

Yes, Minister?

The Bureaucracy Clamps Down on Citizen's Rights

○ Madhu Kishwar

Modern India has become synonymous with corruption, mismanagement and inefficiency. This despite the fact that the number of individually honest, decent and hard-working people in our society is far higher than that of crooks, who are actually a minority. Unfortunately, the crooks have come to dominate our society as they control the levers of power. This is because our government institutions are designed to breed crime and corruption. The rules of the game are inherently foul in so far as they reduce the average citizen to the status of a colonial subject who is mistrusted, treated like a potential criminal and made to appear as a supplicant before those who sit in positions of power.

The O.S. Act

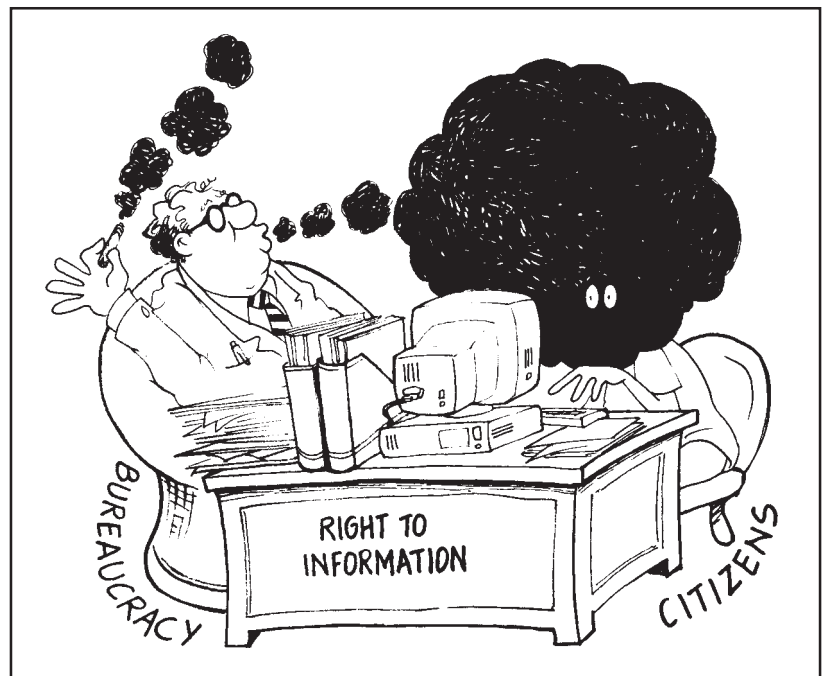
Nothing symbolises the enslaved status of the Indian people better than the Official Secrets Act (OSA), enacted by the British in 1923. It was an offshoot of the Official Secrets Act, 1911, of Great Britain, enacted under the shadow of World War I looming large on the horizon. Its main object was to check espionage activities by "enemy" nations. However, it was meant to be a temporary measure. The Indian Official Secrets Act had an additional purpose—to erect as high a wall as possible between the British rulers and their colonial subjects so that nobody really understood nor dare challenge the rationale of policy decisions. This law was enacted when public servants in India were expected to exercise powers not for and on

behalf of the people of this country, but to represent the interests of the British government.

Far from this hateful piece of colonial legislation being scrapped as a mark of our freedom, the OSA has been given more teeth in the decades after independence. The Act was further strengthened in 1967 with hardly anyone in Parliament opposing the move. This, at a time when Britain and other western democracies had begun to relax rules, with most government information made accessible to public except some defence related matters kept in the domain of secrecy. After the trauma of the Emergency, the Janata Party government promised to reform the OSA but its working committee in

1975-77 denied that there was a need for change. The Janata Dal government of 1989-91 also made a case for a fundamental revision of OSA but did nothing about it. Similarly, the I.K. Gujral government made high sounding promises in this regard but failed to honour its commitment.

