

Geographical data – do we have a fundamental right to access it?

Rahul Matthan

Matthan Law Offices, 22/1 Langford Gardens, Bangalore 560 025, India

Access to geographical data has historically been subject to restrictions. In some cases, as a result of these restrictions, Indian scientists have been denied information that was otherwise available to their counterparts in other countries. The Constitution of India does not specifically guarantee the citizens of this country the right to information. However, through judicial decisions, this right has been recognized as implicit in the fundamental right to freedom of speech and expression. Though the courts have not yet been called upon to decide upon issues relating to the fundamental right to information in respect of geographical data, there is no reason why, based on previous rulings of the court, the right to such information will not be upheld and protected.

THE need for free and unfettered access to geographical data is apparent even to those unschooled in the scientific application of such data. Unfortunately, it is just as clear that in India, there are considerable restrictions on the access and use of such information. The manner in which maps may be created, the degree of magnification that may be permitted and a host of other issues relating to the utilization of geographical data in the context of their pictographical representation on a map are constantly thrown up by the scientific community whenever it is thwarted in its attempt to publish the fruits of its scientific labour.

Why this secrecy? Who has the authority to impose such restrictions? Is their discretion not subject to scrutiny and are they not answerable for their actions? And where do they derive their authority to take such action?

These are questions that any citizen of a democratic society is entitled, and even expected, to ask. Our national polity is based on the democratic principle of government by the people, for the people and of the people. Consequently, should not the lay citizen be entitled as of right to question actions taken by the government, particularly when such actions are so shrouded in mystery that the governed are kept in the dark about the motives of the government?

In order to determine the rights available to a citizen with regard to access to geographical information, it

would be necessary to first determine wherefrom such rights are derived. For this one would need to examine the sources of law.

The sources of law

Any evolved, civilized society functions on the basis of certain fundamental laws. These laws may, in time, be expanded upon and given more focus depending on the specific situations that the evolving face of society requires addressed. However, in the creation of these new and more issue-specific rules, care must be taken to ensure that they adhere to the broad guidelines laid down in the fundamental law as any derogation from the principles set out in the fundamental law would be antithetical to the premise on which that society was created.

This is the philosophy behind almost all the existing systems of government in the world today. India is no exception. Upon gaining independence, India enacted a Constitution which enunciated in clear, unambiguous terms, the fundamental law based upon which the country was to be governed. The Constitution is therefore the fundamental source of law for this country.

The Constitution of India does, however, acknowledge that various laws may be passed which are subordinate to the fundamental law. Similarly, it acknowledges the existence of various statutes that were enacted during India's colonial past and allows such enactments to continue in force. In addition, there are various rules and administrative guidelines that may be issued by administrative authorities from time to time with regard to various specific aspects. These rules and guidelines are also given the sanction of law. Finally the decisions of the courts of the land, in interpreting the laws as laid down in the statute books, as well as in ruling on the validity of administrative actions, is treated as law in that the decision of a court would be binding in the same manner as a piece of legislation passed by Parliament.

All these different laws – the Constitution, the statutes, the administrative rules and judicial decisions – together constitute the various sources of law in this country and together constitute the legal framework according to which the country is governed.

e-mail: rmatthan@matthan.com

Precedence

Since there are several sources of law, it becomes important that we determine which source takes precedence over the others. Since the Constitution of India has been explicitly stated to be the fundamental law of the country, it clearly has primacy over other sources of law. Thus all laws, be they new in character or derived in antiquity, must necessarily measure up to constitutionally established parameters. No law, whether enacted post or pre-independence may survive if the provisions of such law are inconsistent with the stipulations of the Constitution of India. In the event any law is found to be in violation of any of the provisions of this basic document, such law is liable to be struck down as being *ultra vires* the provisions of the Constitution.

Similarly, any action taken by a government official which is contrary to the provisions of the Constitution could be struck down on constitutional grounds. This is regardless of the alleged authority under which the action was taken. In other words, any governmental functionary who takes any action based on the authority that may have been granted to such functionary under any law must, regardless of the provisions of that law, take such action in a manner that is in accordance with the constitutionally established principles in that regard.

