



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

**Peer - Reviewed & Refereed Journal**

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# **CORPORATE TRADE SECRETS VS. THE RIGHT TO INFORMATION ACT: PUBLIC INTEREST, COMMERCIAL CONFIDENTIALITY, AND THE ABSENCE OF A TRADE SECRET FRAMEWORK IN INDIA**

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## **Abstract**

Trade secret and commercially confidential information are now more important than ever in the corporate governance framework and are vital for industries, including technology, pharmaceuticals, public procurement, and strategic commercial activities. Meanwhile, the Right to Information (RTI) Act, 2005 aims to make public authorities transparent and accountable, it recognises access to information as part of democratic governance under Article 19(1)(a) of the Constitution.<sup>1</sup> This creates an ongoing legal conflict between corporations, public sector undertakings, pharmaceutical companies and government-related entities to keep their "commercial information" confidential, and journalists, activists, competing corporations, and citizens who value transparency and are seeking access to information under the RTI framework. In India the situation is complicated by the fact that trade secrets are not governed by a specific legislation despite India's obligation under Article 39 of the TRIPS Agreement.<sup>2</sup> The paper examines whether trade secrets remain protected when disclosure is sought under the Right to Information Act. It examines the concept of interaction with 'commercial confidentiality' under Section 8(1)(d) of the RTI Act and the 'public interest override' under Section 8(2) of the RTI Act, and also discusses the 'judicial approach' that has been followed by different courts in India in balancing transparency requirements and commercial confidentiality.<sup>3</sup> It further looked at the judicial approach followed by Indian courts on weighted nature of commercial confidentiality versus public interest. Special consideration is paid to listed companies, public sector undertakings and pharmaceutical companies, in which commercial information often relates to greater public issues of public health, regulatory oversight and use of public resources. The paper argues that the present legal framework fails to balance trade secret protection with transparency obligations effectively of ensuring trade

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<sup>1</sup> State of Uttar Pradesh v. Raj Narain, (1975) 4 S.C.C. 428.

<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39, Apr. 15, 1994, 1869 U.N.T.S. 299.

<sup>3</sup> Right to Information Act, No. 22 of 2005, Sec. Sec. 8(1)(d), 8(2), India Code (2005).

secret protection will not be stifled by the over-disclosure of information. It brings to a close its finding that the failure to have a special trade secret statute has led to a case-by-case balancing by the judiciary, uncertainty for corporations, regulators, journalists and public authorities.

## Introduction

Confidential business information is becoming one of the key business assets of corporations as the importance of information-based economies has increased. In the modern business context, the notion of a trade secret has become a key component of success and an important point of contention for safeguarding against those who may discover and utilise them.<sup>4</sup> Unlike patents or copyright, trade secrets derive their value from secrecy itself, and thus must be protected from their disclosure and misuse by others. However, there is no specific legislation that covers confidential business information in India and this is the reason for the lack of proper protection of trade secrets in India.<sup>5</sup> While India is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which mandates that member States protect undisclosed information under Article 39, India does not have a comprehensive trade secret legislation.<sup>6</sup> In India, courts have generally relied upon equitable principles and judicial interpretation in deciding copyright misappropriation cases involving commercial confidence. At the same time, enactment of the Right to Information Act, 2005 has brought forth a robust legal infrastructure fostering transparency and accountability in the Government. The RTI Act is designed to deliver transparency in public administration by providing citizens access to information from public administration, in order to increase the accountability of public institutions and arouse democratic participation.<sup>7</sup>

Trade secret protection often conflicts with the RTI framework in terms of constitutionality and commerce. There are many situations where public authorities, regulators, public sector undertakings and government-owned companies have commercially sensitive information provided by private companies. This information could be, for example, pharmaceutical trial data, specifications for pricing, bidding documents, technological processes, or procurement contracts, financial disclosures, or regulatory communications. Journalists, activists,

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<sup>4</sup> David Friedman, William Landes & Richard Posner, Some Economics of Trade Secret Law, 5 J. Econ. Persp. 61, 62–64 (1991).

<sup>5</sup> John Richard Brady v. Chemical Process Equip. Pvt. Ltd., A.I.R. 1987 Del. 372.

