

Pakistan Information Commission



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In Pakistan Information Commission

Appeal No 309-02/20

Muhammad Waseem Elahi

(Appellant)

Vs.

Election Commission of Pakistan

Through its Secretary

(Respondent)

Order

Date: October 28, 2020

Zahid Abdullah: Information Commissioner

A. The Appeal

1. The Appellant filed an appeal, dated 07-02-2020, to the Commission, stating that he Submitted an information request to the Chief Election Commissioner, Election Commission of Pakistan dated 23-01-2020 under the Right of Access to Information Act 2017.
2. The information sought by the Appellant is as follows:
 1. How many citizens applied/requested for cancellation/deletion of their votes from voter list in year 2016, 2017, 2018, 2019, 2020 to date?
 2. Whether Election Commission processed cancellation / deletion of vote(s) on the specific request of citizen(s) in these years?
 3. Provide the name(s) of those citizens who preferred cancellation / deletion of vote from voter list with brief cause of their request?
 4. If someone request cancellation / deletion of vote to Election Commission then whether his data will appear if he sends SMS at 8300?
 5. Whether Election Commission has devised rights & duties for voters and public representatives? If yes, provide copies.

B. Proceedings

3. Through a notice dated 12-02-2020 sent to the Secretary Election Commission of Pakistan, the Commission called upon the Respondent to submit reasons for not providing the requested information.

4. The Respondent through a hearing notice dated 15-07-2020 was informed that the above-mentioned appeal is pending decision before this Commission. The text of the notice is as under:

“In pursuance of the Standard Operating Procedures issued by the Government of Pakistan for the Covid-19 and to ensure public safety, the personal appearance before the Commission at the time of hearing, is condoned for the time being. Therefore, you are directed to submit your written reply and arguments to Pakistan Information Commission within fifteen days of the receipt of this notice.

Copies of the supporting documents may be annexed with the written arguments. If the written arguments are not submitted within 15 days, the appeal will be decided Ex Parte in the light of the record available on file and the Right of Access to Information Act 2017”

5. The Respondent did not respond to the hearing notice. Another hearing was fixed for 20-10-2020 via hearing notice dated 06-10-2020.
6. On the 16-10-2020 the respondent replied via letter No. F.2(24)/2020- Law; text of the letter is as under:

“ I am directed to refer to Notice bearing reference No. Appeal-309-02/2020, dated 6th October, 2020, issued by this worthy Commission i.e. the Pakistan Information Commission (“PIC”), regarding the captioned subject, received by Election Commission (“ECP”) on 9th October, 2020, whereby it has been directed to ECP to submit written reply and arguments to PIC in respect of the subject pending Complaint/Appeal of the Mr. Waseem Elahi, Advocate seeking indulgence of the PIC under the provisions of the “Right of Access to Information Act, 2017” (“RAIA 2017”).

2. It is also informed that the earlier notice of your office dated 15th July, 2020, regarding the subject appeal was responded by this Commission vide reply dated 17th August, 2020 (Annexure-A).
3. In this regard, it is once again submitted that prior to institution of the subject pending Complaint/Appeal, different individuals filed Complaints/Appeals before the PIC seeking under the RAIA 2017, against the ECP. It is pertinent to mention here that out of these Complaints/Appeals, five Complaints/Appeals were decided by the PIC against the ECP on different dates without affording an opportunity of hearing to the ECP. The said orders of the PIC and the jurisdiction assumed by it under RAIA 2017 were assailed by the ECP before the Hon’ble Islamabad High Court by way of filing five different Writ Petitions under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. The said Writ Petitions were fixed for preliminary hearing on 09.03.2020, and the Hon’able Court was pleased to order status quo and the PIC being Respondent in these Writ Petitions was directed by the Hon’able Court to file report and para-wise comments. The said has been fixed by the Hon’able Court so far. (Copies of Writ Petitions and orders are annexed herewith as Annexure B to F).
4. In the abovementioned Writ Petitions, it is stance argument of the ECP that “ Sub section (2) of section (1) of the RAIA-2017 provides applicability of the

