



# ADMISSIBILITY AND PROOF OF RTI DOCUMENTS UNDER THE INDIAN EVIDENCE ACT

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**Abstract** The Right to Information Act, 2005 ('RTI Act') is frequently used in civil and criminal litigation to obtain government documents. However, the RTI Act is silent about the admissibility and proof of such documents in a trial. High Courts across the country have interpreted the Indian Evidence Act, 1872 and handed down conflicting decisions in this regard. Through an examination of these decisions and a reading of the provisions relating to documentary evidence, we argue that copies of public documents obtained under the RTI Act should be treated as certified copies of public documents and directly be admitted in evidence. Similarly, response letters from RTI officials are primary evidence of public documents and should similarly be admitted without any corroborating oral evidence. While there might be concerns that this approach might violate the rule against multiple hearsay evidence, such fears are unwarranted. This approach would not only be correct in law, but would also avoid unnecessary delays in an extremely overburdened judicial system.

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## I. INTRODUCTION

The RTI Act and its predecessor, the Freedom of Information Act, 2002, were introduced to increase access to information and thereby increase transparency.<sup>1</sup> The RTI Act provides that, upon a written request by a person, the designated Public Information Officer ('PIO') must supply the information sought within a period of thirty days.<sup>2</sup> This information includes the right to receive certified copies of documents and records, or to take inspections pertaining to such bodies which are covered under the RTI Act.<sup>3</sup>

In criminal trials, the RTI Act has been extensively used to obtain information about the investigation process, for instance station diaries, police registers and logbooks, forensic science laboratory registers, letters written by the police to various authorities, as well as information about witnesses, such as antecedents. Similarly, in civil suits, the RTI Act has been used to obtain documents, such as sale deeds, filed with public authorities. Suits against the government, understandably, see the RTI Act used quite extensively as well.<sup>4</sup>

Although the purpose of the RTI Act was to tackle corruption and ensure transparency,<sup>5</sup> it is silent on the use of documents obtained thereunder as evidence in courts in the manner laid down by the Indian Evidence Act, 1872 ('Evidence Act'). Questions have arisen across courts with respect to the admissibility and manner of proof of these documents. Courts, however,

<sup>1</sup> Right to Information Act 2005, Statement of Objects and Reasons; Freedom of Information Act 2002, Statement of Objects and Reasons.

<sup>2</sup> Right to Information Act 2005, ss 6 and 7.

<sup>3</sup> Right to Information Act 2005, s 2(f). Certain subjects are excluded from the purview of the RTI Act, including information which would impede an investigation or prosecution. These exclusions are covered under Section 8 of the RTI Act. However, the scope of this and other exclusions is not the subject matter of this paper.

<sup>4</sup> There is a catena of cases in which such information has been sought. For instance, see *Rajinder Jaina v Chief Information Commissioner* 2009 SCC OnLine Del 3511; *Chander Bhushan Anand v Finance Department of Chandigarh Administration* 2009 SCC OnLine CIC 871; *Deputy Commissioner of Police v DK Sharma* 2010 SCC OnLine Del 4454; *Samir Zaveri v Public Information Officer* 2015 SCC OnLine CIC 11875. Also see Central Information Commission, *Some Case Laws on Frequently Sought Information* <<https://cic.gov.in/sites/default/files/court%20orders/HCS.pdf>> accessed 16 May 2020.

<sup>5</sup> Apart from the Statement of Objects and Reasons, speeches in Parliament also speak of using the RTI Act to increase accountability. For instance, Dr Manmohan Singh, the then Prime Minister, in his speech in the Lok Sabha on the day the RTI Bill came to be adopted by the House, said: "For institutions to be efficient and effective, they must function in a transparent, responsive and accountable manner. This is dependent not only on processes internal to the institutions but also on the ability of citizens and external agents to enforce their rights, vis-à-vis these very institutions. The Right to Information Bill, Sir, will bring into force another right which will empower the citizen in this regard and ensure that our institutions and their functionaries discharge their duties in the desired manner. It will bring into effect a critical right for enforcing other rights and fill a vital gap in a citizen's framework of rights." Statement by the Prime Minister, 'Consideration of the Right to Information Bill 2004' (Lok Sabha, 11 May 2005) <[http://loksabhaph.nic.in/Debates/Result\\_Archive.aspx?dbsl=1402351](http://loksabhaph.nic.in/Debates/Result_Archive.aspx?dbsl=1402351)> accessed 16 May 2020.