<sup>6</sup> TRIPS Agreement, supra note 2, art. 39.

<sup>7</sup> State of Uttar Pradesh v. Raj Narain, (1975) 4 S.C.C. 428.

competitors, and public interest groups often request disclosure of such information for reasons of transparency, to stop corruption, to shield consumers, and to hold public health authorities accountable.

The major difficulty lies in the balancing mechanism laid down under Section 8(1)(d) of the RTI Act. The statute, however, does not precisely specify the definition of “trade secret”, “commercial confidence”, and “public interest”.<sup>8</sup> The recent trend in public interest agendas for disclosure contradicts the above in Section 8(2), authorizing disclosure even in the face of statutory protection of interest where public interests outweigh.<sup>9</sup> Therefore, judicial and information commission decisions regarding the need to maintain confidentiality of business information have varied widely. This is especially important in the public welfare or regulatory sectors. Drug firms often assert that such clinical trial and regulatory information will be kept confidential, whereas public interest groups advocate for revealing details related to drug safety and transparency of pricing. PSUs also invoke commercial confidentiality to issues relating to procurement, financial transactions and strategic matters in listed companies. The use of RTI mechanisms to gain indirect access to commercially valuable information has been tried by journalists and competitors in several circumstances via public authorities. Indian courts have thus been called on to balance two competing constitutional values: that confidentiality in trade and commerce be maintained and transparency of government is to be fostered. In some cases, disclosure has been favored by judges where there is a stronger public interest in disclosure, and sometimes judges have taken steps to protect confidentiality of business information from access by the public. Another source of doctrinal inconsistency has been the lack of a specific trade secret legislation, as the courts do not have a clear statute defining the relationship between commercial confidentiality and transparency requirement.

The present paper examines whether trade secret and commercially confidential information continue to remain protected even when disclosure is sought under the RTI Act. It examines the legal position of trade secret protection in India, takes a look at the notion of statutory regime of corporate confidentiality under the RTI Act, and studies how the judiciary has approached the balancing act between transparency and corporate confidentiality. The paper maintains that the legislative framework for public interest disclosure and protecting confidential commercial information are absent in Indian law and are difficult to be reconciled

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<sup>8</sup> Right to Information Act, No. 22 of 2005, Sec. 8(1)(d), India Code (2005).

<sup>9</sup> Id. at Sec. 8(2).

consistently. It additionally recommends that transparency be kept in democratic governance systems but it also recommends that disclosure of commercially sensitive information should be based on "structured standards" that include public funding, regulatory accountability, public health considerations, and the actual site of competitive harm and not on "ad hoc" judicial decision.

### **Trade Secret Protection and the RTI Framework in India.**

In contemporary economies, one of the most commercially valuable forms of confidential business information is trade secrets. Trade secrets do not require any formal registration processes like a patent, copyright or trademark. As a result, commercial interests spend substantial amounts of money on sealing up technical formulas, manufacturing processes, pricing structures, databases of clients, research material, marketing strategies, and regulatory submissions to others from disclosure.<sup>10</sup> Internationally the protection of trade secrets has been formalised by Article 39 of the TRIPS Agreement, which provides that trade secrets are to be protected against 'unfair commercial use', which means protection against use by third parties without the owner's access if the use is based on the information's secrecy, commercial value or reasonable efforts to maintain secrecy.<sup>11</sup> But TRIPS does not specify any single kind of legislation for States to follow in terms of protection measures. Despite TRIPS obligations, India does not have a specific law dedicated to the protection of trade secrets (as developed and implemented in other jurisdictions used to be within their own technologies), protection of confidential business information generally emerges from contractual obligations, common law principles of equity and judicial recognition of breach of confidence actions.<sup>12</sup> Even though courts have long endorsed the idea that certain commercial information is entitled to a heightened degree of protection afforded by the law where otherwise fair disclosure of the information would be detrimental to competitive interests, the lack of codification has left the law in a conflicting and ad hoc state.<sup>13</sup>

The courts have generally sided with Indian trade secrets; these are mostly defined as contractual remedies upon a violation and equitable remedies, that is, equitable remedies. In *John Richard Brady v. Chemical Process Equipments Pvt. Ltd*, the Delhi High Court found

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<sup>10</sup> Sharon K. Sandeen & Elizabeth A. Rowe, *Trade Secret Law in a Nutshell* 3–5 (2017).

