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# Discourse on the Classification of Information in Nepal

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## Abstract

Even after one and a half decades since the implementation of the Right to Information (RTI) Act in Nepal, the classification of information tasks has not been completed. Although attempts were made to classify the information three times during this period, none of the classifications were valid, and there was difficulty in the implementation of the RTI Act. This study has employed the principle of maximum disclosure, and the contents have been analyzed by adopting descriptive and explanatory methods. Instead of being active by classifying information to fulfill the policy objectives of the RTI Act, such as making the functions of the state open and transparent in accordance with the democratic system, making it accountable and responsible to the citizens, and making the access of citizens simple and easy to the information of public importance held in public bodies, the state has become indifferent.

*Keywords:* right to information, classification of information, public bodies, principle of maximum disclosure, limited exception

## Introduction

In Nepal, after the restoration of democracy in 1990, the right to information was incorporated as a fundamental right, but it took another 17 years to formulate the RTI law. In 2007, the RTI Act was enacted. However, the provision related to the classification of information has not been implemented even after another decade and a half since the Act came into force. During this period, three attempts were made to classify the information (see Table 2 for details). None of the attempts were valid.

Chapter 4 of the RTI Act contains provisions on the classification of information in clause 27. Although there is a broad provision in clause 3.2 that every Nepali citizen will have access to information held in public bodies, clause 3.3 states that information can be protected by considering information in five areas as sensitive. Accordingly, the classification has been arranged for the protection of information related to five areas: national security and international relations, criminal investigation, economic and commercial privacy, jeopardizing harmonious relationships among various casts or communities, and affecting and traumatizing personal privacy.

The Information Classification Committee, chaired by the Chief Secretary of the Government of Nepal (GoN), has two more members, consisting of the secretary of the concerned ministry and an expert on related subjects designated by the head of the office or the chairman.

For the purpose of classifying information, this committee has to inform the National Information Commission (NIC) about the period and method of protection of the information related to sub-clause 3 of clause 3 for determining the number of years the information should be kept confidential, but none of the information classification efforts have been approved so far.

According to the nature of the information to be protected, the classification committee can specify that it can be kept confidential for a maximum of thirty years. There is also a provision that the classification of information can be reviewed every ten years, and the protection of information can be changed. If you are not satisfied with the classification, a petition can be filed before the NIC, which may decide whether it should be kept confidential or not.

It seems that the provision of classification of information under the Right to Information Act is only in Nepal. Apart from this Act, in Nepal and other countries like the USA, UK, and India, the classified documents are classified as 'secret', 'top secret', and 'strictly prohibited documents' according to the sensitivity of the information protected by other laws. In Nepal, information has been classified into three categories in the Documents Secrecy Act, 1982. On the one hand, there is a debate about whether or not information should be classified under the RTI Act; on the other hand, the experience of Nepal has shown that the classification task assigned to the Chief Secretary of GoN cannot give the expected results.

**Statement of the Problem**

After repeated attempts to classify information have not been successful, it has been seen that the implementation of the RTI Act has become entangled for 17 years. Mechanisms and structures have been established in accordance with the Act.

Public bodies have also appointed information officers for information dissemination. However, updating the information of the public bodies periodically and maintaining good governance by establishing access for citizens to the information have not been achieved. What effect has there been on the flow of information due to the lack of classification of information? This is the main research question of this article.

## Objectives

With the absence of classification of information, an easy and favorable environment has not been created for the implementation of various provisions of the RTI Act. The culture of demand for and supply of information has not advanced. There is a situation where extraordinary efforts are required even to obtain ordinary information. The main objective of the study is to analyze the implementation of the RTI Act without having classified information. Its additional purpose is to study how information is being disseminated without classification.

## Methods

In this study, descriptive and explanatory methods have been employed for data collection and analysis. A key informant interview has been carried out with purposeful sampling for the collection of primary data. KII includes the RTI Act drafter and implementor with a semi-open question. For the secondary data, documents of classification of information for different periods, legal provisions, annual reports of the NIC, and policy papers of the Center for Media Research have been studied. Triangulation has been done by collecting useful information from secondary sources and interviewing experts on the subject.