are divided on whether documents obtained under the RTI Act can be led in evidence and also on how such evidence must be led, if they are held to be admissible. While some courts have held that RTI documents can directly be read in evidence, others have either held that they are inadmissible or that witnesses must be examined in order to prove them in evidence. There need to be uniform rules of admissibility and proof. Documents found to be admissible by a trial court should not be rejected by the appellate court either as being inherently inadmissible or having been insufficiently proved. This issue is of utmost urgency for practitioners as it could cause grave prejudice to litigants.

In this paper, we seek a way forward in proving responses obtained under the RTI Act through a reading of the provisions of the Evidence Act and keeping in mind the need to avoid unnecessary delays in trials. We focus on the two primary types of responses that are obtained under the RTI Act: (i) Copies of 'public documents'; and (ii) Answers or data given by the PIO to queries that may have been posed by the applicant.<sup>6</sup> We advocate that both these kinds of responses should directly be read in evidence, without corroborating oral evidence. In an overburdened judiciary plagued by backlogs, the recording of oral evidence is already an extremely time-consuming procedure.<sup>7</sup> Requiring a PIO or any other government servant to appear in court to prove such documents would be a huge burden on the exchequer and inexorably delay trials.

While undoubtedly normatively desirable, the Evidence Act does not appear to easily align with dispensing with the examination of PIOs. In 1872, when the Evidence Act was enacted, such access to government documents was not conceived of. However, we argue that the correct reading of the Evidence Act would permit the interpretation that we advance.

We divide this paper into three parts. In Part II, we briefly describe the scheme of the Evidence Act dealing with documentary evidence. In particular, we focus on the proof of public documents under Sections 35 and 77 of the Evidence Act in order to lay the necessary foundation for further discussion. In Part III, we consider the admissibility as secondary evidence and mode of

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<sup>6</sup> For instance, an application seeking the number of crimes registered in a police station in a certain year might merely receive the response '224' with no documents annexed. A sample has been included at Annexure I. As this paper is only concerned with the admissibility and proof of RTI documents as documentary evidence, samples, models, other kinds of 'information' that may be obtained under the RTI Act are not addressed in this paper. Information obtained in electronic form, for instance, could also be sought to be proved in evidence and might raise evidentiary issues under Section 65B of the Evidence Act. However, we are limiting the scope of this paper to the two kinds of documents mentioned above because these are the most common types of responses and issues that routinely arise in courts.

<sup>7</sup> Law Commission of India, *Delays and Arrears in Trial Courts* (Law Comm No 77, 1978) <<http://lawcommissionofindia.nic.in/51-100/Report77.pdf>> accessed 26 June 2020, 18, 41; Law Commission of India, *Expedition Investigation and Trial of Criminal Cases of Influential Personalities* (Law Comm No 239, 2012) <<http://lawcommissionofindia.nic.in/reports/report239.pdf>> accessed 26 June 2020, 10.

proof of copies of documents received under the RTI Act. In Part IV, we consider the admissibility as evidence and mode of proof of responses, answers, or data received in letters from the PIO. We conclude by arguing that in order to avoid unnecessary delays in trials and to ensure that accused persons can use information about investigations, which are usually shrouded in mystery, a liberal approach ought to be taken regarding the admissibility of such documents.