<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39, Apr. 15, 1994, 1869 U.N.T.S. 299.

<sup>12</sup> N.S. Gopalakrishnan & T.G. Agitha, *Principles of Intellectual Property* 357 (2d ed. 2014).

<sup>13</sup> *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*, 2003 (27) P.T.C. 457 (Bom.).

commercial confidentiality even in the absence of any specific enactment when the information was provided under the umbrella of a commercial relationship thereby causing commercial harm in case of unauthorised disclosure.<sup>14</sup> Similarly, in *American Express Bank Ltd. v. Priya Puri*, the Delhi High Court acknowledged that customer information, internal business strategies, and confidential operational details may qualify for protection where disclosure would cause commercial harm.<sup>15</sup> These decisions demonstrate judicial willingness to recognise commercial confidentiality despite the absence of specific legislation.

Confidential information shared by private entities becomes much harder to protect, however, when the information is also secret to public authorities or government linked entities. Frequently, this can be a challenge when companies provide commercially sensitive information to regulation departments, public sector entities, licensing bodies or ministries. This can encompass technical features, bidding procedures and costs, pharmaceutical test results, environmental clearance, loan or grant applications, or financial disclosures. Once the material is in the possession of public authorities, it can come under disclosure requirements under the Right to Information Act, 2005.

The RTI Act came into effect to ensure transparency and accountability in the government decision making process, and it is founded on the principle of constitution that citizens have the right to access governmental information for enhancing transparency in decision making processes.<sup>16</sup> The Supreme Court had already recognized this rule in the case of *State of Uttar Pradesh v. Raj Narain* prior to the coming of the RTI Act in *State of Uttar Pradesh v. Raj Narain* when it in this case said that people have the right to know how the public bodies work in a democratic society.<sup>17</sup> The RTI Act intentionally adopts a broad scope. However, by using broad language for “information,” under section 2(f), the records and documents of commercial enterprises submitted in response to regulations or to government may fall under RTI applications.<sup>18</sup> The RTI Act also acknowledges that the disclosure of information can do harm to any legitimate private and commercial interest. Section 8,<sup>19</sup> therefore, provides for special exemptions to compulsory disclosure of certain kinds of information, most importantly, clauses

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<sup>14</sup> John Richard Brady v. Chemical Process Equipments Pvt. Ltd., A.I.R. 1987 Del. 372.

<sup>15</sup> *American Express Bank Ltd. v. Priya Puri*, (2006) 110 D.L.T. 278.

<sup>16</sup> Right to Information Act, No. 22 of 2005, pmb., India Code (2005).

<sup>17</sup> *State of Uttar Pradesh v. Raj Narain*, (1975) 4 S.C.C. 428.

<sup>18</sup> Right to Information Act, No. 22 of 2005, Sec. 2(f), India Code (2005).

<sup>19</sup> Id. Sec. 8.

1(d) of section 8:

“information comprising information of a commercial confidence, trade secret, intellectual property of a third party or a fact which disclosure would seriously prejudice the competitive position of such third party, except with the consent of the competent authority, on the basis of which it is satisfied that there are compelling public interest reasons.”<sup>20</sup>

The balancing of disclosure duties and safeguarding of business confidence is what this provision is designed to achieve. The language of provision, however, presents some interpretative challenges. There is no definition of trade secret, commercial confidence or competitive harm in the statute. Nor does it provide a logical standard to test for the establishment of a public interest when it arises to the detriment of confidentiality in the business. The RTI framework adds to this the obligation on the Public Information Officer to inform third parties before disclosure of any information where the disclosure relates to or is derived from information supplied by a third party which is treated as confidential (Section 11).<sup>21</sup> While section 11 sets out process participation rights, it does not necessarily imply absolute veto rights over disclosure. The public authority has the final say once it has taken into account any objections of the affected body.

