Nitin Wakankar CPIO, President Sectt. For the following:

- i) Copy of the complete file regarding appointment of Mr. Justice Vijender Jain as Chief Justice of Punjab & Haryana both by way of photo copies and CD confirming the said appointment together with all file notings and opinion of Supreme Court collegian Member judges on the appointment file. To this he sought that copies of correspondence between President and Prime Minister on appointment of Mr. Justice Jain, as Chief Justice of Punjab & Haryana also be included.
- ii) Action taken on Shri Subhash Chander Agrawal's request for appointment made in a letter of 5.11.06 following on his earlier complaint and request for appointment on 10.2.05.

To this he received a response on December 15, 2006 as follows:

Sl. No.	Information Sought	Reply.
A	Copy of the complete file (Photo copies and CD) confirming the appointment of Justice Vijender Jain as regular Chief Justice of Punjab & Haryana High Courts.	Matter may be taken up with nodal Ministry, which is the Department of Justice in the Ministry of Law & Justice.
B	All file notings and opinion of Supreme Court Collegium's Member judges on the appointment file.	Matter may be taken up with nodal Ministry, therefore, i.e. the Department of Justice in the Ministry of Law & Justice.

C	Copy of correspondence between Hon'ble President and Hon'ble Prime Minister on appointment of Justice Vijender Jain, Chief Justice of Punjab & Haryana High Courts.	Copies of correspondence requested cannot be parted with as it is covered by under Section 8(i)(e) of RTI Act and Article 74(2) of Constitution of India.
D	Action taken on the applicant's letter dated 05.11.2006 seeking personal appointment with Hon'ble President with regard to his complaint dated 10.02.2005 against Justice Vijender Jain.	It was not deemed necessary to grant an appointment.
E	Was the request for appointment and earlier correspondence in regard to his complaint taken into consideration by the Hon'ble President before confirming appointment of Justice Vijender Jain, Chief Justice of Punjab and Haryana High Courts?	All relevant material and related correspondence are given due consideration.
F	Was correspondence between applicant, Hon'ble President and President's Secretariat in this regard placed in the appointment file of Justice Vijender Jain?	It was not deemed necessary to place the correspondence in the said file.

Dissatisfied with this response, Shri Agrawal moved a first appeal before Smt. Rasika Chaube Appellate Authority, President's Sectt. on 9.12.06. By an order of 12.12.06 Smt. Rasika Chaube, Internal Financial Advisor and Appellate Authority, President's Sectt., ruled as follows :-

"I have carefully perused the various issues highlighted in your appeal and it is stated that as regards the issues at S.No. (a) & (b) the PIO has transferred your petition under the Right to Information Act to Shri A.K. Gupta, Director/CPIO, Department of Justice, Ministry of Law & Justice, Jaisalmer House, New Delhi vide his letter dated 15th December, 2006.

As for S.No. (c) correspondence between Hon'ble President and Hon'ble Prime Minister are covered under Article 8(1)(e) of the Right to Information Act and Article 74(2) of the Constitution of India. Hence, no action is required to be taken by the PIO in this regard.

As regards No.(d) it is stated that appointment with the Hon'ble President are given on a case to case basis and keeping in view his convenience. Also, these appointments are solely the personal discretion of the President and no notings exist in this regard. Hence, the PIO will not be able to give any further information in this regard.

As regards S.No.(e) & (f),no action can be taken by the PIO in the light of the reply to (d) above.

Hence action taken by the PIO in regard to your application is appropriate and justified."

Shri Subhash Chander Agrawal, therefore, moved his second appeal before us on 8.2.07 with the following plea :-

"My ultimate request is for copy of complete file relating to appointment of Mr. Justice Vijender Jain as regular Chief Justice of Punjab & Haryana. Since Department of Justice is avoiding complying with the request, same may kindly be directed to supply the required copies."