## II. DOCUMENTARY EVIDENCE UNDER THE INDIAN EVIDENCE ACT, 1872

Under the Evidence Act, evidence is of two kinds: oral and documentary.<sup>8</sup>

Documentary evidence, in turn, can either be primary or secondary.<sup>9</sup> A document is primary evidence when the original document itself is produced before the court.<sup>10</sup> Secondary evidence in relation to documents includes certified copies of the original, photocopies, copies made by comparing with the original, counterparts of the document and oral accounts relating to the document.<sup>11</sup> However, secondary evidence with respect to a document can be led only in limited circumstances specified in the Evidence Act – for instance, where the original document cannot be produced because it has been lost or destroyed or in the possession of an adverse party. Secondary evidence is also permitted when the copies are those of public documents or are certified copies, that a law specifically permits to be given in evidence.<sup>12</sup> It is this type of secondary evidence that we are largely concerned with in this paper.

To prove a document, whether primary or secondary, it is generally essential to prove two things: authorship of the document and the authenticity of its contents.<sup>13</sup> Typically, the author of the document must be examined to identify

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<sup>8</sup> Indian Evidence Act 1872, ss 59 and 61.

<sup>9</sup> Indian Evidence Act 1872, s 61.

<sup>10</sup> Indian Evidence Act 1872, s 62.

<sup>11</sup> Indian Evidence Act 1872, s 63.

<sup>12</sup> Indian Evidence Act 1872, s 65.

<sup>13</sup> When a document is produced in a suit or a trial, the opposing party is first given the opportunity to admit or deny its contents. If the opposing party admits the contents of the documents, they are directly read in evidence. Only if the contents or genuineness of the documents is denied does evidence need to be led. See Civil Procedure Code 1908, o XII; Code of Criminal Procedure 1976, s 294.

In both, civil as well as criminal suits, the process of admission and denial is either mandatory or strongly encouraged across states. For instance, in criminal trials in Maharashtra, it is mandatory to call upon the opposing party to either admit or deny the documents under Section 294. AK Gupte and SD Dighe, *Criminal Manual- Issued by the High Court of Judicature (Appellate Side) Bombay* (6th edn, Hind Law House 2003) 173. An interesting example of the process not being mandatory, but strongly encouraged appears in the practice directions issued for civil suits by the Delhi High Court. The rules state that in case a party fails to call upon the opposing party to admit or deny documents, that party, even if successful in the suit, may be denied costs for the stage of evidence. 'Practice in the Trial of Civil

his handwriting, signature, and the contents of the document. If the author is dead or cannot be brought to court, any other witness, who is conversant with the handwriting/signature of the author and can attest to the genuineness of the contents of the document, may be examined.<sup>14</sup> This is considered sufficient to prove the authenticity of the document such that it can be relied upon by a court.

There are two kinds of exceptions to this rule. *First*, no witness needs to be examined to prove certified copies of public documents, records of evidence in judicial proceedings, Gazettes, newspapers, Acts of Parliament, and such other documents.<sup>15</sup> Section 74 of the Evidence Act defines public documents as documents forming the act or records of acts of the sovereign authorities, official bodies, tribunals and public officers of the legislative, judicial or executive of India or a foreign country. This also includes public records of private documents.<sup>16</sup> Certified copies of public documents can be produced as proof of the contents of the public documents of which they are copies.<sup>17</sup> Moreover, the contents of the documents are also presumed to be true.<sup>18</sup> Thus, Section 77 read with Section 79 of the Evidence Act obviate the need to examine the government official who authored the document as the certified copy is sufficient proof of the authorship as well as authenticity of the original.<sup>19</sup>

At this stage, it is also apposite to draw attention to public records of private documents, for instance, sale deeds filed with Registrars. While these are 'public documents' under Section 74(2), the certified copy alone is not sufficient to prove these documents. It is well-settled that the certified copy is merely proof of the fact that such a deed was filed or registered. However, it is not sufficient to prove the execution of the deed. For this, a witness must

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Suits' in *Court Rules* (High Court of Delhi) [12] <<http://delhihighcourt.nic.in/courtrules.asp>> accessed 23 June 2020.

<sup>14</sup> Indian Evidence Act 1872, ss 47, 67, and 73.