The combined operation of Section 8(1)(d), of Section 8(2) and of Section 11 together create a complex and uncertain regime for corporations interacting with public authorities. Businesses have a right to expect that they can at least expect their commercially sensitive information to be kept confidential when they make it available to regulators, but such disclosure can be compelled in an RTI, under another Citizen's 'right to know' and this can be brought by journalists, competitors, activists, or public interest organisations. This uncertainty tends to be significant especially in sectors where there is considerable public consequences. Pharma firms typically upload clinical trial data, drug safety reports, manufacturing and pricing data to the regulators. Disclosure requests can be initiated due to a public health matter, a consumer rights issue, or even as a result of allegations about failures in the regulatory process. In addition, public procurement procedures for infrastructure projects or public sector undertakings often provide for commercially valuable kinds of bidding data that at the same time are subject to stringent demands for transparency and anti-corruption checks from the public.

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<sup>20</sup> Id. Sec. 8(1)(d).

<sup>21</sup> Id. Sec. 11.

The process of resolving these conflicts has required courts and information commissions to balance competing constitutional values. However, in reality, the balance has been fairly lacking in doctrines consistency along the reasons where there is no specific statutory regime on trade secret in India. Disclosure disputes are often settled by judge-made case law rather than rules, creating an unpredictable system.

This has had the effect of causing considerable legal uncertainty, however, because of the lack of comprehensive trade secret legislation. There is still uncertainty in corporations about how far confidentiality protection can go after the information comes to the hands of public authorities. Meanwhile, various divergent principles are applied to the standards for disclosure in RTI cases and by the media. This doctrinal ambiguity lies at the centre of the conflict between trade secret protection and transparency obligations under Indian law.

#### **Section 8(1)(d), Commercial Confidentiality and Public interest override.**

The central conflict between commercial secrecy and transparency under the RTI Act emerges from Section 8(1)(d). under the RTI Act is Section 8(1)(d) of the Act.<sup>22</sup> In principle, the provision is a balanced approach by the legislature to protect commercially sensitive information without preventing disclosure where of greater public interest. But in actual use its nebulous definition and shifting judicial applications have led to confusion over how protected trade secrets are when given to the public authorities.

#### **Section 8(1)(d) exempts from disclosure:**

“Information, including commercial confidence, trade secrets and/or intellectual property disclosures that would prejudicial to the competitive position of a third party “unless the competent authority is satisfied that the greater the public interest is in the disclosure of such information.”<sup>23</sup>

The organisation of the provision suggests that s.8(1)(d) does not provide absolute protection. The exemption is only granted where disclosure would be detrimental to the competitive position and disclosure may still be made if the public interest is greater than the public interest in confidentiality. What the statute does require is balancing, not automatic protection of

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<sup>22</sup> Right to Information Act, No. 22 of 2005, Sec. 8(1)(d), India Code (2005).

<sup>23</sup> Id.

commercial information. First, Indian law is based on uncertainty regarding what constitutes a “trade secret” and what protects “trade secrets,” because those terms do not have statutory definitions in Indian law. The first problem in the Indian legal context is the lack of statutory definitions of “trade secret,” “commercial confidence” and “competitive harm.” These notions have been understood differently by courts and information commissions. At times, in conflicts, Public Authorities have considered, without proof of any competitive damage, the submission of commercial records as confidential. However, sometimes disclosure has been mandated in the absence of real commercial sensitivity on the basis of a broad consideration of public interest.

In *Institute of Chartered Accountants of India v. Shaunak H. Satya*, the Supreme Court struck a balance between the importance of disclosure and the protection of commercial confidentiality on the one hand, and the prohibition on orders that are too wide-ranging on the other.<sup>24</sup> It held that commercial confidentiality rights may have to be protected under Section 8(1)(d), but orders to restrict disclosure must be read narrowly given the purpose of the RTI Act, which calls for transparency.<sup>25</sup> It explained that, if commercial confidence is sought to be asserted, then it would have to be established that there is a clear competitive harm, beyond mere assertion of confidentiality. In the same manner, in *Central Board of Secondary Education v. Aditya Bandopadhyay*, the Supreme Court reiterated that the purpose of the RTI Act is to ensure accountability and transparency in public administration, even though the case was not directly regarding the disclosure of trade secrets, it paved the way to move towards a pro-transparency approach in respect of any RTI Act disclosure exemptions.<sup>26</sup>

Sectoral views of disclosure have not, however, always prevailed in the judicial arena. In a number of cases concerning contracts, tendering and technical information, courts and information commissions have shielded such information from disclosure because to do so would have infringed the right to fair competition or put at risk the proprietary business information. There is no consistent balancing framework, so there is a possibility that results will vary with the factual context and the understanding of public interest that is followed by adjudicating bodies.