This was requested because, in the meantime in response to the transfer of the case to that Department u/s 6(3) Shri K.Gurtu Director (Justice) and CPIO,

Deptt. of Justice, Ministry of Law & Justice by a letter of December 4, 2006 informed the applicant Shri Subhash Chander Agrawal as follows regarding his application for information on the appointment of Mr. Justice Vijender Jain as Chief Justice of Punjab & Haryana:

“Your request for sending a copy of the complete file confirming and the said appointment together with all file notings and opinion of Supreme Court Collegium’s member-judges regrettably cannot be acceded to. In the context of the provisions of the RTI Act, it is instructive to examine the consultation process for the selection of the judges in the light of the provisions of Section 11(1) and Section 8(e) of the RTI Act. The type of information which is provided by the persons contending to be judges as well as the information collected from various other sources by the Hon’ble Supreme Court in order to equip the Apex Court to discharge its constitutionally ordained role of advising the President of India regarding who to appoint as judges in the nation’s highest judicial bodies is in the nature of personal information provided by the third party and thus attracts Section 11(1). It further attracts exemptions under Section 8(1)(e) being information given to the charge of the Chief Justice of India by those under consideration for selection as Judges, in trust and in confidence. Disclosing of any such information will be violative of a fiduciary relationship (Section 8(1)(e) of RTI Act).”

Against this Shri Agrawal appealed to Dr. P.K. Seth, Appellate Authority in the Deptt. of Justice on 8.12.06 stating that u/s 11(1) his application should have been ‘transferred within five days’ which had not been done.

In response to our Appeal Notice, Smt. Rasika Chaube vide her letter of 9.1.07 has defended the decision of the CPIO in transferring the matter to the Supreme Court and later to the Ministry of Law & Justice which in her view was the most appropriate action in this case. In his letter of 4.1.’07 CPIO has stated that having regard to Article 77 of the Constitution of India and Sec. 6(3) of the RTI Act the matter was referred to the nodal Ministry.

This appeal was heard on 14.3.07, when the following were present :-

1. Shri Subhash Chandra Agrawal, appellant
2. Smt. Madhu Agrawal (assisting appellant)
3. Shri K. Gurtu, Director (Dept of Justice)

4. Shri Nitin Wakankar, President's Sectt.
5. Shri Rasika Chaube, President Sectt.

We found that the matter now pertains only to the perusal of the files that are in the custody of the Deptt. of Justice, Ministry of Law & Justice. The President's Sectt. has completed its task of transferring the cases to the appropriate Ministries and can no longer be held accountable for providing information requested. Appellant has argued that in case a fiduciary relationship is pleaded, we may call for the file as we had directed in the case of Sh. Ramesh Vs. Deptt. of Personnel & Training to determine whether it conforms to the requirement of sec. 8 for exclusion from disclosure. Director Shri Gurtu CPIO also requested that a further date be given when Jt. Secretary Dr. Seth could also be present. A further hearing was, therefore, held on 16.3.07. The following were present:

1. Shri Subhash Chander Agrawal, appellant
2. Smt. Madhu Agrawal (assisting appellant)
3. Shri Prashant Bhushan (-do-)
4. Dr. P.K. Seth, Jt. Secy. (Dept of Justice)
5. Shri K.Gurtu, Director (Dept of Justice)

Shri Prashant Bhushan arguing on behalf of appellant Shri Agrawal stated that the relationship between a judge and Chief Justice, all functioning in their official capacity, cannot be construed to be fiduciary as claimed by CPIO, Deptt. of Justice. He presented before us the ruling of Hon'ble Justice Bhagwati in 'S.P. Gupta Vs. Union of India & ors.' (**AIR 1982 SC 149**) which deals extensively with the question of correspondence between the Law Minister, Chief Justice of Delhi and Chief Justice of India. Justice Bhagwati has held as follows in this context :

"62.It is here that the judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice."

On the question of immunity against disclosure in respect of correspondence between the Law Minister, Chief Justice of Delhi High Court and

the Chief Justice of India, Hon'ble Justice Bhagwati has, in the same order ruled as follows :