RAIA-2017 to the effect that “it shall apply to all public bodies of the Federal Government”, which means that RAIA 2017 shall apply only to those public bodies which are part of the Federal Government or working under the control and supervision of the Federal Government. The ECP is an independent constitutional entity having its independent status and autonomy, established under the Article 218 (1) of the Constitution of Islamic Republic of Pakistan (“Constitution”) and its duties and functions have been provided in Article 218 (3) of the Constitution and the jurisdiction assumed by PIC under the RAIA 2017, is without lawful authority as RAIA 217 does not apply to the ECP and it is not amenable to the jurisdiction of the learned PIC under the RAIA-2017. Furthermore, the Hon’able Islamabad High Court while allowing a Writ Petition No. 490/2014 on 23.01.2020, of the ECP against the Federal Ombudsman Islamabad, has been pleased to declare the independent status and autonomy of the ECP in the following terms (relevant portion of the order):-

5. A plain reading of the above portion unambiguously manifests that the Election Commission of Pakistan, which has been established under the constitution, does not fall within the ambit of the expression ‘Agency’. The Election Commission Of Pakistan is not a Ministry, Division, Department or Commission of the federal Government. Likewise it is not a statutory body, corporation or other institution established or controlled by the Federal Government. It is, therefore, not an ‘Agency’ for the purposes of the Order on 1983. The jurisdiction of the learned Ombudsman is confined to complaints regarding mal-administration of an entity which falls within the ambit of the expression ‘Agency’ defined in the Order of 1983. The Election Commission of Pakistan is, is Therefore not Amenable to the jurisdiction of the learned Ombudsman under Order 1983.
6. For the above reasons, both the petitions are allowed and consequently the proceedings before the learned Ombudsman are hereby declared as bereft of jurisdiction.

(Detailed order of the Hon’ble Islamabad High Court is appended herewith as Annexure-G)

Keeping in view the above, it is requested that the proceedings of the subject Complaint/Appeal may be adjourned sine die till the final disposal of the above mentioned five Writ Petitions wherein the Hon’ble High Court has to interpret the provisions of RAIA 2017, and its application to the ECP. This request/prayer is being made in the best interest of justice”.

7. Mohsin Ali khan, Assistant Director appeared on 20-10-2020 on behalf of the respondent, he informed the Commission that they will come to discuss the case on merit on the 27-10-2020.
8. On 27-10-2020, Munawar Hussain Sr. Assistant, Shahnawaz Assistant Director and Nauman Munir appeared on behalf of the Respondent and pleaded that they have filed a case in Islamabad High Court that Election Commission is not a Public Body as Election

Commission of Pakistan is constituted under Article 218 and they will provide a written reply on Monday”.

9. Through a letter dated 26-10-2020, the Respondent shared with the commission the following:

“1. That the Federal Legislature legislated Right of Access of Information Act 2017 on 13-10-2017, Section 4 of the Act provides that the principle officer of each public body shall ensure that the record held by that body is properly maintained so as to enable it to comply with its obligation under the Act.

Section 5 of the Act casts a duty on the principle officer of each public body to ensure within six months to publish information and record which is enumerated in clause "a" to clause of section 5 (1). Section 11 provides that a citizen of Islamic Republic of Pakistan can make a request to a public body through a designated official to provide information or record to him. Section 12 provides that where a public body does not hold information or record, the applicant seeking information shall be informed accordingly within 10 working days of the receipt of the request. Section 13 provides that in case the designated official refuses the request, he shall inform the applicant about the said rejection along with reasons of rejection. Section 14 provides time limit for responding the request and the maximum period is 10 days counted from the receipt of the request. Section 17 provides that if the applicant seeking information is dissatisfied with the decision of the designated officer or where no decision has been communicated to him within the time fixed in terms of section 14, he may file an appeal before the information Commission established under section 18 of the Act

2. That designated officer has been defined in clause (ii) of section 2 of the act to mean that an official of a public body designated as such in accordance with section 9 of the Act.

3. That public body has been defined in clause ix of section 2 of the Act as under:-

(ix) "Public body" means-

(a) Any Ministry, Division, attached department or subordinate office, including autonomous bodies of the Federal Government.

