

केंद्रीय सूचना आयोग
CENTRAL INFORMATION COMMISSION
बाबा गंगनाथ मार्ग
Baba Gangnath Marg
मुनिरका, नई दिल्ली - 110067
Munirka, New Delhi-110067

File no.: CIC/DBTEC/A/2021/648583

In the matter of
Prashant Reddy

... Appellant

VS

CPIO

Biotechnology Industry Research Assistance Council (BIRAC),
1st Floor, MTNL Building, 9 CGO Complex,
Lodhi Road, New Delhi - 110003

... Respondent

RTI application filed on	:	09/05/2021
CPIO replied on	:	06/06/2021
First appeal filed on	:	22/06/2021
First Appellate Authority order	:	07/09/2021
Second appeal filed on	:	15/10/2021
Date of Hearing	:	19/09/2022
Date of Decision	:	28/09/2022

The following were present:

Appellant: Advocate N. Sai Vinod, Representative, present in CIC

Respondent: Kavita Anandani, DGM (CS) and CPIO, present in CIC alongwith Akansha Garg, LC (Scientific Division)

Parag Kinge, Attorney for Genova, Third party; Sugosh S Neergund, Representative, Bharat Biotech, Third party, present in CIC

Information Sought:

The Appellant has sought the following information:

1. Provide the amount of funding given by BIRAC to Genova Pharmaceuticals and Bharat Biotech for the development of COVID-19 vaccines.

2. Provide copies of the funding agreements entered into by BIRAC with Gennova Pharmaceuticals and Bharat Biotech for the development of vaccines.

Grounds for Second Appeal

The CPIO did not provide the desired information.

Submissions made by Appellant and Respondent during Hearing:

The appellant's representative submitted that the reply of BIRAC is contrary to the full bench decision of the Commission in Navroj Mody vs. Mumbai Port Trust and others, (CIC/AT/A/2009/000964) dated 03.09.2009. The Full Bench was constituted to decide "*whether public-private partnership agreements can be disclosed to third parties under the RTI Act?*" Answering the question in the affirmative, this Commission ruled that:

"20. The appellant has forcefully brought out that a PPP Agreement involving the nation's physical resources and its infrastructure, which had critical environmental, social and human aspects, apart from its technical and financial aspects, could not be a matter between the bureaucracy of the government and the private party alone. The people of the country are entitled to know the truth about the PPP Agreements, in general as well as in their specific details. The logic that the private party could not be forced to share with others the technical and financial details it handed over to the Government is not a persuasive argument. Such private parties frequently win the right to participate in the PPP Agreement in open competition, or are selected for their exclusive and extra-ordinary competence in specified areas of activity. In either case, it is necessary that there is complete transparency about whether the selection of the Private Partner by the Government was made correctly and carefully and, that all aspects of the issue – environmental, social and human included – were seriously considered by the Government in making the choice. A matter of such critical importance to the country cannot be negotiated and settled behind the back of its people. The third-party cannot take recourse to the argument of its vital commercial and technical details being disclosed to its rivals for the simple reason that it is the consideration of these very details that won him the competitive bidding in the first place. It is important and crucial that the

choice of the Private Partner by the Government is not cloaked in undue secrecy.

23. In overall consideration, it is our view that the present information cannot be said to be barred by [Section 8\(1\)\(d\)](#) of the RTI Act because regardless of the status of this information, there is unmistakable public interest, which warrants and merits its disclosure. We, therefore, hold that [Section 8\(1\)\(d\)](#) does not bar disclosure in the present case.

*24. We are also not persuaded by the respondents' plea that disclosure of PPP Agreement would discourage private parties from entering into such agreements with the Government in future. This proposition is not borne out by any evidence produced before us and seems to be more a surmise than fact. It flies in the face of the categorical assertion of both the Planning Commission and the C&AG that there was nothing inappropriate about disclosure of PPP Agreements and that there was a distinct public interest to be served by making these Agreements public.”
(emphasis added)*

He further submitted that the Commission's reasoning in Navroj Mody (supra) applies mutatis mutandis for requests seeking disclosure of funding agreements entered by BIRAC. First and foremost, the funding agreements executed by BIRAC and the third parties is in the nature of a PPP. In fact, the third parties were required to execute “Mission COVID Suraksha Partnering Agreement” with BIRAC as a precondition for selection. Secondly, Genova and Bharat Biotech voluntarily participated and were selected based on a competitive process announced by the DBT in December 2020- under the title “request for expression of interest (REOI): Development of COVID-19 vaccine candidate(s) (REOI).” And thirdly both of them received public funds to the tune of Rs 30 Crores and Rs 2.706 Crores, respectively- out of the total budget of 900 Crores allocated by the Government of India for Phase-I of the Mission. For these reasons, the confidentiality interests of third parties-if any-should come in the way of larger public imperatives in enabling transparency.