79. xxx *"It was a class immunity which was claimed in respect of this correspondence and the protected class was said to consist of correspondence between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the notings made by these constitutional functionaries in that behalf. The argument was that the documents belonging to this class are immune from disclosure, irrespective of their contents, because it is in national interest and also necessary for maintaining the dignity of the judiciary and preserving the confidence of the people in the integrity of the judicial process that documents belonging to this class should be withheld from disclosure. Now there are a few prefatory remarks we would like to make before embarking upon an examination of this argument. In the first place, it is necessary to bear in mind that the burden of establishing a claim for class immunity is very heavy on the person making the claim. Lord Reid pointed out in Reg v. Lewes Justices, ex parte Home Secretary that the speeches in Conway v. Rimmer made it clear that there is a heavy burden of proof on any authority which makes a claim for class immunity. The claim for class immunity is an extraordinary claim because it is based not upon the contents of the document in question but upon its membership of a class whatever be its contents and therefore the court should be very slow in upholding such a broad claim which is contradictory, if not destructive, of the concept of open government. Secondly, it is true, as pointed out earlier, that classes of documents to which the immunity may be accorded are no closed and in the life of a fast changing society rapidly growing and developing under the impact of vas scientific and technological advances new class o classes of documents may come into existence to which the immunity may have to be granted in public interest, but that should only be as a highly exceptional measure. It is only under the severest compulsion of the requirement of public interest that the Court may extend the immunity to any other classes of documents and **in the context of our commitment to an open government with the concomitant right of the citizen to know what is happening in the government, the court should be reluctant to expand the classes of documents to which immunity may be granted.** The Court must on the contrary move in the direction of attenuating the protected class or classes of documents, because by and large*

secrecy is the badge of an authoritarian government. We may point out once again, though it be at the cost of repetition, that even in regard to documents belonging to the class, which has been judicially recognized as entitled to immunity, the law must now be taken to be well settled that the immunity is not absolute. **The public interest in non disclosure of a document belonging to this class may in an appropriate case yield to the public interest that in the administration of justice, the court should have the fullest possible access to every relevant document and in that event, the document would be liable to be disclosed even though it belongs to the protected class.** The executive cannot be merely invoking the scriptural formula of class immunity defeat the cause of justice by withholding a document which is essential to do justice between the parties, for otherwise the doctrine of class immunity would become a frightful weapon in the hands of the executive for burying its mistakes, covering up its inefficiencies and sometimes even hiding its corruption. Every claim for immunity in respect of a document, whatever be the ground on which the immunity is claimed and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one test, namely what does public interest require – disclosure or non disclosure. The doctrine of class immunity is therefore no longer impregnable; it does not any more deny judicial scrutiny' it is no more a mantra to which the court pays obeisance. Whenever class immunity is claimed in respect of a document, the court has to weigh in the scales the one aspect of public interest which requires that the document should not be disclosed against the other that the court in performing its functions should not be denied access o relevant document and decide which way the balance lies. And this exercise has to be performed in the context of the democratic ideal of an open government. **(Emphasis added)**

80. If we approach the problem before us in the light of these observations, it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non appointment of a High Court Judge or Supreme Court Judge or the transfer of High Court Judge and **the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure.** It is undoubtedly true that appointment or non appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the

various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters. But we do not think that the candour and frankness of these constitutional functionaries in expressing their views would be affected if they felt that the correspondence exchanged between them would be liable to be disclosed in a subsequent judicial proceedings. The constitutional functionaries concerned in this exercise are holders of high constitutional offices such as the Chief Justice of a High Court and the Chief Justice of India and it would not be fair to them to say that they are made of such weak stuff that they would hesitate to express their views with complete candour and frankness if they apprehend subsequent disclosure. We have no doubt that high level constitutional functionaries like the Chief Justice of High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed. If, to quote the words of Lord Pearce in Conway v. Rimmer “there are countless teachers at schools and universities, countless employers of labour, who write candid reports, unworried by the outside chance of disclosure” there is no reason to suspect that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would flinch and falter in expressing their frank and sincere views when performing their constitutional duty. We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted – and of this we have no doubt – that our Chief Justices and Judges are made of sterner stuff; they have inherited along and ancient tradition of independence and impartiality; they are by training and experience as also by their oath of office dedicated to the cause of justice administered without fear or favour, affection or ill will and in fact there is no power on earth which can deflect them from the path of rectitude. They are, to quote the words from the famous verse from Manasollasa “rag-dvesh-vivirjita” and “viloma bhay-verjita” and we find it difficult to believe that they would not act as judges but as weak kneed and effete individuals afraid to express their views lest they might come to be known to others and provoke criticism. The Chief Justice of a High Court and the Chief Justice of India would undoubtedly expect confidentiality while expressing their views but that is no ground for upholding a claim for class immunity in respect of the correspondence exchanged between them and the Central Government or the State Government. Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot

sustain a claim for immunity against disclosure. Vide : “Science Research Council v. Nasse” and particularly the observations of Lord Scarman at pages 697 and 698. Even if a document be confidential, it must be produced, notwithstanding its confidentiality, if it is necessary for fairly disposing of the case, unless it can be shown that its disclosure would otherwise be injurious to public interest.

