

Legislative Brief

The Whistleblowers Protection (Amendment) Bill, 2015

The Bill was introduced in Lok Sabha on May 11, 2015 and passed in that House on May 13, 2015. It is currently pending in Rajya Sabha.

Highlights of the Bill

- ◆ The Bill amends the Whistleblowers Protection Act, 2014.
- ◆ The Act provides a mechanism for receiving and inquiring into public interest disclosures against acts of corruption, wilful misuse of power or discretion, or criminal offences by public servants.
- ◆ The Bill prohibits the reporting of a corruption related disclosure if it falls under any 10 categories of information.
- ◆ These categories include information related to: (i) economic, scientific interests and the security of India; (ii) Cabinet proceedings, (iii) intellectual property; (iv) that received in a fiduciary capacity, etc.
- ◆ The Act permits disclosures that are prohibited under the Official Secrets Act (OSA), 1923. The Bill reverses this to disallow disclosures that are covered by the OSA.
- ◆ Any public interest disclosure received by a Competent Authority will be referred to a government authorised authority if it falls under any of the above 10 prohibited categories. This authority will take a decision on the matter, which will be binding.

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Key Issues and Analysis

- ◆ The Statement of Objects and Reasons of the Bill states that the 10 prohibited categories are modelled on those under the RTI Act, 2005. However, this comparison may not be appropriate. Unlike the RTI Act, disclosures under the Bill are not made public but in confidence to a high level constitutional or statutory authority.
- ◆ With regard to the 10 prohibited categories, the RTI Act allows (i) the public authority to disclose information if he considers it to be in public interest; and (ii) a two stage appeal process if information is not made available. The Bill does not contain such provisions.
- ◆ A Competent Authority is required to refer a prohibited disclosure to a government authority for a final decision. However, the Bill does not specify the minimum qualifications required or the process of appointment of this authority.
- ◆ Whistleblower laws in other countries also prohibit the disclosure of certain types of information. These include information related to national security and intelligence, received in a fiduciary capacity, and any disclosure specifically prohibited by a law.

PART A: HIGHLIGHTS OF THE BILL

Context

The Whistleblowers Protection Act, 2014 enables any person (i.e. a whistleblower) to report an act of corruption, willful misuse of power or discretion, or criminal offence by a public servant. This includes all public servants, including Ministers, Members of Parliament, the lower judiciary, regulatory authorities, central and state government employees, etc.¹ Such disclosures are made to a specified Competent Authority who must conduct a discreet inquiry and conceal the identity of the complainant and public servant.

After the 2014 Act was passed as a Bill by Lok Sabha, the government circulated amendments in Rajya Sabha to prohibit two categories of information from being disclosed. This included information related to: (i) sovereignty, strategic, scientific or economic interests of India, foreign relations, or the incitement of an offence; and (ii) proceedings of the Council of Ministers. However, when the Bill was passed by Rajya Sabha, these amendments were not moved as the discussion took place on the last day of the 15th Lok Sabha.²

The Whistleblowers Protection (Amendment) Bill, 2015 was introduced in Lok Sabha on May 11, 2015 and passed in that House on May 13, 2015. The Bill amends the Whistleblowers Protection Act, 2014.

Key Features

Under the Whistleblowers Protection Act, 2014, any person may make a public interest disclosure against a public servant. Such disclosures are made before a Competent Authority. The Act specifies the Competent Authority for each category of public servant. For example, it would be the Prime Minister for a Union Minister; Speaker/ Chairman for Members of Parliament; the Chief Justice of the High Court for district court judges, the Central or State Vigilance Commission for government servants.

The Bill amends the Act to prohibit the disclosure of 10 categories of information to a Competent Authority. The table below compares the provisions of the Bill with the Act.