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<sup>24</sup> *Institute of Chartered Accountants of India v. Shaunak H. Satya*, (2011) 8 S.C.C. 781.

<sup>25</sup> *Id.*

<sup>26</sup> *Central Board of Secondary Education v. Aditya Bandopadhyay*, (2011) 8 S.C.C. 497.

The issue of “larger public interest” is the most subject to controversy part of Section 8(1)(d). The definition is not provided in the RTI Act, giving a reason to courts to interpret the concept in as wide a variety as possible. In practice, public interest argument has been invoked in instances of allegations regarding alleging corruption, misuse of public funds, environmental issues, public health issues, public interest, and regulatory failures. But Indian jurisprudence doesn't have a clear legal standard to prove that when does `public interest' become large enough and proportionate to override commercial confidentiality.

This is particularly relevant for those involving pharmaceutical firms and public health control. A drug company is likely to submit a report or safety data, manufacturing processes, compliance documents, to the regulatory authorities a lot of times in clinical trials. The companies usually make submissions of this information a "commercially sensitive document" within section 8(1)(d). The public health community, however, asserts that disclosure would be required in cases where drugs have a direct impact on public safety and on the welfare of consumers. The conflict illustrates the challenge of conflicting interests between commercial secrecy and obligations to constitutional transparency. Too much sharing can stop innovation, corrode competitive advantage and reduce expectations for legitimate business operations. Too much privacy, on the other hand, can mask regulatory shortcomings, potentially unsafe products or diversion of public resources for these purposes. Balancing these conflicting interests and concerns is what the RTI framework tries to do, although with little specificity of standards, the outcomes are often unpredictable.

This provision (section 8(2)) makes a broad public interest override even where there are statutory exemptions. This means that even information falling within the exceptions of being a trade secret or one created by commercial confidence will be made available in appropriate cases.<sup>27</sup>

The second one is about competitors employing RTI tools in strategic ways to secure valuable business intelligence. Regulators and public authorities typically receive confidential technical information, pricing information and procurement procedures from the business on a regular basis. Access to such information through RTI applications may distort fair competition and/or harm to legitimate commercial confidentiality. The courts have sometimes found this hazard

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<sup>27</sup> Right to Information Act, No. 22 of 2005, Sec. 8(2), India Code (2005).

when interpreting Section 8(1)(d). Even though both information commissions and public authorities have declined to disclose information in cases where it seemed to be primarily to gain commercial advantage rather than public interest, it's not always easy to decide in the real world whether something is for investigative journalism, public accountability matters or commercial advantage.<sup>28</sup>

This has resulted in inconsistent balancing approaches in judicial and administrative decisions. The absence of clear statutory standards has thus resulted in differing practices that have made balancing different on decisions of retention. In some instances the key focus is transparency and accountability; in others it's commercial certainty and safeguarding proprietary information. Structured balancing regime is thus required under the Indian Law. Public funding, having a public impact on health, evidence of corruption, competitive harm, and disclosure kicking in should be part of a consistent, uniform legal standard.

### **Judicial Approach and Inconsistent Standards in Disclosure Disputes**

The interpretation by Indian courts and information commissions has been inconsistent in balancing the conflicting rights of commercial confidentiality and obligations for transparency as per the RTI Act. When there is an absence of a specific legislation on trade secrets, courts frequently make use of general principles of the Constitution, balancing the various considerations, and making discretionary decisions on public interest. This has led to no single doctrinal model for the preservation of commercially sensitive information and its limits of disclosure.