In any event, the public authority has failed to make out a case for exemption u/s 8(1)(d). In particular, BIRAC failed to show that” (a) disclosure would constitute a breach of duty of confidence owed by BIRAC to the third parties; and (b) disclosure would hurt the competitive position of the third parties; and

(c) alleged harms suffered by third parties outweighs the larger public health imperatives in enabling transparency.

He further submitted that BIRAC failed to establish that the disclosure of funding agreements would constitute a breach of duty of confidence. The test of funding agreements- that were mutually agreed by the parties- does not belong to either of the party and to the exclusion of the other. No one party to the agreement (i.e, BIRAC or third parties) is prohibited from sharing the contractual terms, unless there is a positive legal obligation against such disclosure. Here, no such legal duty can be inferred from GOI's Mission statement or under the REOI announced by DBT. Likewise, the FAA failed to point out any clause within the funding agreements that mandates confidentiality.

He also submitted that BIRAC failed to show a clear cause and effect relationship between the disclosure of funding agreements and alleged prejudice to third parties. The claim that disclosure would negatively affect the "*competitiveness and financial position*" of third parties is merely a bald assertion, and lacks proof. On the contrary, the claim itself is questionable because, (a) the disclosure is being sought post facto- i.e, at the conclusion of a competitiveness process outlined under REOI and after disbursing public funds; (b) the quantum of funds given to third parties is publicly known (and disclosed under the RTI Act); and (c) more than one year had lapsed which mitigates the likelihood of competitive harms, if any.

In any event, the claims of economic prejudice appear pale and insignificant in comparison to break neck speed of vaccine development. BIRAC's partnership under suraksha mission is not limited to providing funds, but also to assist the chosen third parties to develop COVID-19 vaccines in one or two years- as against prevailing norm of "10-15 years" for developing vaccines.

He also stated that public health imperatives in enabling transparency outweighs the alleged prejudice to interests of third parties. The suraksha Mission is unlike routine public grants, given its mandate to enable affordable and equitable access to COVID 19 vaccines for India and rest of the world. In fact, the REOI stipulated that "For the products being funded, the Global Access obligations to ensure that the products being developed are affordable and accessible, for the target population is a must." Given the stated public

health goals- public scrutiny over the performance of third parties and accountability for utilising of public funds is a necessary imperative.

He further relied upon the judgment of the Delhi High Court in the matter of *Jamia Milia Islamia vs Sh Ikramuddin*, W.P(C). No. 5677 of 2011, in which it was held as under:

“The act of entering into an agreement with any other person/entity by a public authority would be a public activity, and as it would involve giving or taking of consideration, which would entail involvement of public funds, the agreement would also involve public interest. Every citizen is entitled to know on what terms the agreement/settlement has been reached by the petitioner public authority with any other entity or individual. The petitioner cannot be permitted to keep the said information under wraps.”

Likewise, the Bombay High Court in *Shonk Technology vs State Information Commission*, W.P No. 2912 of 2011, held that:

“Further, the conclusion is that the disclosure of information would enable public scrutiny of the process and contracts and therefore, it is desirable in larger public interest that the information is provided.”

The CPIO vide written submissions dated 19.09.2022 submitted that the RTI application was received by BIRAC online on 09.05.2021. The applicant had sought information on 2 queries pertaining to funding granted by BIRAC to BBIL and Gennova Bipharmaceuticals Limited (hereinafter referred to as “Fund Recipients”) and the agreements executed between BIRAC and the Companies for development of COVID 19 vaccines. The CPIO sought information from different departments and provided a response to the first query. However, considering the commercial confidence involved, trade secrets and intellectual property the information sought being exempted u/s 8(1)(d) of the RTI Act, the request for information on the second query was denied by the CPIO on 06.06.2021.