81. *Now we fail to see how in cases of this kind where non appointment of an Additional Judge for a further term or transfer of a High Court Judge is challenged, the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them, could at all said to be injurious to public interest. We have already pointed out above that so far as non appointment of an Additional Judge for a further term is concerned, the only two grounds on which the decision not to appoint can be assailed are : firstly, that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India before reaching the decision and secondly, that the decision is malafide or based on irrelevant considerations. Now obviously these two grounds cannot be made good by a petitioner unless the correspondence between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them are disclosed, for they alone would furnish the relevant evidence showing whether these two grounds are satisfied or not. These documents would show or at least shed light on the question whether there was full and effective consultation between the Central Government on the one hand and the Chief Justice of the High Court, the State Government and the Chief Justice of India on the other, because, as already pointed out by us, such consultation would ordinarily be in writing – as it ought to be – and they would also, in cases where such consultation has taken place, indicate the reasons which have weighed with the Central Government in reaching its decision. Apart from these documents, there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations and if an affidavit is made by an appropriate authority of the Central Government or by the Chief Justice of the High Court or by the Chief Justice of India stating that every relevant aspect of the question was discussed and there was full and effective consultation, it would be well-nigh impossible for the petitioner to successfully challenge the decision of the Central*

Government. It is only through these documents that the petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the Additional Judge. It would have the effect of placing the Union of India, whose decision is challenged, in an unassailable – almost invincible – position where it can, by claiming class immunity in respect of these documents, ensure the rejection of the writ petition. **The harm that would be caused to the public interest in justice by the non disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure,** because the non disclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the petitioner may be true and just. Moreover, it may be noted that the discontinuance of an Additional Judge by the Central Government is a serious matter and if such discontinuance is mala fide or based on irrelevant grounds, it would tend to affect the independence of the judiciary and it is therefore necessary in order to maintain public confidence in the independent functioning of the judiciary that the people should know whether the constitutional requirements were complied with before the decision was taken not to continue the Additional Judge and whether any oblique motivations or irrelevant considerations influenced the Central Government in reaching that decision. The charge against the Central Government in the first group of present writ petitions was that there was no full and effective consultation with the Chief Justice of India before the decision was reached by the Central Government in regard to S.N. Kumar and in any event, the decision of the Central Government was actuated by oblique or improper motives. This was a serious charge against the Central Government and there can be no doubt that it would be very much in public interest that the necessary documents throwing light on the truth or otherwise of this charge **should be disclosed, so that the full facts may be known to the public** and the doubts raised and entertained about the influence of extraneous factors in the case of S.N. Kumar should be resolved and removed. It is significant to note that had there not been disclosure of these documents, a certain doubt or misgiving would have continued to prevail in the public mind that the decision to discontinue S.N. Kumar as an Additional Judge was taken by the Central Government without full and effective consultation of the Chief Justice of India and that this decision was motivated by

oblique or irrelevant considerations. But, as we shall presently point out these documents when disclosed helped to clear this doubt and remove this misgiving by explaining to the people what were the true facts behind the decision to discontinue S.N. Kumar as an Additional Judge. Furthermore, it may be noted that when the charge against the Central Government is that it has discontinued S. N. Kumar as an Additional Judge for oblique or improper reasons and thereby sought to interfere with the independence of the judiciary, it would be singularly inappropriate to exclude these documents which constitute the only evidence, if at all, for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution. **The interest of the wider community in getting to the bottom of this charge is so great that it cannot be allowed to be impeded by a mere rule of evidence.** Nor can the decision to admit or exclude be safely left to the Central Government, which is itself charged with wrongful or improper conduct.. **(Emphasis added)**