The OSA has become one of the most important instruments for corruption and crime, as it provides an effective veil of secrecy over the misdeeds of our power-wielders. It has been used to thwart the flow of relevant and necessary information to the citizens and to facilitate arbitrary decision-making and loot of public resources by those holding office. As eminent lawyer Rajiv Dhavan points out, even the rules



RUSTAM VANIA

about Official Secrets Classification (published till 1973) are confidential.

This, despite the fact that the Indian Constitution guarantees a fundamental right to speech and expression, and therefore, to information. The most obstructive part of the OSA is Section 5 which can be and is literally interpreted within the government to mean that it is an offence for a public servant to disclose any information, however innocuous, if it comes to him in his official capacity. (see box for the text of Section 5)

The Many 'Uses' of OSA

This Section 5 helps the bureaucrats arbitrarily declare anything and everything "secret" with no well-defined rules as to what information legitimately belongs to the public domain. To lend further stringency to the OSA, the government of India has also framed various conduct rules for public servants which make it a misconduct for a public servant to disclose to the people any information that has come to him in his official capacity.

Sadly enough, there has been hardly any serious challenge to this Act from the educated and influential sections of our society. Our industrialists have been kept on a tight leash by the license-quota-permit raj, which is by and large still intact, despite all the talk about economic reforms. Therefore, they haven't had the guts to demand transparency in government functioning, even though *sarkari* babus and *netas* hold them to ransom in the process. They have opted to propitiate these secular deities by regular offerings to get the required "clearance" and permits.

Apart from facilitating loot of public money, the OSA has also been used by corrupt bureaucrats and defence officials to implicate

The Culprit Clause

"S.5(1): If any person having in his possession or control any secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which is likely to assist, directly, or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such office or contract:-

(a) wilfully communicates the code or password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or pass-word or information;

he shall be guilty of an offence under this section."

inconvenient colleagues on trumped-up charges as the case of Dr B.K. Subbarao demonstrates (see page 4) Dr Subbarao was arrested and put behind bars for carrying to a conference in the USA, his own PhD thesis on nuclear weaponry. Similarly, in the Larkins case and in proceedings against General Puri, strong espionage offences were made out even though the information supposedly "revealed", is contained in easily accessible manuals on defence affairs and magazines like the *Jane's Defence Weekly*. In recent

years, two Maldivian women were imprisoned and subjected to inhuman torture on what turned out to be trumped up charges of spying and carrying defence secrets. (See box on page 10)

The Culture of Secrecy

The culture of secrecy in government has got so deeply entrenched that "accountability to Parliament by information has got considerably eroded in various ways." (For a detailed analysis see Rajiv Dhavan, Freedom of Information; Pilsarc Working Paper

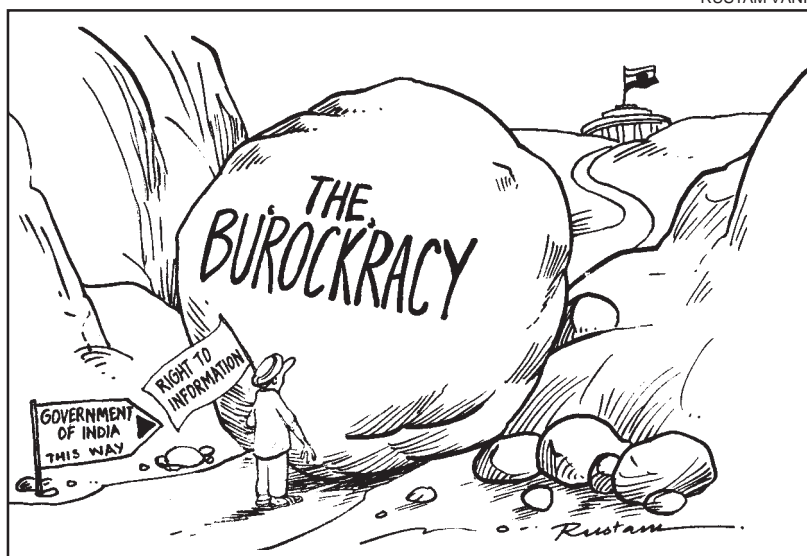
No. 122) The first and the most obvious tactic used by the bureaucracy has been to respond to questions posed by MPs in Parliament without giving any substantial information. Mostly, the MPs get evasive or skimpy answers and cannot hold anyone to account for accurate information.