The applicant was not satisfied with the reply of the PIO and forwarded an appeal to the Appellate Authority. In the appeal the appellant had posted again the same two questions as sought in the initial application dated 09.05.2021. The same was again considered and replied to by the FAA by way of an interim order.

The interim order stated that a third party notice shall be provided complying with the mandates of Sec 11 of the RTI Act. Following the interim order BIRAC promptly serviced third party notices to the Fund Recipients dated 9th August 2021.

A response from BBIL and Genova Biopharmaceuticals Ltd. was received on 23.08.2021 and 17.08. 2021. Post examination of the replies to the notice received from the Fund recipients, the FAA opined that, with respect to the second query the agreements contain information that are confidential and intellectual, the disclosure of which will prejudice the competitiveness, financial position in the market and scientific interest. The response also stated that disclosure of such information of fund recipients shall lead to its mis-use which would be hazardous to public at large. Further, it was opined that the applicant failed to demonstrate any public interest that would be served on disclosure of the agreement.

The appellant was not satisfied with the FAA's order and approached the Commission through a second appeal on 13.10.2021. The said matter was communicated to BIRAC through email received on 15.10.2021. Taking note of second appeal filed by the appellant, BIRAC issued a letter to the Fund recipients dated 07.02.2022 seeking submissions on the second appeal filed in CIC. Detailed written submissions dated 16.02.2022 were provided by BBIL and Genova Biopharmaceuticals Ltd. The written submissions by the third parties refuted and rebutted the contentions made by the appellant and sought protection of their data through non-disclosure of the agreements executed with BIRAC.

The contentions of the applicant in the second appeal have been duly discussed with the scientific and technical departments at BIRAC. She further submitted that the query posed by the applicant are bound by confidentiality clause between BIRAC and the fund recipients (BBIL and Genova Biopharmaceuticals Ltd.) which is also classified as commercial data, trade secrets and proprietary information and if disseminated shall be misused causing hazardous damage to public at large and lead to heavy scientific prejudice. Given that BIRAC aims at supporting the developmental phases of vaccines under biotech sector in India, the activities and information it received from the third parties involves genetic sciences, virology, molecular biology, biotechnology and technologies that are highly specialised in scientific domain and hence, are of great significance. Such information being

intellectual property of third parties binds BIRAC with a confidentiality clause. Such confidential information becomes a reason of benefitting diverse human diseases ensuring public interest of public at large specially during the COVID pandemic. BIRAC is not only bound by confidentiality but also is in a fiduciary capacity bound to protect the information shared by the third parties specified in these agreements.

Observations:

Based on a perusal of the record, it was noted that the CPIO vide letter dated 06.06.2021 replied to the appellant and stated in respect of point no. 1 that the amount disbursed for research and development involving pre-clinical and clinical studies to Bharat Biotech International Ltd. is Rs. 2.706 Crore and to Genova Biopharmaceuticals Ltd is Rs. 30 Crore. The fund has been given only for the development of different vaccine candidates.

In respect of point no. 2, the CPIO replied that the information sought is not specific and is exempted from disclosure under Section 8 (1) (d) of RTI Act, 2005. However, it was observed by the Commission that specifically the funding agreement copies were sought.

The appellant was not satisfied with the reply on point no. 2 and hence filed a first appeal. The FAA vide his order dated 07.09.2021 held that the CPIO was asked to complete the third party notice to the parties. The reply to the notices were received from both the third parties and after examining the objections, he cited the following grounds:

- a. Agreements contain information that is confidential and intellectual property of Genova Pharmaceuticals and Bharat Biotech. The data cannot be disseminated as the disclosure of such information will prejudice the competitiveness and financial position of Genova Pharmaceuticals and Bharat Biotech.
- b. Disclosure of any such information may prejudicially affect the scientific interests of Genova Pharmaceuticals and Bharat Biotech. Misuse of such information would be hazardous to public at large, information if disclosed is used incorrectly.
- c. Further, the applicant has not demonstrated any public interest which would be served on the disclosure of copies of agreement.