82. These selfsame reasons must apply equally in negating the claim for immunity in respect of the correspondence between the Law Minister and the Chief Justice of India and the relevant notings made by them in regard to the transfer of a High Court Judge including the Chief Justice of a High Court. These documents are extremely material for deciding whether there was full and effective consultation with the Chief Justice of India before effecting the transfer and the transfer was made in public interest, both of which are, according to the view taken by us, **justiciable issues and the non disclosure of these documents would seriously handicap the petitioner in showing that there was no full and effective consultation with the Chief Justice of India or that the transfer was by way of punishment and not in public interest.** It would become almost impossible for the petitioner, without the aid of these documents, to establish his case, even if it be true. Moreover, the transfer of a High Court Judge or Chief Justice of a High Court is a very serious matter and if made arbitrarily or capriciously or by way of punishment or without public interest motivation, it would erode the independence of the judiciary which is a basic feature of the Constitution and therefore, when such a charge is made **it is in public interest that it should be fully investigated and all relevant documents should be produced before the court so that the full facts may come before the people, who in a democracy are the ultimate arbiters.** It would be plainly contrary to public interest to allow the inquiry into such a charge to be baulked or frustrated by a claim for

*immunity in respect of documents essential to the inquiry. It is also important to note that when the transfer of a High Court Judge or Chief Justice of a High Court is challenged, the burden of showing that there was full and effective consultation with the Chief Justice of India and the transfer was effected in public interest is on the Union of India and it cannot withhold the relevant documents in its possession on a plea of immunity and expect to discharge this burden by a mere statement in an affidavit. Besides, if the reason for excluding these documents is to safeguard the proper functioning of the higher organs of the State including the judiciary, then that reason is wholly inappropriate where what is charged is the grossly improper functioning of those very organs. It is, therefore, obvious that, in a proceeding where the transfer of a High Court Judge or Chief Justice of a High Court is challenged, no immunity can be claimed in respect of the correspondence exchanged between the Law Minister and the Chief Justice of India and the notings made by them, since, on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure. **(Emphasis added)***

83. *But, quite apart from these considerations, we do not understand how the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notes made by them in regard to non appointment of an Additional Judge for a further term or transfer of a High Court Judge can be detrimental to public interest. It was argued by the learned Solicitor-General on behalf of the Union of India that if the Chief Justice of the High Court and the Chief Justice of India differ in their views in regard to the suitability of an Additional Judge for further appointment, the disclosure of their views would cause considerable embarrassment because the rival views might be publicly debated and there might be captious and uninformed criticism which might have the effect of undermining the prestige and dignity of one or the other Chief Justice and shaking the confidence of the people in the administration of justice. If the difference in the views expressed by the Chief Justice of the High Court and the Chief Justice of India becomes publicly known, contended the learned Solicitor-General, it might create a difficult situation for the Chief Justice of the High Court vis-à-vis the Chief Justice of India and if despite the adverse opinion of the Chief Justice of the High Court, the Additional Judge is continued for a further term, and the Additional Judge knows that he has been so continued overruling the view of the Chief Justice of the High Court,*

it might lead to a certain amount of friction which would be detrimental to the proper functioning of the High Court. So also if an Additional Judge is continued for a further term accepting the view expressed by the Chief Justice of the High Court and rejecting the opinion of the Chief Justice of India, it would against create a piquant situation because it would affect the image of the Chief Justice of India in the public eyes. Moreover, a feeling might be created in the mind of the public that a person who was regarded as unsuitable for judicial appointment by one or the other of the two Chief Justices, has been appointed as a Judge and the litigants would be likely to have reservations about him and the confidence of the people in the administration of justice would be affected. The learned Solicitor-General contended that for these reasons it would be injurious to public interest to disclose the correspondence exchanged between the Law Minister, the Chief Justice or the High Court and the Chief Justice of India.