A new hurdle was created by the 1986 amendments to the Commission of Enquiry Act 1952 which makes it possible for any commission to withhold information from the Parliament to which it is supposed to report. This was done at the behest of Thakkar Commission which did not want to make its report on Indira Gandhi's assassination available to public or even to Parliament. Similarly, even on important policy issues or at the time of tabling new legislation, Parliament is seldom given adequate and accurate information as to the objectives and rationale for new policies or new legislative bills. As a result, most laws are rushed through without an informed debate on the subject concerned.

The problem is further compounded by the fact that India does not have a proper public records policy, for both past and contemporary records. Valuable records are being destroyed for lack of proper maintenance. Those that exist are neither properly indexed nor properly stored and preserved. This provides an additional excuse for denying citizens access to official information.

Right to Information

One would have expected academics, and intellectuals to be in the forefront in demanding the Right to Information Act. Unfortunately, even our historians and political scientists, who need access to government records and



policy documents in order to carry out meaningful research, have failed to put their act together and demand open access to relevant government records. Our archives are still “protecting” British policy papers from the gaze of Indian social scientists, in deference to the archaic provisions of the OSA.

Likewise, many journalists who cannot possibly practice their profession in a responsible way without having access to policy documents and other relevant information, have been curiously indifferent to the obstructions placed by the OSA on the pursuit of their legitimate, professional duties. Neither the numerous journalists' associations in the country, nor the editors' bodies have ever made this a high-priority issue. They have been content to depend on selective “leaks” by interested parties, even though this has made them vulnerable to information planted by bureaucrats and politicians, out to settle scores against their adversaries.

MKSS Initiative

The educated and influential classes ought to feel embarrassed that the movement for scrapping

the OSA and the demand for the Right to Information Act has come from the poor and marginalised communities as part of their struggle for livelihood, whereas journalists, academicians and intellectuals, whose profession it is to seek, collect and disseminate information, have paid scant regard to this basic right, without which any democracy can be reduced to a farce.

The movement was initiated by the Mazdoor Kisaan Shakti Sangathan (MKSS), articulating the grievances of the poverty-stricken villagers who come to work on rural employment programmes run by the government in drought-prone rural areas. It was triggered off by the routine corruption of local officials who try to siphon off funds meant for promoting village-level employment and “development” works by paying the labouring poor far less than their entitlement and carrying out “development programmes” only on paper. The MKSS initially demanded that information about rural development funds, copies of all muster rolls and bills and vouchers, relating to public works

be made available to people, for a people's audit. This was slowly channelled into a concerted movement pushing for the enactment of a Right to Information Bill, prepared by the movement's leaders in collaboration with select lawyers and intellectuals supporting this endeavour.

Despite a long-drawn struggle over the last four years and many promises by sundry politicians that such a law will be enacted soon, there has been very little progress in making government functioning more transparent and open to public scrutiny. In Rajasthan, the state from which the movement was launched, the then Chief Minister Bhairon Singh Shekhawat had announced that in deference to the movement's demand, photocopies of documents regarding public works would be made available on demand. However, even this limited concession has not been implemented. The movement's activists have been thwarted by officials in gaining access to most basic documents.

Chief Ministerial Initiatives

However, in recent times, two bold initiatives in this regard have surprisingly come from three politicians—Digvijay Singh, Chief Minister of Madhya Pradesh, Chandrababu Naidu, Chief Minister of Andhra Pradesh and Ram Jethmalani, Minister for Urban Affairs and Employment in the Union government.

