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Subject: Interpretation of Section 8 of Freedom of Information Ordinance, 2002 with respect to Non-Provision of Information

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Right of Access to Information under Freedom of Information Ordinance, 2002

1. The right of a citizen to have access to information kept and maintained by public bodies in all matters of public importance was conferred as a statutory right by the Freedom of Information Ordinance, 2002 (“**Ordinance**”). The preamble stipulates the purpose of the Ordinance as that of providing “for transparency and freedom of information to ensure that the citizens of Pakistan have improved access to public records and for the purpose to make the Federal Government more accountable to its citizens...”

Section 3(2) of the Ordinance, in delineating the interpretational requirements of the Ordinance, states that:

“This Ordinance shall be interpreted so as:

- (i) to advance the purposes of this Ordinance, and*
- (ii) to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.”*

2. Section 7 of the Ordinance states that “[s]ubject to the provisions of section 8, the following record of all public bodies are hereby declared to be the public record, namely:--

- (a) policies and guidelines;*
- (b) transactions involving acquisition and disposal of property and expenditure undertaken by a public body in the performance of its duties;*

- (c) *information regarding grant of licences, allotments and other benefits and privileges and contracts and agreements made by a public body;*
- (d) *final orders and decisions, including decisions relating to members of public; and*
- (e) *any other record which may be notified by the Federal Government as public record for the purposes of this Ordinance.”*

The purpose of this section of the Ordinance is clear: to ensure that as much information kept by a public body as possible is brought into the ambit of ‘public record’ so that such public body remains accountable to the citizens of Pakistan and that the latter have access to all information and data which is of public importance and/or has a bearing on the public’s interests or rights.

- (i) In considering the importance of making information related to the functioning of a government or public bodies public, the Supreme Court of India held in ***S.P. Gupta vs. President of India*** (AIR 1982 SC 149) that “[W]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.”
- (ii) The Sindh High Court held in ***Indus Battery Industries (Private) Limited vs. Federation of Pakistan and Others*** (2008 P T D 246) that “[i]t goes without saying that access to information is sine qua non of constitutional democracy. The public has a right to know everything that is done by the public functionaries. The responsibility of public functionaries to disclose their acts works both against corruption and oppression. Though this right has its limitations but every routine business of the public functionary cannot be covered with the veil of secrecy and privilege. ... This right to information, which emanates from the freedom of expression, is regulated by Freedom of Information Ordinance, 2002. The object of this Ordinance as evinced from its preamble, is to provide for transparency and freedom of information in order to ensure that citizens have access to public records and the Government is more accountable to its citizens. Under section 3 of the Freedom of Information Ordinance, 2002 the provisions of the said Ordinance are to be so interpreted so as to facilitate prompt disclosure of information at minimal cost. Furthermore section 3 also contains a non obstante clause which provides that notwithstanding anything contained in any other law, no person is to be denied information from any official record. The only limitations to this right are the immunities described in section 8 and section 15 of the said Ordinance.”

- (iii) The Supreme Court of Pakistan, while considering the responsibilities of state functionaries towards citizens of Pakistan, stated in ***Watan Party and Others vs. Federation of Pakistan and Others*** (*supra*) that “[t]he Constitution of 1973 has not been bestowed as a matter of grace on the People of Pakistan by a monarch or a foreign Parliament as, for instance, is the case with Canada, Australia and a number of other countries. Our Constitutional Order has been established by ‘the will of the people of Pakistan.’ All State functionaries have to understand that in a very real sense, they are employed in the service of the People of Pakistan and are paid for by them. The loyalty, therefore, of these State functionaries has to be to the Constitutional Order established by the People.”

Therefore it is obvious from the jurisprudence laid down by the superior courts of Pakistan and other jurisdictions that public functionaries are answerable and accountable to the citizens of Pakistan in the exercise of the functions bestowed on them.

3. The statutory right of access to information conferred by the Ordinance is supported, endorsed and bolstered by Article 19-A of the Constitution of Pakistan, 1973 (“**Constitution**”) which identifies the right of access to information as a fundamental right of the citizens of Pakistan. Fundamental rights have come to be recognized within all rule-of-law based systems as those inalienable rights of human beings that cannot and ought not to be denied. Subjecting such rights to broad restrictions or contriving legal tests of reasonableness in relation to fundamental rights that readily allow the state to infringe individual rights amounts to moving away from the global consensus of civilized people that fundamental rights are inalienable.