## Conceptual Framework and Literature Review

The classification of information is based on the principles of maximum disclosure and proactive disclosure. According to the principle of maximum disclosure, any public body should provide the maximum level of information to citizens (Article 19, 2016). According to this principle, there should be limited scope for exception. The three-part test must be followed by the public bodies. Accordingly, (a) the information must relate to a legitimate aim as provided for in international law; (b) disclosure must threaten to cause substantial harm to that aim; and (c) the harm to the aim must be greater than the public interest in having the information (ibid.). The United Nations Human Rights Commission also adopted this principle in its decision on freedom of expression in the 2000 session (UNCHR, 2000). It was updated in 2013.

Although all documents related to the RTI in Nepal have adopted the principles of maximum disclosure and proactive disclosure, they have not been transformed into routine work. The preamble of the RTI Act, 2007 reads: "It is expedient to make the functions of the state open and transparent in accordance with the democratic system and to make responsible and accountable to the citizen; to make the access of citizens simple and easy to the information of public importance held in public bodies; to protect sensitive information that could have an adverse impact on the interest of the nation and citizen; and for the necessity to have legal provisions to protect the right of the citizen to be well-informed and to bring it into practice, this law has been enacted."

Accordingly, the objectives of the RTI Act are mainly as follows:

(1) To make the functions of the state open and transparent in accordance with the democratic system,
(2) To make the structures of the state responsible and accountable to the citizens, and
(3) Making the access of citizens simple and easy to the information of public importance held in public bodies.

For fulfilling the policy objectives, there are a few obligations of public bodies, which include providing access to information, periodic proactive disclosure of information, and maintaining the archive of information for twenty years. In the context of Nepal, the need for classification has become mandatory to increase public access to information. Public bodies are not even maintaining periodic proactive disclosure of information. On the other side, the RTI Act has a provision for exemption, which creates a hurdle for not providing information when requested. According to sub-clause 3 of clause 3 of the RTI Act, the information items to be kept confidential are as follows:

(a) which seriously jeopardizes the sovereignty, integrity, national security, public peace, stability, and international relations of Nepal.
(b) which directly affects the investigation, inquiry, and prosecution of a crime.
(c) Which seriously affects the protection of economic, trade, or monetary interest, intellectual property, banking, or trade privacy?
(d) Which directly jeopardizes the harmonious relationships that persist among various castes or communities?
(e) which interferes with individual privacy and security of body, life, property, or health.

Information related to these issues has not been disseminated, indicating the absence of classification. A 'classification of information' has been envisaged to protect and manage the information under the provisions of the exception mentioned above. For this, in Clause 27 of the Act, a three-member Information Classification Committee has been established under the chairmanship of the Chief Secretary.

This committee will also recommend how long the information about the exceptions should be kept confidential and how to protect it. The Classification Committee may extend the period of confidentiality up to a maximum of thirty years, if necessary (clause 27.5). There is also a provision in the Act that the classification of information should be reviewed every ten years (clause 27.6). A person who is dissatisfied with the committee's classification can apply to the NIC for review of such information, and the Commission can take the necessary decisions (clauses 27.3 and 27.4).

Before the RTI Act of 2007, there was quite a struggle to pass it in Nepal. Although the Constitution of 1990 incorporated the right to information (Article 16), the state showed indifference to enacting a law. Requests were made for information on the issue of public concern, but such requests were denied. Then the cases were filed with the Supreme Court, asking for information in various cases (National Information Commission, 2009).

In the Ambassador Appointment Case (1992) filed by advocate Radheshyam Adhikari, the Tanakpur Dam Project Case (1992) filed by advocate Balakrishna Neupane, the Arun III hydropower project (1995) filed by Rajesh Gautam, and the case related to Gautama Buddha's birthplace Lumbini (1996) filed by Kashi Dahal, the Supreme Court explained the right to information and gave a directive order to provide information and formulate a law related to the RTI. But the government did not prepare the RTI law.

To demand the formulation of the RTI law, campaigns were started at the citizen level. The Federation of Nepali Journalists (FNJ) started the campaign by producing a model law in 1999 (based on personal communication with Suresh Acharya, the then chair of FNJ, on August 24, 2022). It had somehow created strong pressure on the government. The Nepal Press Institute and other civil society organizations were also involved in this campaign. The FNJ made a formal decision on December 22, 1999, and conducted pressure programs for making the RTI law. Interaction with parliamentarians and discussion programs on why the right to information is needed were held across the country (Kasajoo, 2013; Dahal & Kafle, 2011).