<sup>15</sup> Indian Evidence Act 1872, ss 79 to 85. See *Madamanchi Ramappa v Muthalur Bojjappa* AIR 1963 SC 1633 ('*Madamanchi Ramappa*'); *Jaswant Singh v Gurdev Singh* (2012) 1 SCC 425 ('*Jaswant Singh*').

<sup>16</sup> Indian Evidence Act 1872, s 74.

<sup>17</sup> Indian Evidence Act 1872, s 77.

<sup>18</sup> Indian Evidence Act 1872, s 79. Section 79 must also be read along with Section 114(e) of the Evidence Act.

<sup>19</sup> See *Madamanchi Ramappa* (n 15); *Jaswant Singh* (n 15). We are grateful to the anonymous reviewer for pointing out that in practice, some trial courts insist on the concerned officer herself producing the certified copy. In other words, as per this interpretation, Section 79 would mean that the certified copy is proof of the contents of the original, but that there is no assurance of the authenticity of the certified copy itself. In our opinion, if such a practice were to be followed, it would be incorrect. Section 77 is unambiguous in stating that a certified copy is sufficient proof of the original. Simultaneously, Section 76 envisages that officers must provide certified copies to any person who may demand one. Both these provisions ought to be read in consonance, and not isolation. We are also emboldened in this claim by the fact that even in cases where the authenticity or contents of the document were called into question, the Supreme Court has found that it would affect the *probative value* of the document and not its admissibility. See *Babloo Pasi v State of Jharkhand* (2008) 13 SCC 133.

be examined.<sup>20</sup> Throughout this paper, where ‘public documents’ are referred to, unless the context indicates otherwise, we mean public documents under Section 74(1) of the Evidence Act, and not public records of private documents under Section 74(2).

The *second* exception involves entries made in books of account, public or official books or registers.<sup>21</sup> For such documents, the author need not be examined. As per Section 35 of the Evidence Act, any such entry or record made by a public servant, or any other official, in the discharge of his duty is relevant and may be proved by any official who can show that the records were maintained in the ordinary course of official duty.<sup>22</sup> Section 35, however, deals only with relevance of such documents and not their mode of proof. It is quite possible that a document which is relevant under Section 35 may be proved through the production of a certified copy as prescribed under Section 77. Alternatively, to prove such documents, it has been held that any witness, not necessarily the author or even someone who knows the author’s handwriting, may be examined to prove the foundational facts that the book or register is regularly maintained in the ordinary course of duty. If these foundational facts are proved, the document can be relied upon by the court.

For instance, a frequent example is school registers which record the date of birth of children. Unlike the birth register maintained by the municipal corporation, it is not a public document. The certified copy, thus, cannot directly be read in evidence. Instead, the current principal of the school may testify as to the manner in which the school register is maintained. If he testifies that the register is regularly maintained in the ordinary course of duty, the contents of the register are considered to be proved even if the author has not been examined.<sup>23</sup> The rationale behind this provision is three-fold: (a) it is often impossible to always find the author, especially in case of entries in public records like birth registers; (b) it is presumed that such documents are not falsified as they are regularly maintained and there would be no incentive to falsify entries at the time they were made; and (c) public officials are presumed to carry out their duty honestly.<sup>24</sup>

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<sup>20</sup> *Rekha v Ratnashree* 2005 SCC OnLine MP 364 : AIR 2006 MP 107 (*‘Rekha’*).

<sup>21</sup> Indian Evidence Act 1872, ss 34 and 35.

<sup>22</sup> Indian Evidence Act 1872, s 35.

<sup>23</sup> For instance, see *Ram Suresh Singh v Prabhat Singh* (2009) 6 SCC681 : AIR 2009 SC 2805. A teacher, who was not employed at the school at the time the relevant entry was made in the register, was examined to prove the contents of the register and the manner in which it was maintained. Based on his testimony, and the fact that the entry appeared genuine, the register was held to be conclusive proof of the child’s age.