In *State of Uttar Pradesh v. Raj Narain* the Supreme Court held that the right to information is one of the early constitutional rights built into the framework of democratic accountability of public authorities.<sup>29</sup> It noted that "transparency in public activity is a key to public accountability and democratic participation". Unlike the case involving trade secrets and commercial confidentiality, this decided case ruled that transparency shall be a constitutional good under the provision of Article 19(1)(a). Subsequent RTI jurisprudence generally adopted a pro-disclosure approach. The Supreme Court in *Central Board of Secondary Education v. Aditya Bandopadhyay* brought attention towards the strict interpretation of the exemptions

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<sup>28</sup> *Bihar Pub. Serv. Comm'n v. Saiyed Hussain Abbas Rizwi*, (2012) 13 S.C.C. 61.

<sup>29</sup> *State of Uttar Pradesh v. Raj Narain*, (1975) 4 S.C.C. 428.

provided under the RTI Act as a matter of transparency is a primary goal of the Act.<sup>30</sup> The Court cautioned against broad interpretation of exemptions under the RTI Act to be interpreted in a manner that is unnecessarily broad as it would impair the effectiveness of the RTI framework.

However, judicial treatment is slightly more complicated when confidential commercial information is involved. Restricted disclosure of trade secrets or proprietary business information has been consistently recognized as a factor that can hurt business interests and inhibit genuine cooperation between private parties and public institutions and authorities. As a result, section 8(1)(d) has frequently been taken to be an important measure that allows commercial confidentiality to be protected.

Meanwhile, in *Institute of Chartered Accountants of India v. Shaunak H. Satya*, the Supreme Court honed in on the point that commercial confidence and intellectual property could rightfully fall within the ambit of Section 8(1)(d),<sup>31</sup> but that denial of information cannot be achieved by blanket assurances of confidentiality. It is public authorities' obligation to demonstrate that disclosure would indeed harm the competitive position of the concerned entity. The thought behind the order was to strike the right balance between transparency and proprietary interest in commercially sensitive information but to develop a formal doctrine in the process was not the aim of the judgment.

One of the recurring ambiguities in Indian jurisprudence is that of the meaning of "larger public interest." Public interest has been invoked in various circumstances such as allegations of corruption, misuse of public money, environmental, public health and accountability concerns, and regulatory accountability. The limit for overruling business confidentiality is not obvious, however. In some conflicts, adjudicating bodies have given special consideration to transparency in connection with information of public expenditure or public welfare. In others courts have been protective of confidentiality in the face of concerns for public interest. This inconsistent state has resulted, in part, from the lack of statutory definition of the terms "trade secret" and "commercial confidence," as well as "public interest".

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<sup>30</sup> *Central Board of Secondary Education v. Aditya Bandopadhyay*, (2011) 8 S.C.C. 497.

<sup>31</sup> *Institute of Chartered Accountants of India v. Shaunak H. Satya*, (2011) 8 S.C.C. 781.

This is an example that can be seen easily throughout the pharmaceutical industry. Regulatory agencies are commonly supplied with clinical trial reports, manufacturing information, safety details, and pricing by pharmaceutical firms. Such information can include commercially important research and/or proprietary formulations that are worthy of safeguarding from rival companies. At the same time, it may be relevant where public health, drug safety or regulatory accountability is a concern.

In such cases, Indian courts have not been able to establish a uniform standard. Judicial reasoning on pharmaceutical disclosure issues has remained inconsistent, balancing between the interest in innovation incentives and public health transparency. Excessive disclosure sometimes has been given credence by courts as an element that will deter investment in research and development and affect however slight the competitive edge. On the other hand they also have recognised that there are areas, such as those related to public health and consumer safety, where secrecy may not be employed to protect information. The other major consistency area relates to procurement contracts and public sector transactions. Public authorities enter into numerous agreements with private companies for matters such as infrastructure projects, the procurement of defence, mining projects, telecommunications and public services, among others. Commonly, businesses engaging in these types of transactions contend that bidding documents, technical specifications, pricing, and contractual negotiations are commercially confidential information that is shielded by Section 8(1)(d).

These case scenarios have been handled in different ways by information commissions and courts. Transparency is being supported by some decisions, which are based on the idea that expenditure of public funds is public and that there is a need for public contracts to be transparent. Other decisions have resulted in the protection of commercial information that may affect the competitive fairness or future bidding processes. This incongruity vividly leaves room for doubt for companies engaging with public entities and for the applicants of RTI to ask for accountability in public contracting.