Only after the people's movement in 2006 was a special committee formed under the coordination of Kashiraj Dahal to draft the RTI Act. Parliament passed this Act in 2007 with some amendments on the recommendation of this committee. This act was

given great importance by the then-Parliament. The period itself has been set to come into force on the 30th day after the Act was approved by parliament. In other laws, the enactment period is not specified in this way, and it is written that it will start from the date specified by the government by publishing a notice in the gazette.

According to Kashiraj Dahal, convenor of the RTI Bill drafting committee, there are many examples of lax laws in Nepal. So that this does not happen in the case of RTI, some mandatory conditions have been laid down in the Act to make public bodies responsible (based on Personal Communication, 2022).

Although a classification committee has been arranged to manage the exception provisions of sub-clause 3 of clause 3 of the Act, the responsibility of public bodies has been determined in other general cases. Clause 4 reads that it is the responsibility of every public body to respect and protect citizens' right to information. For ensuring that thrust, the public body shall (1) categorize and update the information and make it public, publish and broadcast periodically, (2) make citizens' access to information simple and easy, (3) conduct the function of public bodies in an open and transparent manner, and (4) provide adequate training and education for their employees (clause 4.2 of the RTI Act).

In addition, the public body should, as far as possible, update the information related to its body up to at least 20 years before the implementation of the Act (clause 5.2). Even if citizens do not demand information, it has been made mandatory for public bodies to disclose proactively 20 types of information about their activities in each of the next three months (13 types of information as mentioned in clause 5.3 of the Act and 7 types of information as mentioned in clause 3 of the RTI Regulation).

Similarly, in clause 7.2, it has been mentioned that there are two types of information that can be provided immediately and which cannot be provided immediately. The information that can be given immediately must be provided to the requester immediately, and if not, within 15 days of receiving the application. In this clause, there is a provision that only Nepali citizens can ask for information. The practice of proactive disclosure and asking for information is increasing after the implementation of the Act. Although there is no integrated record of how much information was requested and given by which public agency in which year, based on the number of appeals for information (Table 1), it can be easily assumed that the trend and practice of the RTI are expanding.

**Table 1**

*The Number of Appeals, Complaint and Application at the NIC*

| Fiscal Year | Appeal, Complaint and Application number | Cleared | Percentage |
|---|---|---|---|
| 2009 (2065-66) | 12 | 11 | 91.67 |
| 2010 (2066-67) | 39 | 29 | 74.36 |
| 2011 (2067-68) | 47 | 22 | 46.81 |
| 2012 (2068-69) | 136 | 90 | 66.18 |
| 2013 (2069-70) | 260 | 199 | 76.55 |
| 2014 (2070-71) | 470 | 409 | 87.02 |
| 2015 (2071-72) | 777 | 765 | 98.45 |
| 2016 (2072-73) | 678 | 674 | 99.41 |
| 2017 (2073-74) | 497 | 494 | 99.79 |
| 2018 (2074-75) | 1176 | 1175 | 99.99 |
| 2019 (2075-76) | 1144 | 1144 | 100 |
| 2020 (2076-77) | 1013 | 1013 | 100 |
| 2021 (2077-78) | 753 | 742 | 98.53 |
| 2022 (2078-79) | 1083 | 1077 | 99.44 |

*Source:* NIC Annual Report, 2022 (2078/079) (pp. 9-10)

**Attempts at Classifying Information**

In accordance with the provision of forming a committee under the chairmanship of the chief secretary for classification of information, seven chief secretaries have completed their tenure since the enactment of this Act (Office of the Prime Minister and Council of Ministers, 2023). On June 16, 2023, the new chief secretary, Baikuntha Aryal, was appointed, and his tenure is yet to be reviewed. But classification was attempted during the period of the three chief secretaries mentioned below, but none of the classifications could be valid.

**Table 2**

*Attempts Made to Classify Information so Far*

| Attempts made | When | Policy areas of information | Remarks |
|---|---|---|---|
| 1st Classification (during the tenure of chief secretary Dr. Bhojraj Ghimire | 22 December 2008 (2065 Poush 7) | 154 points | NIC ordered for reclassification on 4 December 2009 (2066 Mangsir 19). |

| | | | |
|---|---|---|---|
| 2nd Classification (during the tenure of chief secretary Madhav Prasad Ghimire) | 14 December 2011 (2068 Mangsir 28) | 88 points | Dismissed by the Supreme Court in the case registered against the classification by ARTI Nepal organization. |
| 3rd Classification (during the tenure of chief secretary Shankardas Bairagi) | 13 January 2023 (2079 Poush 29) | 87 points | Based on the date it was sent to the NIC for consultation. This classification is not on the public domain. |

*Source:* prepared by author using various documents

**First Attempt**

The first classification was accomplished on December 22, 2008 (2065/9/7 B.S.) during the tenure of Chief Secretary Dr. Bhojraj Ghimire. In this classification, information was classified into 154 points. But the National Information Commission ordered reclassification on December 4, 2009 (2066/8/19 B.S.), saying that this classification was unacceptable.