The right to information under the Constitution of India

A brief examination of the provisions of the Constitution reveals the absence of an express provision guaranteeing the citizen's right to information. Several other rights have been granted to the citizens, such as the right of freedom of speech and expression, the right to form associations and unions, the right to move freely throughout the territory of India and the right to practice any profession or carry out any occupation. However, either by intent or oversight, no explicit mention has been made of a fundamental right to information.

Nevertheless, even though the express provisions of the Constitution do not make mention of the right to freedom of information, the courts of the land have, through a series of judicial decisions interpreted the provisions of the Constitution to bring into existence, this right. The courts have through a judicial interpretation of the fundamental right to freedom of speech and expression, held that the right to information is implicit in that right. Let us therefore examine, in a little more detail, the fundamental right to freedom of speech and expression.

Article 19(1) of the Constitution of India

The fundamental right to freedom of speech and expression is contained in Article 19(1)(a) of the Constitution of India and states as follows:

'Article 19. Protection of certain rights regarding freedom of speech, etc.

- (1) All citizens shall have the right
- (a) to freedom of speech and expression;'

This article is, however, not absolute. The fundamental right guaranteed under Article 19(1)(a) is restricted to the extent stated in Article 19(2) which states as follows:

- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Thus, while all citizens have a fundamental right to freedom of speech and expression, this fundamental right may be curtailed by the operation of any new or existing law that has been enacted in the interests of the sovereignty and integrity of the country, its security, friendly relations with foreign states, public order, decency or morality, or with regard to contempt of court, defamation or incitement. Thus it would not be possible for a citizen to allege that his fundamental right to freedom of speech and expression has been curtailed, so long as it can be shown that any such restriction has been imposed on any of the grounds set out in Article 19(2) of the Constitution.

The Supreme Court has interpreted the provisions of Article 19(1)(a) to include within its ambit the right to information. This it has done through a series of decisions that have affirmed and enunciated this right.

Supreme Court and the Right to Information

The first noteworthy case in which this interpretation was pronounced was the case of *State of UP vs Raj Narain* ((1975) 4 SCC 428), where the court acknowledged that the right to freedom of information was implicit in the right to freedom of speech and expression and stated that the 'people of the country have the right to know every public act, everything that is done in a public way, by their public functionaries'.

In another case the Supreme Court held that '[t]he concept of open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore disclosure 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' (S. P. Gupta vs Union of India 1981 (Supplement) SCC 87).

These cases and the whole series of other cases that followed the same or similar line of reasoning, establish clearly that the concept of freedom of information is implicit in the Constitution of India even though the same may not have been expressly stated in the text of the Constitution. By virtue of this judicial interpretation of the fundamental rights, the right to information is therefore, just as constitutionally enforceable as any of the other rights that are included in the Constitution. It would be safe to state that, even though the Constitution does not expressly include the right to information under its list of fundamental rights, every citizen does have a fundamental right to information which he or she can enforce through judicial process.

However a word of caution is necessary at this stage of the discussion. To the best of the knowledge of this writer, all the cases that have dealt with the fundamental right to information have been cases that, in some way or the other, involved obtaining information from the government as to the manner in which the government is functioning. The court in all these cases, has therefore passed orders with a view to ensuring that the government operates with maximum transparency so that the common man is able to determine whether his elected government is in fact carrying out the mandate given to it or not. It is in this context that the concept of a right to information has evolved.

The right to information in respect of geographical data is a completely different matter. This is not information that relates to governmental activities nor would such information throw any light on the manner in which government functionaries have conducted themselves. Geographical data is information that is being controlled by the government on the ground that the unrestricted dissemination of this information would pose a security risk to the nation. The Supreme Court has not so far addressed the issue of the fundamental right to information from this perspective.