Judicial reasoning has also been spurred by the potential of using RTI strategically by its competitors. Courts have on occasion found that the use of RTI can sometimes not be driven by the principle of accountability – but also by commercial competition. The Supreme Court in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi* noted that where disclosure of information causes a prejudice to recognized protected interests but does not

further any public purpose, an exemption under the law may be warranted.<sup>32</sup> The case had nothing to do with the protection of trade secrets as such, but underlined the court's concern over use of disclosure devices. Other disputes arise in connection with investigative journalism. Access to documents that reveal corruption, regulatory shortcomings, anti-competitive behavior, or waste of public money is often a key component of investigative journalism. In some instances, trade sensitive documents could disclose information that is material to public health. The tension between the requirements of democracy and legitimate business confidentiality is thus a serious challenge for courts.

India's uncertainties are due to the lack of any explicit legislation in the country around trade secrets. Where there are no special trade secret laws, Indian courts, instead of referring to specific statutory rules and definitions, generally apply general constitutional principles and reasoning of fairness. Therefore, the result of the court case is oftentimes decided through factual considerations and balancing rather than predictable legal standards.

However, this uncertainty is a dynamic one involving several participants. Companies are still unclear on how little or much commercially sensitive information will be protected when companies submit information to regulators. Determination of whether disclosure exemptions can be granted is a challenge for public authorities. Journalists and activists are subject to varying degrees of public interest protection. There is also no consistency in the doctrinal approach from the information commissions for balancing transparency and confidentiality.

A clear legislative framework is thus needed. Judges should apply a formula that takes into account nature of information, level of competitive harm, significant reliance upon public funding, impact on public welfare, evidence of corrupt or flawed regulatory practices, and the need for disclosure for democratic accountability. If there are no standards then judges will keep balancing it and the results will vary and be unpredictable.

### **Sectoral Analysis: Listed Companies, Public Sector Undertakings, Pharmaceutical Firms, and the Need for a Coherent Framework**

The clash between trade secret protection as a right and transparency requirements is very apparent in certain commercial activities that are coupled with public accountability.

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<sup>32</sup> Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi, (2012) 13 S.C.C. 61.

Companies, such as the listed companies, public sector undertakings (PSUs), and pharmaceutical companies, often have to deal with a regulatory body and also need to use commercially sensitive information to gain a competitive edge. In these areas, RTI cases will inevitably be accompanied by other public health, public finance, consumer protection and democratic oversight issues. Public sector undertakings exist in a peculiar place in this conflict as they are commercial enterprises in the public sector governed by the RTI Act.<sup>33</sup> They are often found in competitive markets that have to do with infrastructure, energy, telecommunications and manufacturing. They frequently involve sensitive price negotiation, procurement processes, technical requirements, and strategic commerce decisions. Their public ownership at the same time puts them under pressure for increased transparency concerning the use of public resources.

This tension has generated frequent disputes in disclosure of commercial information by PSUs. There have been cases of transparency involving disclosure of public expenditure, public tendering allocation, complaints of corruption, etc. that information commissions have preferred. However, PSUs often insist that not all technical and financial information be available, for fear that this could be against their competitive position and a negative effect on their commercial operations. Lack of uniformity in the courts has made the ambit of Section 8(1)(d) unclear.

In addition to concerns of disclosure, listed companies have disclosure issues because the information they provide regulators is available through public authorities as well. Indirect access to pricing constructions or compliance reports, or to strategic corporate information, seems to be attempted regularly by competitors and occasionally by investigative journalists, via RTI mechanisms. Generally, courts have understood that disclosure should not be compelled simply because information is held by a public authority, and by destroying that legitimate commercial privacy.<sup>34</sup>

Perhaps the example of conflict between the protection of trade secrets and disclosure for the public interest case can be seen best in the pharmaceutical industry. Pharmaceutical Companies devote significant resources to research, testing and approval. Pharmaceutical regulation affects public health and safety of the consumer which makes it a strong argument for

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<sup>33</sup> Right to Information Act, No. 22 of 2005, Sec. 2(h), India Code (2005).