- d. The facts and circumstances of the cases cited by the applicant are different. In the case cited by the applicant, the project is related to infra development and had no competitive link with any foreign company/organisation or involved any confidential information and it was locally executable. While in the present case COVID-19 projects have ramifications inside and beyond India in the COVID-19 vaccine market.

The appellant contested the above FAA's order in detail in his second appeal which was perused and therefore, the CPIO was asked to further explain the points raised by the appellant in his second appeal to justify their stand to which she relied upon the fact that the disclosure of the information may have severe ramifications in case of any intellectual property rights breach and misinterpretation of the agreement clause.

The appellant's representative reiterated the second appeal and also submitted written submissions, which was taken on record. He highlighted the public interest issue and stated that the onus is on the CPIO to justify the exemption claimed.

Sughosh S Neergund, Representative of Bharat Biotech International Limited submitted that the document contains intellectual property, involved funding agreements and research. He clarified that funding and research assistance is available in the document and is not only funding ,per se.

The representative of Bharat Biotech submitted that the harmful effect of vaccine information cannot be understood by a non expert. He submitted that there are peer reviewed journals in this regard.

The CPIO submitted that the information sought is considered to be exempt from disclosure u/s 8(1)(a) and Sec 8(1)(d) of the RTI Act since the same is bound by confidentiality clause involving technical details for development of indigenous COVID 19 vaccine and involves trade secrets. Such information contains scientific development milestones along with technical activities to be undertaken within timelines and if disclosed would cause great scientific prejudice, disturb the competitive position of the third party and cause grave harm to public at large if the information released is misused by any person. She further submitted that the appellant failed to establish any larger public interest warranting disclosure of information and that the concerns put forth in the appeal. In the context of non-disclosure of information u/s 8(1)(d) of the

RTI Act, the Commission can refer to the decision in Naresh Trehan vs Rakesh Kumar Gupta, where it was held as under:

“Such information would clearly disclose the pricing policy of the assessee and public disclosure of this information may clearly jeopardise the bargaining power available to the assessee since the date as to costs would be available to all agencies dealing with the assessee. It is thus, essential that information relating to business affairs, which is considered to be confidential by an assessee must remain so, unless it is necessary in larger public interest to disclose the same. If the nature of information is such that disclosure of which may have the propensity of harming one’s competitive interests, it would not be necessary to specifically show as to how disclosure of such information would, in fact, harm the competitive interest of a third party. In order to test the applicability of Sec 8(1)(d) of the Act it is necessary to first and foremost determine the nature of information and if the nature of information is confidential information relating to the affairs of a private entity that is not obliged to be placed in public domain then it is necessary to consider whether its disclosure can possibly have an adverse effect on third parties.”

It was also submitted by the third party that there exists intense competition in the area of the COVID-19 vaccine development and many vested/motivated interests have cropped up that may act against the interests of Gennova by way of extracting such information from the said agreements and using it selectively to compromise/oppose the progress of the COVID-19 project of Gennova supported by BIRAC through the said agreements.

The Commission after hearing all the parties and all the submissions, written and verbal, is of the opinion that a funding agreement is an agreement between an issuer and an investor. While the investor provides a lump sum of money, the issuer guarantees a fixed rate of return over a time period. Whereas, a public-private partnership (PPP, 3P, or P3) is a long-term arrangement between a government and private sector institutions. The fact remains that the funding agreements were between third parties who are not public authorities and are private entities who are treating the information confidential to their institution. The Government and public authority like BIRAC involved in agreements with private entities, if they disclose the funding agreement, it can compromise the future commercial confidence of third parties and the same can only be detrimental to the interest of the public when the vaccination is not a project already executed, it is a continuing project.

The appellant had pressed for information in larger public interest citing case laws but failed to substantiate in particular to this case, as to why such technical information containing intellectual and commercial information of third parties should be disclosed.

Decision:

Be that as it may, the information on point no. 2 was rightly denied u/s 8(1)(d) of the RTI Act as the third parties had raised concerns regarding the compromise with the technical specification of the vaccine and the same cannot be ruled out when the funding agreement is in public domain or accessible to general public. In view of the above, the Commission is in agreement with the reply of the CPIO and upholds the same. No further action is warranted.

The appeal is disposed of accordingly.

Vanaja N. Sarna (वनजा एन. सरना)

Information Commissioner (सूचना आयुक्त)

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