- (i) It is a cardinal rule of constitutional and statutory interpretation that any fundamental human rights or benefits conferred by the Constitution or a statute are to be interpreted liberally and the scope of such right or benefit is to be expanded by way of such interpretation and not contracted. The motive of the interpretation ought to be the protection and expansion of the right or benefit bestowed. As such, the courts have also consistently applied the rule of beneficial construction for such constitutional or statutory provisions and have given them a liberal construction in order to afford a maximum number of citizens the said right or benefit.

Section 7 of the Ordinance, which creates and confers a right on the citizens of Pakistan which is also endorsed and supported by the Constitution, is therefore to be interpreted liberally. The inclusion of Article 19-A of the Constitution has raised to a higher plane a right to information initially afforded to the citizens of Pakistan by a statutory instrument. The provisions of the Ordinance providing such right, now backed by Article 19-A, ought to be interpreted liberally to expand the scope of the fundamental right to access information.

- (ii) However, the right of a citizen to have access to information related to all matters of public importance is not an unconditional right. Article 19-A, while it creates a fundamental right to have access to information in all matters of public importance also subjects such right to “*regulation and reasonable restrictions imposed by law.*”

In other words, Article 19-A of the Constitution leaves room for the state to encumber the right of access to information or place fetters thereupon. However, in doing so the state has been subjected to procedural and substantive requirements which it must satisfy in order for such regulation and restriction to be justified.

- (iii) The Supreme Court of Pakistan, in the case of ***Watan Party and Others vs. Federation of Pakistan and Others*** (P L D 2012 S C 292), opined on Article 19-A of the Constitution and lent credence to the significance of the right of access to information in the following manner: “[b]y virtue of the said Article the right of a citizen to have information ‘in all matter of public importance’ is made a fundamental right which is guaranteed by the Constitution. Article 184(3) of the Constitution stipulates, inter alia, that this Court shall have jurisdiction to pass an order in a case ‘if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I of Part II [of the Constitution] is involved.’ Article 184(3) read in conjunction with Article 19-A has empowered the citizens of Pakistan by making access to information a justiciable right of the People rather than being a largess bestowed by the State at its whim. Article 19A has thus, enabled every citizen to become independent of power centers which, heretofore, have been in control of information on matters of public importance.”

The Supreme Court further explained that “[t]he very essence of a democratic dispensation is informed choice. It is through such choice that the political sovereign, the People of Pakistan acquire the ability to reward or punish their elected representatives or aspirants to elected office, when it is time for the People to exercise their choice. If information on matters of public importance is not made available to citizens, it is obvious they will not have the ability to evaluate available choices. Information on matters of public importance thus, is a fundamental bedrock of representative democracy and the accountability of chosen representatives of the people. It is in this context, both historical and conceptual, that the fundamental right to information has to be seen. Through Article 19A in the Constitution, the citizens of Pakistan have also been freed from the caprice of a sorry fate and have become independent of whistle-blowers in foreign lands or the magnanimity of the likes of WikiLeaks or biographies of political actors, to get to the information they are now entitled to as of right under the Constitution. This provides for and makes good a crucial missing element of responsible State governance in our Constitutional scheme.”

- (iv) The procedural requirement cited in Article 19-A is that any restriction imposed must be imposed through law. In other words, there is no arbitrary right or discretionary authority vested in the executive branch of the state to curb this freedom at will. It has been left to

the legislative branch of the state to regulate or restrict this freedom, if need be, through legislation, which can be deemed to have been exercised through the restrictive provisions in the Ordinance.

4. Section 8 of the Ordinance provides that “[n]othing contained in section 7 shall apply to the following record of all public bodies, namely:--

- (a) *nothing on the files;*
- (b) *minutes of meetings;*
- (c) *any intermediary opinion or recommendation;*
- (d) *record of the banking companies and financial institutions relating to the accounts of their customers;*
- (e) *record relating to defence forces, defence installations or connected therewith or ancillary to defence and national security;*
- (f) *record declared as classified by the Federal Government;*
- (g) *record relating to the personal privacy of any individual;*
- (h) *record of private documents furnished to a public body either on an express or implied condition that information contained in any such documents shall not be disclosed to a third person; and*
- (i) *any other record which the Federal Government may in public interest exclude from the purview of this Ordinance.”*

(i) It is pertinent to note that the spirit of the Ordinance – as laid down in section 3(1) of the Ordinance – is such that unless official record falls within any of the exemptions laid down in section 8 or section 15 of the Ordinance, “no requester shall be denied access to an official record.”