<sup>34</sup> Institute of Chartered Accountants of India v. Shaunak H. Satya, (2011) 8 S.C.C. 781.

transparency, whilst at the same time, there is commercially valuable information that protects against other companies on clinical trial data, manufacturing methods, pricing mechanisms and formulations of medicines.

The issue of medical trials secrecy, adverse effects, prices, and medicine approvals has been further disputed by public interest organizations and journalists about how it compromises the accountabilities of public health. Issues are especially important when medicines come under a publicly financed scheme or when the medicines are associated with charges of regulatory negligence. Courts and regulators are thus faced with the challenge of finding a balance between innovation incentives and transparency of public health. Currently such a structure for the distinction between true public interest disclosure and disproportionate commercial harm does not exist in Indian law. Relying on “flexible” constitutional balancing, without consistent factors and evidentiary rules, has been accepted in general by courts.<sup>35</sup> Consequently, the duty to disclose issues over trade secrets are often de facto left to ad hoc and unpredictable judicial discretion.

Thus a clear and coherent legal regime is essential. Inconsistency is one of the main challenges in India, in the lack of a dedicated trade secret law. Commercial confidentiality should be protected when the public interest is not provided by disclosing the information; but where it would constitute genuine competitive harm. However, no act of secrecy should be allowed to cover corruption, improper use of public authority or office, misuse of public funds, or concerns directly to with public health and safety.

This could be done with a set of balancing test that incorporates the following variables:

1. the type and value of the information;
2. the level of competition that is likely to be infringed by disclosure;
3. hardship arising from disclosure;
4. the involvement of public funds or public procurement;
5. evidence of corruption or regulatory failure; or
6. and whether it's really vital for democratic accountability to disclose.

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<sup>35</sup> N.S. Gopalakrishnan & T.G. Agitha, Principles of Intellectual Property 364–66 (2d ed. 2014).

## Conclusion

Trade secret protection versus the Right to Information Act is an important area of conflict between commercial confidentiality and constitutional transparency of Indian law. Establishes transparency and promotes democracy based accountability and guarantees access to information held by public authorities versus trade secret protection; aims to keep or secure legitimate commercial interests and to achieve competitive fairness. The urgency of tension arises most acutely when journalists, activists or previously unknown competitors submit an RTI application for information which is considered by regulators, PSUs, or government linked parties to be confidential information.

So far there is no clear legislative framework for this conflict in Indian law. India has yet to have explicit legislation on trade secrets, notwithstanding its contractual commitments under Article 39 of TRIPS. The protection of confidential commercial information is thus largely contractual and grounded on principles of equity and scattered judicial wisdom. At the same time the general exemption contained in Section 8(1)(d) of the RTI Act is limited, and is ambiguity over the term "trade secret" or the terms "commercial confidence" and "public interest" even more ambiguous. As a result, it is not surprising that varying outcomes have been reached by judges. Some cases are focused on transparency and democracy accountability, others on the protection of proprietary commercial information. The courts have invariably found that confidentiality cannot be invoked at any level by using general statements of confidentiality only, and they have also held that the disclosure of information in an unlimited way may prejudice the substantial rights of others in relation to legitimate competitive interests.

The concern is particularly acute in sectors where processes such as public procurement, public sector enterprises and pharmaceuticals also directly engage with public welfare and regulation, such as commercial secrecy. Too much privacy can hide issues such as corruption, regulatory problems, unsafe products, and waste of public money. On the other hand, too much disclosure can undermine incentives for innovation and to foster competition in the free marketplace. So a consistent legislative structure is required. Indian law needs to evolve a "structured doctrinal framework" for disclosure obligations under the RTI regime, and impose a rational, systematic regime, rather than the typical "balancing" approach of jurisprudence. Where there is substantial competitive injury without recognizable public benefit, protection should be

continued of trade secrets. Where there are issues of corruption, misuse of public funds, public health or significant regulatory reporting, however, there should be public interest disclosure. In conclusion, the protection for trade secrets under Indian law is not just about whether it should receive protection, the answer should be when does public interest outweigh commercial interest of the trade secret holder?