84. We have given our most anxious thought to this argument urged by the learned Solicitor General, but we do not think we can accept it. We do not see any reason why, if the correspondence between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India and the relevant notes made by them, in regard to discontinuance of an Additional Judge are relevant to the issues arising in a judicial proceeding, they should not be disclosed. There might be difference of views between the Chief Justice of the High Court and the Chief Justice of India but so long as the views are held bona fide by the two Chief Justices, we do not see why they should be worried about the disclosure of their views? Why should they feel embarrassed by public discussion or debate of the views expressed by them when they have acted bona fide with the greatest care and circumspection and after mature deliberation. Do Judges sitting on a Division Bench not differ from each other in assessment of evidence and reach directly contrary conclusions on questions of fact? Do they not express their judicial opinions boldly and fearlessly leaving it to the jurists to decide which of the two differing opinions is correct? If two Judges do not feel any embarrassment in coming to different findings of fact which may be contrary to each other, why should two Chief Justices feel embarrassed if the opinions given by them in regard to the suitability of an Additional Judge for further appointment differ and such differing opinions are made known to the public. Not only tolerance but acceptance of bona fide difference of opinion is a part of judicial discipline and we find it difficult to believe that the disclosure of their differing opinions might create a strain in the relationship between the Chief Justice of the High Court and the Chief Justice of India. We have no doubt that the Chief Justice of

*the High Court would come to his own independent opinion on the material before him and he would not surrender his judgment to the Chief Justice of India, merely because the Chief Justice of India happens to be head of the judiciary having a large voice in the appointment of Judges on the Supreme Court Bench. Equally we are confident that merely because the Chief Justice of the High Court has come to a different opinion and is not prepared to change that opinion despite the persuasion of the Chief Justice of India, no offence would be taken by the Chief Justice of India and he would not harbour any feeling of resentment against the Chief Justice of the High Court. Both the Chief Justices have trained judicial minds and both of them would have the humility to recognize that they can be mistaken in their opinions. We do not therefore see any real possibility of estrangement or even embarrassment for the two Chief Justices, if their differing views in regard to the suitability of an Additional Judge for further appointment are disclosed. We also find it difficult to agree that if the differing views of the two Chief Justices become known to the outside world, the public discussion and debate that might ensue might have the effect of lowering the dignity and prestige of one or the other of the two Chief Justices. When the differing views of the two Chief Justices are made public as a result of disclosure, there would certainly be public discussion and debate in regard to those views with some criticizing one view and some criticising the other, but that cannot be helped in a democracy where the right of free speech and expression is a guaranteed right and if the views have been expressed by the two Chief Justices with proper care and deliberation and a full sense of responsibility in discharge of a constitutional duty, there is no reason why the two Chief Justices should worry about public criticism. We fail to see how such public criticism could have the effect of undermining the prestige and dignity of one or the other Chief Justice. So long as the two Chief Justices have acted honestly and bona fide with full consciousness of the heavy responsibility that rests upon them in matters of this kind, we do not think that any amount of public criticism can affect their prestige and dignity. But if either of the two Chief Justices has acted carelessly or improperly or irresponsibly or out of oblique motive, his view would certainly be subjected to public criticism and censure and that might show him in poor light and bring him down in the esteem of the people, but that will be the price which he will have to pay for his remissness in discharge of his constitutional duty. No Chief Justice or Judge should be allowed to hide his improper or irresponsible action under the cloak of secrecy. If any Chief Justice or Judge has behaved improperly or irresponsibly or in a manner not befitting the high office he holds, there is no reason why his action should not be exposed to public gaze. **We believe***

in an open government and openness in government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterize the functioning of the judicial apparatus including judicial appointments and transfer. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India. In case of appointment or non appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade off. We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should not be protected against disclosure at all events and in all circumstances. Where it becomes relevant in a judicial proceeding, why should the Court and the opposite party and through them the people not know what are the reasons for which a particular appointment is made or a particular Additional Judge is discontinued or a particular transfer is effected. We fail to see what harm can be caused by the disclosure of true facts when they become relevant in a judicial proceeding. In fact, the possibility of subsequent disclosure would act as an effective check against carelessness, impetuosity, arbitrariness or mala fides on the part of the Central Government, the Chief Justice of the High Court and the Chief Justice of India and ensure bona fide and correct approach objective and dispassionate consideration, mature thought and deliberation and proper application of mind on their part in discharging their constitutional duty in regard to appointments and transfers of Judges. It is true that if the views expressed by the Chief Justice of the High Court and the Chief Justice of India in regard to the suitability of an Additional Judge for further appointment become known to the public, they might reflect adversely on the competence, character or integrity of the Additional Judge, but the Additional Judge cannot legitimately