Table 1: Comparison Whistleblowers Protection Act, 2014 with the Amendment Bill, 2015

	Whistleblowers Protection Act, 2014	Whistleblowers Protection (Amendment) Bill, 2015
Disclosure of information	Disclosures may be made on any act of corruption, abuse of power or discretion, or criminal offence by a public servant.	<ul style="list-style-type: none"> ▪ A disclosure is prohibited if it contains information related to: <ol style="list-style-type: none"> i) The sovereignty, strategic, scientific or economic interests of India, or the incitement of an offence; ii) Records of deliberations of the Council of Ministers; iii) That which is forbidden to be published by a court or if it may result in contempt of court; iv) A breach of privilege of legislatures; v) Commercial confidence, trade secrets, intellectual property (if it harms a third party); vi) That relayed in a fiduciary capacity; vii) That received from a foreign government; viii) That which could endanger a person's safety etc.; ix) That which would impede an investigation etc.; x) Personal matters or invasion of privacy. ▪ However, if information related to (ii), (v), (vi), and (x) is available under the Right to Information Act, 2005, then it can be disclosed under the Bill.
Applicability of the Official Secrets Act (OSA), 1923	Disclosures can be made under the Act even if they are prohibited under the OSA. [The OSA prevents documenting or communicating any information, etc., if it violates national security.]	Disclosures cannot be made under the Bill, if it is prohibited under the OSA.
Procedure to determine prohibited disclosures	Not applicable, as the Act does not prohibit any type of information from being disclosed.	<ul style="list-style-type: none"> ▪ Once a disclosure is made, the competent authority will refer it to a government authorised authority. ▪ This government authority will take the final decision on whether the disclosure is prohibited.

Issues that may not be revealed during an inquiry into a whistle blowing complaint	<ul style="list-style-type: none"> ▪ Once a whistleblowing complaint is admitted, and is being inquired into, no person is required to provide any information if it falls under five categories. ▪ These categories include: i) security of India, ii) foreign relations; iii) public order and morality; iv) contempt of court; defamation, incitement to an offence; and v) Cabinet proceedings. 	The five categories are replaced with the above 10 categories of information.
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Sources: The Whistleblowers Protection Act, 2014; The Whistleblowers Protection (Amendment) Bill, 2015; PRS.

PART B: KEY ISSUES AND ANALYSIS

Prohibition of 10 categories from public interest disclosure

Act: Sections 3 (d), 4

The Whistleblower Protection Act, 2014 was enacted to enable any person to disclose to a Competent Authority, acts of corruption or wilful misuse of power or discretion, or criminal offences by a public servant. The Competent Authority is the Prime Minister or Chief Minister in the case of Ministers, the Speaker or Chairman for Members of Parliament or state legislatures, the Chief Justice of the High Court for district court judges, and the Central or State Vigilance Commission for government servants.

Bill: Clause 4

The Bill amends this provision to prohibit a person from disclosing information related to corruption by public servants if it falls under 10 categories. These categories include information related to sovereignty, scientific, economic interests and security of India, proceedings of the Council of Ministers, breach of privilege of legislatures, intellectual property, an investigation process, etc.

Purpose of the RTI Act differs from the Whistleblowers Act

Whistleblower

Act: Sections 3(b), 5 (1), (2), 13

RTI Act: Section 8 (1)

The Statement of Objects and Reasons of the 2015 Bill states that the prohibited categories have been modelled on the 10 categories of information that cannot be revealed under the Right to Information (RTI) Act, 2005.³ However, this comparison may not be appropriate. The purpose of the RTI Act is to make information with public authorities accessible to all citizens in order to promote transparency and accountability.⁴ There may be circumstances where it may not be desirable for public institutions to reveal all types of information to citizens.

In contrast, the Whistleblowers Act provides for corruption related information to be given by an individual to a Competent Authority. The Competent Authority, in all cases, is a high level Constitutional or statutory authority. This information is not made public and the inquiry into the allegation is required to be discreet, with the identity of the complainant, public servant, and related documents being kept secret.