<sup>24</sup> For instance, the Supreme Court has often compared Section 35 to the Latin maxim *ante litem motam* (‘spoken before a lawsuit is brought’). See *Murugan alias Settu v State of Tamil Nadu* (2011) 6 SCC 111; *Umesh Chandra v State of Rajasthan* (1982) 2 SCC 202.

The genuineness of the acts of public officials and that of documents maintained in the ordinary course are also found in Sections 114(e) and 114(f) respectively.

With this brief background, the question of the admissibility and proof of documents obtained under the RTI Act can now be examined.

### III. DOCUMENTS RECEIVED UNDER THE RTI ACT

It is an uncontested position that documents received under the RTI Act, as photocopies, come squarely within the definition of secondary evidence under Section 63(2) of the Evidence Act. However, proving them as photocopies would mean that these documents would have to be proved in the manner prescribed under Section 65(a) to (d), as opposed to 65(f), which pertains to certified copies as opposed to photocopies. This leads to two time-consuming procedures in a trial in order to actually read the documents in RTI replies into evidence.

The first is that, as discussed above, photocopies can only be introduced as per the Evidence Act in limited circumstances. Before a party can introduce the document received under the RTI Act, she would be required to prove certain foundational facts: she would have to show to the court that the original document cannot be produced because it has been lost or destroyed or is in the possession of an adverse party. The party would, thus, have to produce a witness to testify to this effect.

The second difficulty arises in actually proving the documents received as a reply to the RTI application. For this, the concerned PIO would need to be examined. The officer would be required to identify her signature and testify to the fact that the document is a copy, made by a mechanical process, of the original. This difficulty would be severely compounded by the fact that the PIO would be testifying against the interests of his department, in case of criminal or government litigation. Only after the examination of these two witnesses, the document may be read in evidence.

Examining witnesses is the most time-consuming part of a trial and is responsible for long delays. Witnesses are difficult to locate, and once located, they have to be present on a day when the court has time to conduct the examination. In practice, it is an expensive and inefficient process involving issuance and service of summons and accommodating schedules of the court, witnesses, and lawyers. The Evidence Act recognizes these issues and allows for certain evidence to be introduced without the need for witnesses to testify.

Copies of public documents received under the RTI Act could potentially fall within one such exception: certified copies of public documents may directly be read in evidence.<sup>25</sup> In this section, therefore, we ask two questions in order to examine whether this exception may be availed of: *first*, do copies

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<sup>25</sup> Indian Evidence Act 1872, s 77.

of documents received under the RTI Act qualify as certified copies under the Evidence Act; and *secondly*, whether they can be relied upon without the need for proving any foundational facts.

### **A. Are Documents Received Under the RTI Act Certified Copies of Public Documents?**

Section 63(1) defines secondary evidence as certified copies given under the provisions of the Evidence Act. This has to be read with Section 76, which defines certified copies as copies of those public documents in the custody of a public officer which a private citizen has a right to inspect, given along with a certificate that the same is a true copy. The certificate must also carry the name, signature, and seal of the officer issuing the copy.<sup>26</sup> Therefore, the two requirements under Section 76 are: *first*, a person must have a right to inspect a document; and *secondly*, there must be a certificate stating that the document procured is a true copy along with the details of the officer involved.

The RTI Act is the general law with respect to seeking inspection of documents. The definition of the right to information itself includes the right not merely to obtain copies, but also to inspect documents.<sup>27</sup> Thus, the first requirement is fulfilled. Further, documents received under the RTI Act are accompanied by a letter from the PIO stating that true copies of the requested documents are annexed. The annexed documents bear the seal of the Officer and a 'True Copy' stamp. Thus, the second requirement is also fulfilled, and documents received under the RTI Act, when concerned with public documents, can be considered certified copies of public documents as per the provisions of the Evidence Act.<sup>28</sup>

<sup>26</sup> Indian Evidence Act 1872, s 76. It reads: "Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is true copy of such document or part thereof, as the case may be and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation – Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."