Naidu has avoided getting stuck with a new legislation. Instead, he is attempting to make government functioning more accountable to the citizens as part of a larger vision to make Andhra Pradesh move out of the poverty trap and becoming a trend-setter in the area of economic

OSA : As a Weapon for Personal Vendetta

In 1994, Fauzia had come to India from Maldives in connection with her child's education and her friend Mariam came to help her with some problems she was facing in that connection. Mariam's stay permit was expiring on a particular date but due to the outbreak of a plague, she needed to extend her stay by a couple of days beyond the permit limit.

To get that extension, she went to the local police inspector named Vijayan in Trivandrum. He asked her to get her ticket reconfirmed for the exact date of departure. This she did. He then asked her to leave her passport and ticket with him. After she did this, he asked her for sexual favours for granting her the extension of stay. She ticked him off and threatened to take it up with his superiors. He panicked and got her arrested for overstaying her permit. As part of the whole drama, he confiscated her diary among other things. There he found the telephone numbers of an eminent scientist, Shasikumaran working at the Indian Space Research Organisation (ISRO). Imagining that he had got big fish in his net, Inspector Vijayan implicated and arrested not only Mariam, but also her friend Fauzia, Sasikumaran and Nambi Narayanan who was Sasikumaran's colleague and two others working at ISRO.

The two women were accused of espionage and the scientists booked under the OSA for passing on defence secrets. The case was handed over to the CBI which investigated the case with the help of the Interpol in Russia, Sri Lanka, and Maldives. Apart from collecting thousands of pages of evidence and examining hundreds of persons, the CBI came to the conclusion that the Kerala police had acted malafide, and that the charge of espionage was a complete fabrication, and "that the whole case false". All this was done to teach a lesson to women for resisting sexual harassment. But the two women spent four harrowing years in detention under the National Security Act. Finally, in 1997 when the period of their detention without trial came to an end, the Supreme Court also gave its judgement and passed heavy strictures against the Kerala police and ordered the Kerala government to pay damages of Rupees one lakh each to all the four accused. This is among the many examples of misuse of OSA for settling personal scores.

regeneration. Towards this purpose, Naidu is initiating far-reaching political and economic reforms in the state that include computerising of all government information, with provisions for making it accessible to citizens at the press of a button. As expected, his ambitious plans are being thwarted by his political colleagues as also his own bureaucrats, who naturally feel threatened by such a radical move.

In 1997, Digvijay Singh brought before his cabinet a bill similar to the one drafted by the Right to Information Movement led by MKSS in collaboration with the Press Council of India. However, his cabinet colleagues opposed it unanimously and, therefore, it had to be referred to a Committee of Secretaries. They prepared a much diluted version which was passed by the M.P. state legislature a few months back. Unfortunately, the Central

government has refused to give assent to that bill.