The NIC reminded the principle of maximum disclosure that the Act has adopted. Some of the issues of the classification do not match the essence of the RTI Act. The decision of the NIC is as follows:

Overall, the classification seems to be contrary to the spirit, intent, and objective of the RTI Act, 2007. Therefore, keeping in mind the provisions of sub-clauses 2 and 3 of clause 27 of the Act, the NIC recommends reviewing the classification as soon as possible in accordance with clause 19(f) of this Act. (Excerpt from Appendix 7 of the Commission's Second Annual Report 2066-2067)

No reasonable and sufficient reason has been given in the classification why any information should be kept confidential or why it should be kept secret for a certain year. In addition, certain standards have not been determined about the information, "including the method of protection." In other words, important information such as how confidential information is protected, the medium, and the physical and chemical measures or techniques to be used are not included in the classification.

Similarly, the first point of point no. 2 of the classification, "If the law specifies a period for the subject to be kept confidential, then the same period, if not, until the period determined by the head of the relevant agency considering the nature of the subject," is to maintain the provision of the old law, which contradicts the Right to Information Act. It seems that the head of the agency is given the right to make

it public or not. In addition, the committee has delegated the right to determine the period of time to the head of the concerned agency by saying that "up to the period determined by the head of the concerned body considering the nature of the subject." But there is no such arrangement in the Act.

**Second Classification**

The second classification was classified into 88 points on 8/28/2068 B.S. during the tenure of Chief Secretary Madhav Prasad Ghimire. Against this classification, Ramkrishna Timalsena of an organization called ARTI, filed a case in the Supreme Court, and the court held that classification invalid and ordered to reclassify it on Bhadra 24, 2072 B.S. In this judgment of the court, it was also reminded to be liberal in providing information, saying that there is no obstacle to providing information except for the provisions of exception.

The Supreme Court on 24 Bhadra 2072 B.S. against the second classification said:

According to Section 27(1) of the Act, the decision made by the committee on the date Mangsir 26, 2068 B.S. to classify the information to be kept confidential and the letter issued to implement that decision on the date Magh 1, 2068 B.S. are not in accordance with the law. That letter had also been canceled by issuing a certiorari order.

In that decision, it is said that until the reclassification in the areas of exception of Section 3(3) of the Act, the matter will be kept in abeyance and other information will be issued in accordance with the provisions of Sections 3(1) and 3(2). In other words, in sections 3(1) and 3(2), it is mentioned that every Nepali citizen has access to information in public bodies.

**Third Classification**

During the tenure of Chief Secretary Shankardas Bairagi, a document was sent to the National Information Commission on Poush 29, 2079 B.S. stating that the information was classified. It was not made public when the decision was taken by the committee led by the Chief Secretary. Although the information was classified into 87 policy points, this classification was not made public after immediate opposition from the concerned agencies.

After opposing the third classification, Prime Minister Pushpa Kamal Dahal's official Facebook page, C. Prachanda/Comrade Prachanda, wrote on January 29, 2023: "The government of Nepal has taken serious note of the concerns expressed by various agencies regarding the decision made by the Committee on Classification of Information. Tomorrow, Monday, the necessary decision will be taken to solve

the problem after discussing it with the concerned parties." In the meeting with the stakeholders, the Prime Minister said that the classification will only be revised and made public, but no further progress regarding the classification has been made public.

Freedom Forum (2023) has mentioned that the classification committee has classified information in a way that is against the spirit of the Constitution, the Right to Information Act, and the order of the Supreme Court. The Freedom Forum protested that many issues, including tax evasion and fraud, public procurement, meetings of dignitaries, and information to be presented for the government's decision, are classified as confidential.

## Discussion

Even after the provisions of the Constitution, the Act, and the verdict of the Supreme Court, it has become clear that the government is not honest in the classification of information. The non-acceptance of all three attempts to classify information so far shows that the government is not serious.