However, having said this, there appears to be no reason why the Supreme Court would differ in its approach to the two forms of information. Having affirmed the existence of a fundamental right to freedom of information, it is hardly likely that the Supreme Court will apply different standards when the information sought is scientific information. If anything the Supreme Court would look more favourably towards protecting the

fundamental rights of scientists who seek information. It would thus be safe to state that the right to information which has been established through case law would apply to allow scientists a right to access information such as geographical information, provided that such access is not denied on grounds set out in the Constitution.

The practical situation with regard to access to geographical data

From the forgoing discussions it seems clear that citizens do have a fundamental right to information. Consequently, if this right is denied to the citizens, they would have the constitutional right to challenge any action that is calculated to deny them such information. However, despite the fact that the law grants to citizens a fundamental right to information, there is little doubt that information is not as free as scientists or other common citizens would like it to be. Geographical data is just one form of information to which access is not freely granted. However, given the constitutionally imposed restriction on the freedom granted under Article 19(1)(a), it is important that we examine the grounds based upon which such information is denied.

With particular reference to geographical data, there are vast amounts of information to which the general public is denied access. Maps of numerous areas are restricted beyond a particular scale and where such maps are submitted to the Surveyor General of India for approval, more often than not, these maps are returned with instructions to remove contour details and other essential information such as the latitude and longitude of the section covered by map. With the increasing sophistication of map-making technologies and remote sensing satellite imagery, these restrictions are becoming more and more redundant. In many cases, information, which the ordinary citizens of India are not allowed to access, is freely available in other countries of the world.

If one probes deeper to determine why access to this information is being denied, the inevitable answer is that such restriction on access to information is in the interests of the defense of the country. As it stands, this is a legitimate restriction on the disclosure of information and one that has constitutional support. The provisions of Article 19(2) of the Constitution of India clearly state that the right to freedom of speech and expression must be subject to reasonable restrictions on a variety of grounds, one among which is the interests of the sovereignty and integrity of India as well as the security of the State. The government or any department of the government could, on the basis of this provision, validly deny any citizen the right to access this information if it is deemed that the disclosure of such informa-

tion may compromise the security and integrity of the State.

No citizen has the power to question why or on what grounds any information that he/she has sought was denied. Typically, where access to information is denied on the grounds of security of the country, even a writ petition to the courts would be of little use as, in denying the information, the government has not acted in any manner that is contrary to the Constitution, but rather has operated within the constitutionally established parameters in this regard. One would, therefore, have to be satisfied with the decision of any government official who claims that the information sought is being denied in the interests of the security of the State.

However, the courts do have the power, for the limited purpose of determining whether or not the executive has exercised its discretion appropriately, to examine the nature of the information withheld as well as the grounds for so withholding the information. Therefore, where the information denied has been so denied on clearly capricious grounds and where there is no perceivable threat to the security of the nation, a writ petition challenging the denial of such information would be admitted and in all probability, the Courts would uphold the citizen's right to such information.

Statutes restricting public access to data

As has already been established, the Constitution is the primary document from which all other laws derive their legal sanction. As a document, it sets out the general legal parameters within which the country's legal system must function. However, there are various statutes that discuss in more detail, specific areas of governance and regulation. Several such statutes impose restrictions on the free access to information. It may be useful to examine some of these statutes to understand the extent to which freedom of information is provided under the legal system of this country.

The most maligned statute in this context is the Official Secrets Act, 1923 a law under which government functionaries frequently take refuge to justify their decision to deny information. Though this Act is made out to be a statute under which all information that may be classified as an official secret can be denied, an examination of its provisions indicates a completely different interpretation. A simple reading of the statute indicates that the provisions of this Act deal largely with issues such as espionage, entry into prohibited places, use or control of secret official codes or other acts that result in the communication of information to enemy agents or enemy States. The term 'official secret' has not been defined under the statute and the items of information that are sought to be protected appear to relate to information such as codes and other types of secrets that

would only be interesting for spies or secret agents. This is hardly the omniscient statute it is made out to be.