(b) Any Federal and any municipal or local authority set up or establishment by or under any Federal law;

(c) The National Assembly and the Senate including their secretariats, committees and members:

(d) Any statutory corporation or other body corporate or institution set up or established or owned or controlled

or funded by the Federal Government;

(e) Any court, tribunal, commission or board under the Federal law;

(f) Any incorporated or unincorporated body of the Federal Government functioning under the control or authority of another public body or wherein one or more public bodies own or have controlling interest or provide substantial funding:

(g) Any other organization which directly or indirectly receives or has received public funds. subsidy, tax exemption, piece of land or any other benefit involving public funds and any other non-governmental organization or body registered under any law for the time being in force;

Election Commission of Pakistan is not a public body within the meaning of clause "ix" of section 2 of the "Right of Access to Information Act, 2017". It does not fall in any of the clauses of clause "ix" of section 2 of the Act. Election Commission of Pakistan has been constituted under Article 218 of the Constitution of Islamic Republic of Pakistan 1973. It cannot be said to have been constituted under the Federal Law. Federal law has been defined in Article 260 of the Constitution to mean "a law made by or under the authority of Majlis-e-Shoora (Parliament)". The Constitution cannot be termed as a Federal Law. Thus, clause (e) of clause (ix) of Section 2 of the Act cannot be stretched to declare the Election Commission of

Pakistan to be a public body.

4. A plain reading of the above provisions of Right of Access to Information Act 2017 unambiguously manifest that election commission of Pakistan which is established under the Constitution of Islamic Republic of Pakistan 1973 does not fall within the ambit of expression a public body

5. That in view of the above legal and constitutional position, the provisions of "Right of Access to Information Act, 2017" are not applicable to the Election Commission of Pakistan which is established under Article 218 of the Constitution of Islamic Republic of Pakistan, therefore,

Election Commission of Pakistan is not amenable to the jurisdiction of Pakistan Information Commission established under the Act of 2017.

10. That it is important to mention here that the jurisdiction of Pakistan Information Commission has been impugned by the Election Commission of Pakistan before the Honourable Islamabad High Court through 05 writ petitions which are still pending adjudication. The Honorable Chief Justice of Islamabad High Court has already issued notice to the Pakistan Information Commission on the issue of jurisdiction vested or otherwise in it, therefore, proprietary demands that information commission may wait till the final outcome of the judgement impugned by the Election Commission of Pakistan".

C. Discussion and Commission's View on Relevant Issues

11. The question before this commission is as under:

(a) Can citizens of Pakistan seek information from the Election Commission of Pakistan under the Right of Access to Information Act 2017, henceforth referred to as Act? and

(b) Has the commission been directed by the Honourable Islamabad High Court to stop proceedings pertaining to the appeals filed by citizens against the Respondent for not providing the requested information under the Act?

12. The contention of the Respondent shared through letter dated 16-10-2020 vide letter No. F.2(24)/2020- Law that "It is pertinent to mention here that out of these Complaints/Appeals, five Complaints/Appeals were decided by the PIC against the ECP on different dates without affording an opportunity of hearing to the ECP", is factually incorrect as per record available with the commission. The commission adopted due process of law providing ample opportunities through duly served notices to present its arguments in each appeal.

13. The Honourable Islamabad High Court has not directed this commission to stop proceedings on fresh appeals filed by citizens seeking information from Election

Commission of Pakistan. As such, this commission cannot put on hold its proceedings pertaining to appeals filed against the Respondent for not providing the requested information.

14. This commission is of the view that ECP is not only public body under section 2, but it is also a public body under Section 2(ix) (g) of the Act because it performs public functions.
15. In the Appeal No 049-06/19, Mukhtar Ahmed Ali VS Office of the President, this commission concurred with the pertinent point raised by the Appellant “President's Secretariat and the Hon'ble President of Pakistan (in fact all state officials and institutions) exercise authority that has been vested in them by the people of Pakistan through a delegatory process involving chosen representatives of the people of Pakistan i.e. through the Constitution and relevant laws, (Please refer to the wording of the Objective Resolution that is now an integral part of the Constitution). Therefore, the President's Secretariat that exercises public authority is very much a public body that discharges 'public functions'”.
16. This commission is of the view that the argument in the above para is relevant in the instant appeal as well.
17. This commission believes that the principle behind the enactment of the Act is to ensure public accountability so that the precious resources of the citizens of Pakistan are put to use in a judicious manner. That is why even the Non-Governmental Organisations that receive or have received public funds have been brought within the purview of the Act under Section 2(ix) (h) of the Act. As such, ECP which is a public authority run on public funds falls within the ambit of the Act.
18. The Preamble¹ Of the Act states the rationale behind the enactment which can be described as: making government accountable and answerable to people, greater participation of citizens in the affairs of the government, reduction in inefficiency and corruption through transparency and openness, wellbeing of the citizens through economic growth, good governance and protecting and promoting human rights. This is to be achieved by providing citizens access to public records. This is the rationale behind the enactment of law. If this be the rationale and the purpose of the Act, how can any public entity or any institution claim absolute exemption?
17. Does the law provide for absolute exemption to any public entity or any institution? A close scrutiny of the Act shows that the Act itself does not provide absolute exemption to any public entity or any public institution. In fact, even defence forces have not been given absolute exemption as an entity. Only certain records pertaining to defence forces have been given exemption under Section 7 (e) of the Act and all records pertaining to commercial and welfare activities have not been exempted.
18. In constitutional petition 39 of 2019, Juris Foundation through Chairman VS Federal Government through Secretary, Ministry of Defence, the Hon'ble Supreme Court said: “Acts of the Parliament or subordinate legislation are public documents and must be readily available to the citizen of the country subject to the exceptions provided under