*complain about it, because it would be at his instance that the disclosure would be ordered and the views of the two Chief Justices made public. If the Additional Judge is appointed for a further term either accepting the opinion expressed by the Chief Justice of the High Court in preference to that of the Chief Justice of India or vice versa, the question of disclosure of differing opinions of the two Chief Justices would not arise, because no one would know that the two Chief Justices were not agreed on continuing the Additional Judge for a further term and therefore, ordinarily, there would be no challenge to the appointment of the Additional Judge. It is only if the Additional Judge is not continued for a further term that he or someone on his behalf may challenge the decision of the Central Government not to continue him and in that event, if he asks for disclosure of the relevant correspondence embodying the views of the two Chief Justices, and if such disclosure is ordered, he has only himself to thank for it and in any event, in such a case there would be no harm done to public interest if the views expressed by the two Chief Justices become known to the public.” . **(Emphasis added)***

In response to this argument Dr. P.K. Seth, Jt. Secretary and Appellate Authority, Department of Justice has argued that the decision in S.P. Gupta Vs. Union of India has been superceded by –

(i) i) Review of the judgment by Advocates on Record (1993);ii) Presidential reference to the Supreme Court under Article 143 (1998) regarding appointment of Judges by transfer; and iii) the procedure for appointment of judges established in 1999. We, therefore, asked for copies of the orders cited by Dr. Seth, which have been received and placed on record. These have been examined by us. We find on examination that while all the records cited do indeed examine in detail the procedure for appointment of Chief Justice of India and Judges of the Supreme Court of India and the procedure for appointment and transfer of Chief Justices and Judges of the High Court and determine primacy of the Chief Justice of India in recommending such appointments, majority opinion in S.P. Gupta’s case was overruled insofar as it was in conflict with the view relating to the primacy of the opinion of the Chief Justice of India in matters of appointment, transfer and the justiciability of these matters as well as

in relation to judge strength, but we do not find that the decision in the case of S.P. Gupta on the question of disclosure was overruled.

DECISION NOTICE

Having heard the arguments and studied the papers on record we cannot find grounds to exclude disclosure of the correspondence of the nature in question between the Hon'ble Chief Justice of Supreme Court of India and the Law Minister on the recommendations for appointment of Hon'ble Justices. Nor does this fall under any exclusion specified in sec. 8(1). The CPIO, Ministry of Law & Justice, Department of Justice is therefore directed to provide a copy of the file to appellant Shri Agrawal

However, respondent Dr Seth has shown us in confidence the letter of July 27,2006 in which the decision of the collegium has been conveyed to Law Minister by Hon'ble Chief Justice. This contains reference to a number of persons who will, therefore, become third parties in this matter, and none of them are a party to the present proceedings. In his rejoinder to the comments of CPIO Sh. Gurtu on the appeal notice, as mentioned above, appellant Shri Subhash Chander Agrawal has argued that sec. 11(1) calls for transfer of the RTI petition to a third party for submission in writing about the information sought by the petitioner within five days which was not done. In this case, however, if the information was not to be disclosed at any rate the reference to sec. 11(1) would be redundant. Sec. 11(1) does not call for reference to the third party but only the issue of a written notice to such third party of the request and of the fact that the CPIO intends to disclose the information. Now that we have directed disclosure of the information PIO will invite the third parties to make a submission in writing or orally regarding whether the information in respect of them should be disclosed. In case there is valid ground for objection to disclosure in any case, the information sought may be supplied to the exclusion of the objectionable portion as prescribed under the principle of severability (Sec.10). This procedure

may now be followed in disclosing the information as directed. The exercise may be completed within one month from the date of issue of this Decision Notice, which will include the five days necessary for issue of notice to third parties and obtaining their comments if any.

The appeal is, disposed of accordingly.

Announced on 23/3/07. Notice of this decision be given free of cost to the parties.

(Wajahat Habibullah)
Chief Information Commissioner
23.3.2007

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.

(L.C.Singhi)
Addl. Registrar
23.3.2007