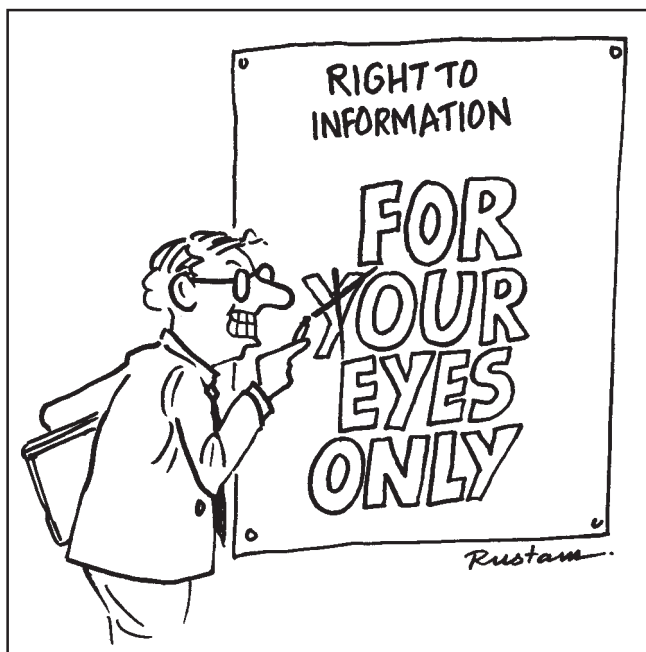
Jethmalani Opens the Door

In the case of Ram Jethmalani, the far-reaching move to bring about transparency in his own ministry seems to have been triggered off by chance. As one of India's top lawyers proud of his lucrative practice, Jethmalani let it be known that he wasn't going to use his office as an extortion centre for personal wealth accumulation, because he could make as much money as he wanted through his skills as a lawyer. He wanted his ministry to show results and tackle some of the urgent problems of urban India. He insisted on quick decisions and speedy implementation. None of this found favour with his bureaucrats. As a person, well-versed in government rules and legal tangles, he was not willing to be led by the nose by the officials, and insisted on taking his own decisions. This again

was resented by bureaucrats who are used to being the real power centres even while they pay ritual deference to their political bosses. In a few instances, he is reported to have found evidence of ministry officials having made corrupt deals, leading to harmful decisions.

That led him on an irreversible confrontation course with babudom, which had good reason to feel angry and threatened. They first tried the usual game of leaking information to friendly journalists, alleging that Jethmalani had reversed certain official decisions because he was paid-off by interested parties. Being the

maverick that he is, instead of taking fright, Jethmalani retaliated by issuing a real bomb-shell of a memorandum on October 10, 1998, declaring that all documents pertaining to his ministry including ministerial decisions and file notings, would henceforth be available on demand to any citizen who wished to scrutinise them. Jethmalani began his memo with a reminder that his own party had declared in the first clause of its



National Agenda for Governance that their—"first commitment to the people is to give a stable, honest, transparent and efficient government capable of accomplishing all-round development."

In Violation of OSA

The BJP had also committed to enacting the Right to Information Act in its 1998 election manifesto. Since Jethmalani's memo is a historic document of far-reaching import, I reproduce it below in full:

"India today ranks among one of the most corrupt countries in the world due to lack of transparency. Corruption can be

eradicated only if people have information. Right to Information is the most fundamental right in democracy. Most of the corruption takes place because of secrecy with which we deal with the files. There is no reason for secrecy in a Department like Urban Affairs and Employment where files are expected to be disposed off as per laid down rules. Therefore, with immediate effect, the following guidelines regarding transparency in the Department of Urban Affairs and Employment, are approved for providing information to the public:

1. The public will have the right to see any file in the department except those where cabinet notes are being got ready, where a decision is awaited from the cabinet, where budget proposals are involved, and in those dealing with vigilance enquiries.

2. Any person, even if he is not the concerned party in the issue, will have the right to see any file in the department.

3. Any person desirous of seeing a file should fill up the prescribed form and submit it to the concerned under secretary/desk officer. The concerned under secretary/desk officer will be the nodal officer. Nodal Officer will make the file available for perusal within five days of the date of application.

4. The prescribed fee for perusal of a file will be Rs 10. The files will have to be perused in the presence of the under secretary in his chamber.

5. If the file required is not available with the Under Secretary, he will requisition the file from whichever officer has the custody of the file at the point of time. Even if the file is with the office of the minister, he may requisition the file, take possession of it and resubmit it back to the minister's office on the same day. While requisitioning and resubmitting the files, the under secretary need not go through the hierarchy of officers as in the normal course. He can approach the concerned officer directly and take possession of the file and resubmit it back to the same person on the same day.

6. Any person desirous of having extract of the note sheet or correspondence, may indicate in the prescribed application forms the details of the notes which are required by him or her. A fee of Rs 2 will be charged per page for providing photocopies. Extracts will be provided to the applicant within a period of seven days.