<sup>27</sup> Right to Information Act 2005, s 2(j). It reads: "'right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

- (i) inspection of work, documents, records;
- (ii) taking notes, extracts or certified copies of documents or records;
- (iii) taking certified samples of material;
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

<sup>28</sup> It is interesting to note that parallels were drawn between Section 75 and the right to information by the legislature. The Standing Committee considering the Freedom of Information Bill,

However, certain issues have been raised in this regard. The High Court of Andhra Pradesh ('AP High Court') in 2013 found that 'certified copies' are different from 'true copies' supplied under the RTI Act. In *Bhaskar Rao v. KA Rama Rao*, a single-judge bench of the AP High Court observed: "Further, none of the said documents are certified copies and only the Xerox copies of the documents are certified as true copies under the Right to Information Act. True copies cannot, therefore, be equated to certified copies under the Evidence Act."<sup>29</sup> The Court neither provided reasoning for arriving at this conclusion nor stated what the difference between true copies and certified copies might be.

This decision was considered again by the AP High Court in *Datti Kameswari v. Singam Rao Sarath Chandra*.<sup>30</sup> The Court in *Datti Kameswari* found that, "if a document is obtained under the Right to Information Act from a competent Authority, it can be asked to be taken as a certified copy if the original satisfies the definition of public document."<sup>31</sup> In coming to this conclusion, it differed from *Bhaskar Rao* since the latter had ruled that all RTI documents do not constitute certified copies, without any distinction between public documents and public records of private documents.<sup>32</sup> The Court in *Bhaskar Rao*, on facts, also appeared to be concerned with public documents and not public records of private documents. However, *Datti Kameswari* ruled that the observations of the earlier court in *Bhaskar Rao* were limited to the facts of that particular case, without elucidating why this was the case. As both judgments are by benches of co-ordinate strength, the earlier decision could not have been overruled. Instead, an unclear and unspecified distinction was made on facts in order to arrive at a different conclusion.

In *Narayan Singh v. Kallaram*,<sup>33</sup> the Madhya Pradesh High Court ('MP High Court'), like the AP High Court did in *Datti Kameswari*, concluded that true copies under the RTI Act are the same as 'certified copies'. The MP High

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2000 (the predecessor of the RTI Act) heard Mr AG Noorani, who is considered a leading constitutional expert. The report states: "Shri AG Noorani stated that as per his interpretation Section 75 of the Indian Evidence Act 1872 already had the element of freedom of information." Department-related Parliamentary Standing Committee on Home Affairs, *Freedom of Information Bill, 2000* (RS 2001, 78), <[http://164.100.47.5/rs/book2/reports/home\\_aff/78threeport.htm](http://164.100.47.5/rs/book2/reports/home_aff/78threeport.htm)> accessed 16 May 2020.

<sup>29</sup> 2010 SCC OnLine AP 350 ('*Bhaskar Rao*').

<sup>30</sup> 2015 SCC OnLine Hyd 389 :AIR 2016 Hyd 112 ('*Datti Kameswari*').

<sup>31</sup> *Datti Kameswari* (n 30) [9].

<sup>32</sup> At this stage, it is appropriate to recall the distinction between public documents and public records of private documents (such as sale deeds kept with a Registry). As discussed in the previous part, certified copies of the latter do not prove themselves and require a witness to prove their execution. Therefore, while certified copies of such documents would also be 'certified copies', the evidentiary value would differ. Even copies received under the RTI Act must be treated in the same manner. As this controversy has been settled, and is not specific to the proof of such copies received under the RTI Act, we shall not be addressing it in this paper. See *Rekha* (n 20); *Datti Kameswari* (n 30).

<sup>33</sup> 2015 SCC OnLine MP 281 : AIR 2015 MP 186 ('*Narayan Singh*').