However, a closer look at the provisions of the statute indicates that this conclusion may be deceptive. Thanks to the over-broad manner in which the provisions of this Act have been drafted, the provisions are capable of being interpreted in the widest possible manner. The statute could therefore be used to deny access to virtually any type of information if the government official relying on its provisions chooses to adopt a broad interpretation.

Similar powers to impose restrictions on the freedom of information are found in the Indian Telegraph Act, 1885 which states that the government has the power to restrict and intercept information transmitted through telegraph lines. It is pertinent to note that it is this statute which governs the utilization of the internet. Given the volume of data that flows through the internet, the potential for abuse of an individual's right to information is considerable.

However, the one enactment whose provisions truly merit discussion is the Atomic Energy Act, 1962. This statute imposes restrictions on the utilization and dissemination of information relating to atomic energy or atomic power plants. These are restrictions that may easily be justified on the grounds of national security. However, what is interesting in the context of our present discussion is the exclusion that is set out in Section 18(3)(ii). While the rest of the provisions of Section 18 pertain to restrictions imposed on the disclosure of information, Section 18(3) lists the exceptions to this general rule. Section 18(3)(ii) is particularly relevant in the context of our discussion:

- (3) Nothing in this section shall apply –
- (ii) where any information has been made available to the general public otherwise than in contravention of this section, to any subsequent disclosure of that information.

Thus, through this provision, the Act has clearly excluded from the purview of the restrictions set out in the rest of the enactment, those items of information which are already available to the general public otherwise than as a result of a contravention of the provisions of the Act. In doing so the legislature has made a statutory affirmation of the principle that finds its way into most contracts – the exclusion of public domain information from the restrictions on confidentiality.

This is a rational approach to the whole issue of imposing restraints on the freedom of information. Restrict, by all means, access to information that poses a threat to national security or to the sovereignty and integrity of the country, but where the information is already public knowledge, restriction of access to such

information cannot be justified. The inclusion of provisions such as Section 18(3)(ii) of the Atomic Energy Act, 1962, in all statutes that impose restrictions on the freedom of information, is necessary in order to effectively enforce these restrictions.

As has been discussed earlier, maps that are restricted in India are sometimes easily available in other countries. This is a clear example of the type of mismatch that exists between regulations sought to be imposed by the government and the practical reality of free availability of information. It is obvious that little can be achieved by way of protecting the integrity and sovereignty of the State when the items whose restriction is supposed to achieve this end, is easily available to all who choose to purchase it.

This mismatch can be avoided by amending the law relating to the dissemination of geographical information to state that information which is available in the public domain would be excluded from the purview of the restrictions. This would at least serve to put Indian citizens on par with persons from other parts of the globe who are, as a result of these myopic restrictions, in a better position *vis-à-vis* Indian geographical data than Indian citizens.

What are your rights

So is there in fact a right to information? Does the common citizen have the right to demand information from the government or from functionaries of the government who have the power to withhold such information?

The foregoing discussion seems to indicate that every citizen does have a fundamental and inalienable right to information. No governmental agency or body can deny a citizen access to information without reason. However, the government may withhold access to some information on the grounds that it is prejudicial to the interests of the security of the state or the sovereignty of the nation. It is, therefore, possible that citizens seeking security sensitive information from the government may find themselves denied all such information on the grounds that the disclosure of such information presents a risk to national security. Where this is the case, the citizen has no recourse at all.

However, where there is no risk to national security or where the information sought does not fall within the constitutionally stipulated exceptions set out in Article 19(2), the government may not withhold information from the citizens. Any action that results in the withholding of such information would, if challenged in the court, be liable to be struck down as being a violation of the citizen's fundamental right to information. If there are government officials today, who are flouting the individual's right to information, by denying citizens their fundamental rights, the only reason why such officials can continue to do so is due to a lack of awareness about the individual's right to information. These actions taken by government officials need to be challenged in a court of law and once a precedent is set, the right of an individual to access scientific information of all types, will become much more clearly evident.