7. Procedure for remitting fee will be finalised immediately."

Sabotaged by Bureaucrats

Predictably enough, this sent the bureaucracy on the warpath. His secretary, Kiran Aggarwal, who is also the president of the IAS Officers' Association, had, in the mean time, taken the matter to the cabinet secretary. The bureaucrats ruled that ministerial files could not be made available for public scrutiny because that would be in contravention of the OSA. They argued that since a Right to Information Bill was under consideration by the government, such an initiative had to be curbed. Therefore, "the opinion of the Ministry of Home Affairs may perhaps be necessary." Furthermore, the implementation of the ministerial guidelines "may

require modifications" of the Service Conduct Rules "regarding unauthorised communication of information." Any move in this direction would require authorisation from the Department of Personnel and Training which controlled the conditions of service of Central government employees. The bureaucratic lobby came to the expected conclusion that "no file which the nodal officer thinks could adversely affect the interest of the department or the government should be open to inspection."

Thus, the bureaucrats asserted their right to arbitrarily refuse access to any and every document they thought fit. They used the "government interest" argument as a fig leaf, government interest in their world-view being synonymous with personal, vested interests of the bureaucrats. As if to ensure that the insult reached the target, this important note, thwarting the initiative of a senior cabinet minister to bring about transparency in his ministry, was sent by way of communication between the cabinet secretary and the special secretary in Jethmalani's ministry.

The *babus* were determined to drive home the message that a minister, despite all the trappings of power and status surrounding him, does not have the power that fairly junior officials and even many clerks wield.

Not one to be easily cowed down, Jethmalani defended his move with even greater vigour and élan. I quote from his note of October 16, 1998, sent to the Cabinet Secretariat:

"I would like to make it clear that the citizens do not really need the assistance of a Freedom of Information Bill to secure access to departmental papers. The citizen's right to know has been recognised in this country as his

constitutional right arising out of the article 19(1)(a) of the Constitution of India. That right stands by itself and will be enforced by the court whenever a citizen is wrongfully denied access to the information that he legitimately desires." Jethmalani then goes on to cite the authority of a Supreme Court judgement on this issue in Gupta's case reported in AIR1988 Supreme Court page 149.

Supreme Court Ruling

The court in this case held that correspondence exchanged between the Law Minister, Chief Justice of Delhi and Chief Justice of India relating to non-confirmation and appointment of a high court judge was not privileged and must be disclosed to the court. Some of the salient statements of the law contained in that judgement are reproduced below :

"i) Where 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.

ii) But this important role people can fulfil in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government.

iii)...if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability... There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration.

iv) The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing.

vii) To cover with a veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

viii) The concept of an 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).

ix) But, it does appear that cabinet papers, minutes of discussions of heads of departments and high-level documents relating to the inner working of the government machine or concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure."

Jethmalani argued that "in view of the above decision of the Supreme Court which is not departed from or modified by any later judgement, it is appropriate to respect the constitutional right of the citizens forthwith." He also believes that this right "cannot be defeated by delay in passing a law". Every document must be open to inspection unless public

interest appears to be gravely jeopardised by the disclosure. This will pertain to considerations which have something to do with "the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation or incitement to an offence," as enumerated under Article 19(2) of the Indian Constitution. "The injury to public interest from



disclosure must be to one or the other of these constitutionally protected interests and none other," notes Jethmalani. "It is not a valid reason for refusal that the government will be exposed to litigation or that its litigation will fail or that corruption and dishonesty or negligence of some public servant or minister will thereby be exposed," he adds.

PM Backs Bureaucrats

The bureaucratic mafia struck back even more decisively this time. The Cabinet Secretary, Prabhat Kumar sent an urgent missive

to the Special Secretary S.S. Chattopadhyaya, in the Ministry of Urban Affairs, instructing him in no uncertain terms that Jethmalani's orders were not to be carried out. I quote from his letter dated October 16, 1998:

"The matter regarding the ambit and scope of items where supply of information shall be mandatory, and the areas of items in respect of which a citizen would have the right to seek and get information, is presently under consideration of the Group of Ministers constituted to consider the proposed legislation on Freedom of Information. It is, therefore, necessary that the implications of the instructions dated October 10, 1998, of Minister for UA&E are first carefully considered by the GOM.

Prime Minister has, therefore, directed not to give effect to the instructions dated October 10, 1998, issued by the Minister for UA&E and to refer the matter to the GOM for consideration."