(ii) Furthermore, principles of statutory interpretation require that section 8 of the Ordinance, as it curtails and limits a right conferred through section 7 of the Ordinance and supported by Article 19-A of the Constitution, is to be interpreted strictly. The right of a citizen to have access to information related to all matters of public importance cannot be curtailed based on the exclusions contained in section 8 of the Ordinance.

- (ii) The exclusions contained in section 8 of the Ordinance ought not be given effect in an arbitrary manner to defeat the purposes of the Ordinance and Article 19-A. There have been instances in which the Courts have interpreted the exclusions narrowly so as to permit disclosure of information retained by a public body or state functionary which has an adverse effect on the personal rights of an individual, regardless of the fact that such information fell within one of the exclusions provided in section 8 of the Ordinance.

The Lahore High Court held in ***Humaira Hassan vs. Federation of Pakistan And Others*** (2012 P L C(C.S.) 566) that “[e]ven otherwise, right to due process under Article 4 read with the newly added fundamental rights to fair trial and access to information under Articles 10-A and 19-A of the Constitution, respectively, do not permit that an order affecting the prospects of promotion of a civil servant is withheld from him. Additionally, under Freedom of Information Ordinance, 2002 (“Ordinance”), final orders or decisions of a public body form part of public records which should be made available to the public especially the officers against whom the said orders are passed. The fact that such adverse order or decision against any officer is recorded in the minutes of meetings of any public body does not exclude it from being a public record in terms of section 8(b) of the Ordinance. Any adverse order or decision against an officer or any member of the public retains its independent status as public record under section 7 of the Ordinance and it matters less if the same has been incorporated or recorded as a part of any minutes of a meeting.”

5. The scheme that section 8 of the Ordinance envisages is that when certain information is created or generated, the Federal Government must declare it as classified in order for it to fall within the exclusions provided under the section. Article 99(3) of the Constitution provides that the business of the Federal Government shall be allocated and transacted in accordance with the Rules of Business, 1973 (“**Rules of Business**”). The Rules of Business, besides providing a procedural manual for the Federal Government, also act as constraints on the exercise of governmental power. Rule 2(iii) of the Rules of Business defines “Business” to mean all work done by the Federal Government, while Rule 2(vi) defines “Division” to mean a self-contained administrative unit responsible for the conduct of business of the Federal Government in a distinct and specified sphere. Rule 3(3) provides that business of the Federal Government shall be distributed amongst Divisions in the manner indicated in Schedule II.

The concerned Division of the Federal Government, as authorized under Schedule II to the Rules of Business, for dealing with matters related to “[S]ecurity and proper custody of official documents and Security Instructions for protection of classified matter in Civil Departments” is the Cabinet Division¹. In order for there to be a valid declaration as to the classification of certain information, such declaration must originate from the Cabinet Division. In view of the Rules of

¹ Item No. 2 (#19), Schedule II to the Rules of Business, 1973

Business, the Ministry of Information Technology and Telecommunications does not appear to be vested with the authority to declare that certain information is not accessible or retrievable as a matter of public record under the Ordinance for reason of it being “classified” or falling within the “national security” exception.

6. Furthermore, it is imperative that not only should the competent authority issue a declaration to the effect that certain information is classified but that in doing so, such competent authority abide by the standard principles regulating the exercise of public authority. Section 24-A of the General Clauses Act, 1897 unambiguously requires the observance of reasonableness, fairness and justice by public functionaries in exercising the authority granted to them in the following manner:

“(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially.”

Therefore in declaring any information as “classified” for purposes of the Ordinance, it is imperative that the competent authority declaring information as such exercise the authority granted to it reasonably, fairly and justly and must give reasons and justifications for its declaration so that there is no arbitrary or whimsical denial of access to information which is a fundamental right of the citizens of Pakistan.