Court, however, provided reasons for arriving at this conclusion. It relied on the definition of ‘right to information’ under the RTI Act<sup>34</sup> which envisages receiving ‘certified copies’ of documents.<sup>35</sup> The Act does not speak of true or attested copies. At the same time, the Court relied on the definition of ‘certified copies’ in the Black’s Law Dictionary, which defines them as copies signed or certified to be true copies by the officer in possession of the original.<sup>36</sup>

We believe that the MP High Court has taken the correct approach, considering the earlier discussed statutory provisions. A reply to an RTI application for a public document amply fulfills all the requirements of Section 76 and, therefore, constitutes certified copies as envisaged under Section 63(1) of the Evidence Act. The distinction made by *Bhaskar Rao* between ‘certified copies’ and ‘true copies’ is falsified by the statute itself. Section 76 of the Evidence Act itself envisages that a certified copy would bear the endorsement of the copy being a ‘true copy’ as is the case with copies being issued by PIOs in practice. Moreover, the RTI Act’s use of the phrase ‘certified copy’ indicates that the distinction between a ‘true’ and ‘certified’ copy is not in accordance with the legislative scheme.

Thus, copies of public documents received under the RTI Act are certified copies within the meaning of Section 63(1) read with Section 76 of the Evidence Act. Once this is established, the Evidence Act allows for them to be directly read in evidence without any further oral corroboration, as we argue in Part III(B) below.

## **B. Can Certified Copies Received Under the RTI Act be Read Directly in Evidence?**

As per Section 77 of the Evidence Act, certified copies of public documents can be produced directly as evidence of the contents of public documents without the need to summon any witnesses.<sup>37</sup> The logical extension should then be that certified copies of public documents received under the RTI Act should be directly admissible in evidence without the cumbersome process of having to call upon the concerned PIO.

Once again, the MP High Court had the earliest occasion to address this question in 2013. In *Mahesh Das v. Neeta*,<sup>38</sup> a number of documents elicited through the RTI Act had been filed before the trial court towards the end of the trial. On appeal, the High Court, without much discussion or deliberation, concluded that, “if some of the documents or any of them is covered under the

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<sup>34</sup> *ibid* [7], [8].

<sup>35</sup> Right to Information Act 2005, s2(j)(ii).

<sup>36</sup> *Narayan Singh* (n 33) [8].

<sup>37</sup> Indian Evidence Act 1872, s 77. See *Madamanchi Ramappa* (n 15); *Jaswant Singh* (n 15).

<sup>38</sup> 2013 SCC OnLine MP 7230.

definition of Public Documents defined under Section 76 of Evidence Act, then in that circumstances, the petitioners shall be at liberty to argue and demonstrate the case on the basis of such documents at the time of final arguments.<sup>39</sup> Therefore, if the document received under the RTI Act was a copy of a public document and not a private document filed with a public body (like a sale/trust deed lodged with a registry), it could directly be read in evidence as being a certified copy of a public document. In 2015, the High Court of Punjab and Haryana ('P&H High Court') in *Munshi Ram v. Balkar Singh* arrived at a similar conclusion without much debate.<sup>40</sup>

This conclusion is also supported by that of the AP High Court in *Datti Kameswari*. After having settled the question of admissibility as discussed earlier, the Court observed that no formal proof would be necessary to prove the documents in evidence.<sup>41</sup>

However, the issue became muddled up soon after. In *Reliance General Insurance Co Ltd v. Sameem*,<sup>42</sup> the P&H High Court, as in *Munshi Ram*, was faced with a copy of a driving license obtained under the RTI Act. The Court held:

“In my opinion, there is no quarrel with the proposition that a response elicited under the RTI Act could be a certified copy of public document if the document is covered under Section 74 of the Evidence Act. But the issue in the present case is that these documents were merely placed on record and no oral evidence was led. Had it been a case where an employee of the appellant had appeared to prove the RTI application and the reply, it could have been held that the driving license was fake. But in the absence of any person who appeared to testify to this effect, and was cross-examined, it would not be possible to come to the conclusion that the document placed on record was actually a public document.”<sup>43</sup>

Therefore, it appears that the Court believed that leading oral evidence as to the attendant circumstances was necessary in order to establish that the response was indeed received under the RTI Act. This is similar to the requirements for documents introduced under Sections 34 and 35 of the Evidence Act. It requires oral evidence not of the author of the document, but of any witness who can speak to the requirements laid down in these sections. Thus, the applicant who sent the RTI query and received the response or the PIO would

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<sup>39</sup> *ibid* [2].