It was clear from this that Prime Minister Atal Bihari Vajpayee is a willing

party to the insult being administered to his own ministerial colleague by a member of his bureaucratic team. This slimy action was in perfect tune with BJP's dismal track-record as the ruling party and Vajpayee's own diminishing credibility as a politician and leader. Though he was believed to be a relatively honest politician, Vajpayee's own reputation for integrity has been seriously tarnished on account of his relatives indulging in the kind of corrupt money-making that has become the hallmark of politicians in India.

Even BJP-RSS cadres admit that Vajpayee's adopted son-in-law has been on a money-collecting spree ever since Vajpayee became Prime Minister. Other BJP leaders have been no less active on this front. If stories of their looting are not coming out in the open as in the case of Laloo Yadav, it is mainly because large, powerful sections within the bureaucracy are favourably inclined towards the BJP. They will remain so inclined only as long as the BJP leaders let them rule the roost. In these circumstances, there is little likelihood of either the bureaucrats or their political masters approving Jethmalani's radical memorandum. For, doing so would only open up a Pandora's-box, and expose the government to public scrutiny and make it somewhat accountable for its actions more than it has ever been after Independence.

Failure of the Press

It is unfortunate that the press has let the matter drop with such readiness, rather than keep the heat on. Many dismiss the whole affair as a clash of egos and interest between the minister and his bureaucrats. Reluctance to lend support to Mr Jethmalani is also being justified on the ground that he is no *mahatma* himself and has made his millions by defending all kinds of devious people in his role as a criminal lawyer. Some even believe he is himself not above corruption.

This line of argument shows political naivete. We have to learn to respond to issues rather than remain obsessed with personalities. Political reform does not come through *mahatmas* but often through the agency of politicians who have the good sense to

Draft of an Appeal to the Prime Minister of India For Use by Manushi Readers

To,
Shri Atal Bihari Vajpayee
Hon'ble Prime Minister of India
New Delhi.

Dear Sir,

We strongly protest against the directive of your office obstructing the move made by Mr Ram Jethmalani, Minister for Urban Affairs and Employment, towards providing the right to information to citizens regarding the functioning of his ministry vide the Minister's instructions dated October 10, 1998.

The citizen's right to know has been recognised in this country as a constitutional right by the Constitution of India. We appeal to you to honour this right and ensure that Mr Jethmalani's initiative is not thwarted and that the transparency he wishes to institutionalise becomes the standard practice in all ministries and government departments.

We also demand that the Freedom of Information Bills (FOI) mooted by the Press Council of India and other people's organisations and movements like CERC, be tabled before the Parliament.

The FOI represents the democratic aspirations of citizens of this country. It would enable groups and individuals to be kept informed of the functioning of the decision making process of the government as it affects them and to know the kinds of criteria that are being applied by government agencies in making these decisions. It stands to enhance the quality of participatory democracy and empower citizens to resist corruption and maladministration.

The BJP had included the right to information in its election manifesto. We hope the Hon'ble Prime Minister will honour the promise made by his party at the time of 1998 Lok Sabha elections.

Signature & Address

recognise that their enlightened self-interest lies in gaining a measure of public credibility. It is noteworthy in this instance that Mr Jethmalani is willing to have his own record of ministerial decisions, including file notings, open to public scrutiny. He has created an important precedent and opened the door for the citizens to walk in and exercise their rights. This door must not be allowed to be shut on our faces again.

MANUSHI, along with the Centre for Public Interest Litigation and the National Campaign for People's Right to Information, has filed a

petition in the Supreme Court on November 10, challenging the bureaucratic clamp down on our right to information. We call upon our readers to send letters of protest to the Prime Minister as also the cabinet secretary demanding that they withdraw their order of October 16, 1998, as also speedily present the Right to Information Bill before the Parliament.

Note : The lengthy quotations from the correspondence between Mr Ram Jethmalani and the bureaucrats obstructing the right to information could well be in violation of the Official Secrets Act.