the Right of Access to Information Act, 2017. Those exceptions extend only to record relating to defines forces, defines installations or connected therewith and ancillary to defence and national security, and not to the Army Laws”.

19. The Definition of public body, as provided in the Act, is inclusive and covers a wide range of public and private bodies including, for example, a non-governmental organization which, directly or indirectly, receives public funds. Hence, when the definition of public body is examined in its totality, while keeping in view Articles 2-A and 19-A of the Constitution, the democratic nature of our Constitution and the preamble of the Act, it is evident that no organization or institution that exercises authority vested in it by the people of Pakistan and that receives public funds can claim to be excluded from the purview of citizens’ right to information. The definition of the public body, as provided in section 2 (ix) of the Act, is reproduced as under:

- (a) Any Ministry, Division, attached department or subordinate office, including autonomous bodies of the federal Government;
- (b) Any federal and any municipal or local authority set up or established by or under any federal law;
- (c) The National Assembly and the Senate including their secretariats, committees, and members;
- (d) Any statutory corporation or other body corporate or institution set up or established or owned or controlled or funded by the Federal Government;
- (e) Any court, tribunal, commission or board, under the Federal Law;
- (f) Any incorporation or unincorporated body of the Federal Government, functioning under the control or authority of another public body or wherein one or more public bodies own or have controlling interest or provide substantial funding;
- (g) Any other organization which undertakes a public function, to the extent of that function; and
- (h) A non-governmental organization which directly or indirectly received or has received public funds, subsidy, tax exemption, piece of land or any other benefit involving public funds and any other non-governmental organization or body registered under any law for the time being in force.

20. It should be noted that the Act has been promulgated to provide a regulatory framework for enforcing citizens’ right to information guaranteed by Article 19-A of the Constitution of Islamic Republic of Pakistan, 1973. Its purpose is to ensure transparency, disclosure of official information and citizen’s oversight over the functions of public authorities.

21. It is also important to understand the rationale of principles of interpretation have been defined in section 3(2) of the Act, which reads as under:

- (2) This act shall be interpreted so as to advance its purposes as set out in the preamble and to—
 - (a) Promote the right of access to information: and