- (i) It was unequivocally stated by the Supreme Court in ***Pakistan Muslim League vs. Federation of Pakistan*** (PLD 2007 SC 642) that in order to be legitimate, executive action must be backed by law and ought not to violate fundamental rights in the following terms:

“Any invasion upon the rights of citizens by anybody no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country. Therefore, executive action would necessarily have to be such that it could not possibly violate a Fundamental Right. The only power of the Executive to take action would have to be derived from law and the law itself would not be able to confer upon the executive any power to deal with a citizen or other persons in Pakistan in contravention of a Fundamental Right...No infringement or curtailment in any Fundamental Right can be made unless it is in the public interest and in accordance with valid law. No doubt that reasonable

restriction can be imposed but it does not mean arbitrary exercise of power or unfettered or unbridled powers which surely would be outside the scope of 'reasonable restriction' and it must be in the public interest."

7. Superior courts of Pakistan have considered situations in which it would be justified to withhold public information or information related to matters of public importance, particularly where statutory exemptions do not provide a cover for such situations. It is settled law that only in very limited circumstances, i.e. where disclosure will cause greater harm than good, such non-disclosure could be justifiable. Even while citing such a ground as a reason for non-disclosure of information, a state functionary or public body can only withhold such information on grounds permitted under the law itself.
 - (i) The Sindh High Court held in ***Indus Battery Industries (Private) Limited vs. Federation of Pakistan And Others*** (*supra*) that “[o]nly where disclosures would cause greater harm than good that the disclosures are to be disallowed. Therefore, as a rule information should be disclosed and only as an exception privilege should be claimed on justifiable grounds permissible under the law.”
 - (ii) Further, the Supreme Court of India held in ***S.P. Gupta vs. President of India*** (*supra*) that “... when there is an objection to disclosure, the Court must consider whether the document related to the affairs of state, and whether its disclosure would be injurious to the public interest. The injury that should be avoided is a potential disruption of the proper functioning of the government as a result of disclosure.”
8. Borrowing wisdom from other jurisdictions, it is also clear that in citing “greater harm than good” as a reason for non-disclosure, a public body is under a strict obligation to provide justifications and cogent reasoning as to why it feels the disclosure of information will cause greater harm than good.
 - (i) In ***Center for International Environmental Law vs. Office of the United States Trade Representative et al.*** (Civil Action No. 01-498) before the U.S. District Court for the District of Columbia, “[j]udge Roberts observed that the agency withholding information bore a burden to justify its actions. Under FOIA Exemption 1 it had to, *inter alia*, explain how disclosure of the material ‘would cause the requisite degree of harm to the national security.’ While doing so, it had to avoid ‘categorical and conclusory statements.’ As to the claim of a breach of the confidentiality agreement, Roberts J. held that mere existence of a confidentiality agreement does not by itself constitute harm to foreign relations. He noted that this argument is less compelling also because the United States would be revealing its own position, as opposed to one received ‘in confidence from a foreign government.’ In any case, the USTR’s view that the breach would adversely affect foreign relations, should pass the ‘test of reasonableness, good faith, specificity and plausibility.’

9. In providing guidance to courts considering questions of immunity from disclosing information related to matters of public importance, the Sindh High Court held in ***Indus Battery Industries (Private) Limited vs. Federation of Pakistan And Others*** (*supra*) that “[w]hen an immunity is claimed from making disclosures, the Courts have to tilt towards permitting disclosures in order to balance the public right to know against the interest of an individual unless of course the disclosures are likely to expose personal privacy of an individual. No doubt where there are two competing interests involved, the Court would perform balancing act by weighing both the interests and decide where the balance tilts.”

Furthermore, the Supreme Court of India held in ***S.P. Gupta vs. President of India*** (*supra*) that “[t]he Court identified a presumption of disclosure: ‘[D]isclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.’”

Conclusion

In view of all of the above, it is clear that in order for certain public record to fall within the exclusions stipulated in section 8 of the Ordinance and thus be exempt from access, it must be declared as “classified” by the competent authority under the Ordinance read together with the Rules of Business. Even while exercising the rightful authority granted to it under the law, the competent authority shall have to provide valid and cogent justifications for its decision to declare certain information as “classified” and in effect curtail what is a fundamental right of the citizens of Pakistan. In view of the Rules of Business, any division or department of the Federal Government other than the Cabinet Division, or for limited purposes the Interior Division and the Defence Division, would seem to be acting outside of its powers and authority in declaring information as classified and thus inaccessible. And such order or exercise of executive discretion leading to the denial of access to information would arguably be ultra vires of the law.