Why is the provision of classification in the Act kept? Kashiraj Dahal, who was also the drafter of this Act, said that the provision of classification has been kept for the effectiveness of the Act.

The Secrecy of Documents Act 2039 was neither repealed nor implemented in Nepal. In the year 2074, that law was amended to make it up-to-date. It is said that the government of Nepal will publish a notice in the Gazette and implement it. But that has not been done yet. The matter of the classification of documents is in it. But it could not be implemented. In one section, we have mentioned the classification of information so that the government will frustrate the Right to Information Act by not enacting another law (based on a personal conversation, 2078).

Information classification is not included in the law in other countries like the USA, UK, and India. Provisions such as protection of whistleblowers and non-guilty disclosure of information with good intentions have also been put in place. But the former Chief Information Commissioner, Krishnahari Baskota, said that there is no good intention when classifying information in Nepal.

Seriousness is not shown in the information classification. It has been done. For example, it was said that the decisions of secretaries' meetings led by the chief secretary should not be made public. Will it affect the sovereignty of the country? Will it affect the court's decision? Will it affect the economy? Will it destroy racial harmony? Invading privacy? The classification could not say the reason why the decision of the secretaries was not made public (based on personal conversation, 2078).

In the classification documents, it is stated that "the period of confidentiality of

information shall be as specified, and the head of the office shall decide on unspecified matters." From this, there is a risk that the heads of the office may impose arbitrary decisions.

In the classification documents, the subjects to be kept secret by the ministry have been listed. Subjects and procedures other than the exceptions mentioned in the Act are also kept in the secret category. The judgment of the Supreme Court had also mandated the government to transmit other information except for the provisions of the exceptions in Section 3(3) a to e. It should not be classified on grounds other than Section 3(3) of the Act. But according to this, work has not been done yet.

In all the attempts at classification, it has not been made public who the members of the classification committee were besides the chief secretary. The staff-led committee does not seem to be working to take on any challenges. They still do not have an open and transparent psychology.

Although information classification documents were prepared, they were not completed completely. It was not specified which information would remain confidential for how long. Likewise, no reasonable reason has been given as to why the information should not be made public. Clear grounds for confidentiality should be disclosed.

Without being clear as to what is sensitive information and why, administrative psychology has been categorized with provisions such as secretaries led by secretaries. Efforts have been made to accommodate issues related to public interest and concern.

Procedural information flow is prohibited in all classifications. In many cases, it is written that the information should not be made public until a decision is made. In a country like Nepal, where democratic practice has not matured, it is seen that it takes a long time to take a decision on an important issue. Only after people tried to self-immolate was the citizenship law amended and implemented. After the loan shark victims protested for months in Kathmandu, the law was finally made. For the improvement of medical education, Dr. Govinda K.C. staged fast-unto-death for the 16th time, and there was some improvement.

In the classification, there is a provision that general contracts and project contracts submitted to the ministry will not be made public until a decision is made. In any case, people have expectations about how the state agencies are doing. It seems that information about the procedural period has been classified in such a way that it is not made public.

In the RTI Act, information has been classified into those that can be provided immediately and those that cannot, but the public bodies have not shown activeness for the proactive flow of information.

## Conclusion

The state has become apathetic about making the state's operations open and transparent in accordance with the democratic system. It is necessary for the state to be accountable to its citizens. It is important to increase the practice of information classification with a liberal mindset in order to provide simple and easy access to citizens.

If the mentality cannot be made liberal, then the provision of information classification should be abolished, and the implementation of the remaining provisions of the RTI Act will gain more speed. Other laws also protect the sensitive information of the state, and it would not be necessary to keep provisions in the RTI Act for protecting sensitive information.

Although there is no right, public bodies must also classify the information to ensure proper internal management. This is an administrative exercise. This should be done regularly. Even within the office, only certain senior officials can see the documents that are kept in the sensitive category. Information management tasks should be given priority. Information kept confidential for a limited period should be brought into the open flow after the purpose is over. In the context of Nepal, the matter of paying and evasioning tax and judicial committee reports fall under this category.

Therefore, with regard to the right to information, public bodies should be aware that the principle of maximum disclosure and the limited use of the provisions of exceptions should be kept in mind with regard to policy standards.

Public bodies should provide their employees with updates on the use and exercise of the right to information. This practice seems very narrow. The availability of resources is important for law enforcement.

The implementer's awareness and strong acceptance of the policy also seem to be weak. Office heads and information officers should be motivated.

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