- (b) Facilitate and encourage promptly the disclosure of the information at the lowest and reasonable cost.
22. The Appellant has the statutory right to have access to the requested information under the Act. Furthermore, the Constitution of the Islamic Republic of Pakistan is the supreme law of the land. Therefore, constitutionality of the right of access to information in matters of public importance dictates that no real or perceived flaw in the statute can trump the fundamental constitutional right in the presence of Article 8 of the Constitution.
23. While the constitutionality of the right of access to information in matters of public importance has accorded it the status of fundamental right, it is not absolute right and is “subject to regulation and reasonable restrictions imposed by law”. The Act operationalises Article 19-A of the Constitution as mentioned in the Preamble and includes restrictions to be imposed on right of access to information as required by Article 19-A of the constitution under Section 7 and Section 16 of the Act. Therefore, citizens’ right of access to information in matters of public importance can only be restricted under the restrictions mentioned in the Act.
24. The question before the commission is as to whether the requested information can be denied to the citizen under the restrictions mentioned in Section 7 and Section 16 of the Act. This commission believes that the requested information does not fall within any provision of the exempted information mentioned in Section 7 and Section 16 of the Act.
25. This is the only Act which provides for provision of information to citizens on-demand as well as enlists categories of information to be proactively disclosed by the public bodies.
26. As the Act provides regulatory framework, it makes it binding on all public bodies to ensure proactive disclosure of information enlisted in Section 5 of the Act. This commission has observed in different Orders that the implementation of Section 5 of the Act can only be ensured if federal public bodies continuously juxtapose categories of information enlisted in section 5 with the information provided on the web sites. In this regard, all federal public bodies are required to use Template for the Compliance Report-Proactive Disclosure of Information under Section 5 of the Right of Access to Information Act 2017 to ensure proactive disclosure of information. This template can be retrieved from the web site of the commission www.rti.gov.pk
27. Pakistan has ratified UN Convention on Rights of Persons with Disabilities. Article 4: General Obligations lists obligations of the state parties in achieving the purpose of the convention as enunciated in Article 1. The states parties are expected to “adopt all appropriate legislative, administrative and other measures” to achieve the purpose of the convention and “modify or abolish existing laws, regulations, customs and practices” which run contrary to the spirit of the convention.

28. The Act provides for regulatory framework to ensure the accessibility of information for persons with disabilities to “adopt all appropriate legislative, administrative and other measures”.
29. It is only through this Act that the information proactively published under Section 5 of the Right of Access to Information Act 2017 is required, as interpreted through various judgements of the commission, has to be ‘accessible’ for all citizens, including the blind, low-vision, physically disabled, speech and hearing impaired and people with other disabilities. This commission has been ensuring through its Orders that the public bodies incorporate of web accessibility standards in the design of their web sites. ‘Web accessibility checklist’ can be retrieved from the web site of the commission.

D. Order

30. The appeal is allowed. The Respondent is directed to provide the requested information to the Appellant about Number of citizens who applied/requested for cancellation/deletion of their votes from voter list in year 2016, 2017, 2018, 2019, 2020 to date; whether Election Commission processed cancellation / deletion of vote(s) on the specific request of citizen(s) in these years; list of citizens who preferred cancellation / deletion of vote from voter list with brief cause of their request; If someone request cancellation / deletion of vote to Election Commission then whether his data will appear if he send SMS at 8300 and whether Election Commission has devised rights & duties for voters and public representatives, If yes, provide copies.
31. The information mentioned in para 32 be provided, with intimation to this office, at the earliest, but in any case, not later than 10 working days of the receipt of this Order.
32. The Respondent is directed to ensure that any information of personal nature like health condition, financial details, personal communication, CNIC details, phone numbers and residential addresses of citizens is not made public while implementing directions of the commission in paras 17 and 18 of this Order.
33. The Respondent is directed to notify Public Information Officer, (PIO), under Section 9 of the Act, put the notification to this effect on its web site as required under Section 5 (1) (b) of the Act, put name, designation and contact details of the PIO on its web site as required under Section 5 (1) (h) of the Act and submit compliance report to the commission within 10 working days of the receipt of this order.
34. The Respondent is directed to take immediate steps to proactively share through the web site all categories of information mentioned in Section 5 of the Right of Access to Information Act 2017 and submit the compliance report to the commission in the Template for the Compliance Report-Proactive Disclosure of Information under Section 5 of the Right of Access to Information Act 2017’. This template is available under ‘Information Desk’ category at the web site of the commission www.rti.gov.pk. The compliance report be submitted to this commission by 03/12/2020.

35. The Respondent is directed to ensure accessibility of the information proactively published on its web site under Section 5 of the Right of Access to Information Act 2017 for all citizens, including the blind, low-vision, physically disabled, speech and hearing impaired and people with other disabilities and submit compliance report to this effect using 'Web accessibility checklist'. This checklist is available under 'Information Desk' category at the web site of the commission www.rti.gov.pk. The compliance report be submitted to this commission by 03/12/2020.
36. Copies of this order be sent to Secretary, Election Commission of Pakistan and the Appellant for information and necessary action.

Mohammad Azam
Chief Information Commissioner

Fawad Malik
Information Commissioner

Zahid Abdullah
Information Commissioner

Announced on:
November 04, 2020

This order consists of 10 (ten) pages, each page has been read and signed.