Certain enabling provisions in the RTI Act have not been replicated in the Bill

RTI Act: Sections 8 (2); 19, 24

It may be noted that the RTI Act permits the relevant public authority to disclose information: (i) that falls under the 10 categories of prohibited information in the Act, and (ii) information prohibited under the Official Secrets Act 1923, if the public interest in revealing information outweighs the harm done to protected interests. Further, while the Act excludes 22 security and intelligence organisations from its purview, any information related to allegations of corruption must be provided. Also, the Act allows a two stage process to appeal against a decision to withhold requested information. The Whistleblower (Amendment) Bill 2015 does not have such provisions.

Prohibited categories in the Bill exceed those in the 2013 proposed amendments

The Statement of Objects and Reasons of the Bill states that at the time of the passage of the Whistleblowers Protection Act 2014, the government had circulated certain amendments.⁵ However, as the Bill was taken up for discussion on the last day of the 15th Lok Sabha, the amendments were not moved. The 2015 Bill now seeks to carry forward those amendments.

The 2013 proposed amendments prohibited only two categories of information from being disclosed under the Act: (i) that related to sovereignty, strategic, scientific or economic interests of India, foreign relations, or the incitement of an offence; and (ii) proceedings of the Council of Ministers. However, the 2015 Bill prohibits the disclosure of 10 categories of information.

Features of government authorised authority not specified

Bill: Clauses 5, 6

The Bill states that if the Competent Authority receives a public interest disclosure that falls under any of the 10 prohibited categories of information, he will refer it to a government authorised authority. This authority will decide whether the disclosure contains any information that is prohibited under the Bill. This decision will be binding on the Competent Authority.

However, the Bill is silent on the minimum qualifications or designation of the government authority. The independence of this authority may be at risk if the authority is junior in rank to the public servant against whom the disclosure is made.

International comparison of whistleblower laws

Different countries have enacted laws to protect whistleblowers and provide some exemptions. Table 2 compares the exemptions under whistleblower laws of different countries.

Table 2: Comparison of exemptions in federal whistle-blower laws across various jurisdictions

UK	USA	Australia	Canada	South Africa
<ul style="list-style-type: none"> ▪ National Security [including three intelligence agencies]; ▪ If a person making the disclosure commits an offence by making it; ▪ If it results in breach of legal professional privilege (between a lawyer and client). 	<ul style="list-style-type: none"> ▪ National defence or foreign affairs exempted <i>only</i> if there is a specific Executive Order to keep the information secret; ▪ If a disclosure is specifically prohibited by law. 	<ul style="list-style-type: none"> ▪ Intelligence information; ▪ Information that risks damage to national defence or security; ▪ Cabinet papers not publicly disclosed; ▪ Information received in confidence from foreign government; ▪ Courts and tribunals. 	<ul style="list-style-type: none"> ▪ Special operational information, including those from confidential sources, intelligence, military operations, a foreign entity or terrorist group; ▪ A confidence of the Queen’s Privy Council for Canada.* 	<p>No exemptions.</p>

Sources: **UK:** Public Interest Disclosure Act, 1998; Employment Rights Act, 1986; **USA:** Whistleblower Protection Act, 1989; **Australia:** Public Interest Disclosure Act, 2013; **Canada:** Public Servants Disclosure Protection Act, 2005; **South Africa:** Protected Disclosures Act, 2000; PRS. Note: *Information may be disclosed to a supervisor but not to the Public Sector Integrity Commissioner.

1. Section 3 (i), Whistleblowers Protection Act, 2014.
2. Rajya Sabha Official Debates, February 21, 2014. Any amendments made by Rajya Sabha would have necessitated sending the Bill back to Lok Sabha. Given that Lok Sabha was holding its last sitting that day, the Bill would have lapsed.
3. Section 8 (1), Right to Information Act, 2005.
4. Long Title, Right to Information Act, 2005.
5. The Whistleblowers Protection Bill, 2011, Notice of Amendments, Rajya Sabha, August 5, 2013, <http://www.prsindia.org/uploads/media/Public%20Disclosure/Notice%20of%20Amendments%20-Whistle%20blower.pdf>.

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