<sup>40</sup> 2016 SCC OnLine P&H 11166 (*'Munshi Ram'*).

<sup>41</sup> *Datti Kameswari* (n 30) [9].

<sup>42</sup> 2018 SCC OnLine P&H 556.

<sup>43</sup> *ibid* [4].

be a competent witness to prove the copies of documents received under the RTI Act.

A judgment of a single-judge bench of the Bombay High Court in *Kumarpal N Shah v. Universal Mechanical Works(P) Ltd* posed further questions.<sup>44</sup> The Bombay High Court discussed the public-private distinction and cited with approval the conclusion arrived at in *Datti Kameswari*.<sup>45</sup> On facts, the plaintiff sought to mark a number of documents as exhibits in his evidence before the court. These included both private and public documents obtained under the RTI Act. The plaintiff could only testify to the sending of RTI applications and receipt of responses. The Court rightly held that the plaintiff was not competent to prove the private documents when the necessary pre-conditions to lead secondary evidence had not been satisfied. On the other hand, the Court went on to state that the copies of the public documents should be considered secondary evidence and marked as exhibits.<sup>46</sup> However, this does not indicate with certainty what the Court might have concluded if no witness were examined to lay the foundation of the sending and receipt of the RTI application and whether, in such a case, the Court would have permitted the marking of these documents as in *Munshi Ram* and *Datti Kameswari*.

We strongly believe that the position in *Munshi Ram* and *Datti Kameswari* is not only correct, but also normatively desirable. If the documents received under the RTI Act are admissible as certified copies of public documents, the benefit of Section 77 should not be denied. Once established that the documents before court are certified copies of public documents, there is no need to lead oral evidence to prove the document. The nature and context of RTI documents is evident from the PIO's accompanying letter and the seal affixed. Insisting on the examination of the PIO along with the RTI applicant would waste the time of the parties, the Court as well as a public functionary thereby unnecessarily delaying the proceedings and burdening the exchequer.

Direct reading in of documents received under the RTI Act also has a principled justification. Even the Best Evidence rule, which limits secondary evidence to only those situations wherein primary evidence cannot be produced, creates an exception for certified copies of public documents. This is because the certified copy has been obtained from a public officer who is presumed under the Evidence Act to act in good faith and perform her duty in a regular fashion.<sup>47</sup> This suggests that she both has the original primary document in her custody and that she has properly prepared the certified copy in a mechanical fashion with no tampering. Since the PIO providing the certified copy of

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<sup>44</sup> 2019 SCC OnLine Bom 1627 : AIR 2019 Bom 290 (*'Kumarpal Shah'*).

<sup>45</sup> *ibid* [45].

<sup>46</sup> *Kumarpal Shah* (n 44) [51].

<sup>47</sup> Indian Evidence Act 1872, s 114(e). Illustration (e) to Section 114 reads: "The Court may presume—... (e) That judicial and official acts have been regularly performed."

the public document is also a public official for whom the same presumptions would apply, the authenticity of the certified copy of a public document received from her under the RTI Act need not be doubted.

Our claim is further emboldened by the fact that the presumption of genuineness under Section 79 is a rebuttable one. Similarly, the presumption under Section 114(e) that an official act here, the issuance of the RTI, is performed regularly and correctly is rebuttable.<sup>48</sup> Consequently, if the adverse party doubts the authenticity of the documents or of the documents being received under the RTI Act, the PIO can be summoned to rebut this presumption if required.

Certified copies of public documents received in reply to RTI applications must, thus, be read directly in evidence. Having examined the admissibility and proof of copies of documents received under the RTI Act, we turn our attention to the second common kind of document – the response letters from PIOs, often containing answers or data, in the next Part.

#### IV. ANSWERS OR DATA RECEIVED UNDER THE RTI ACT

The RTI Act allows an individual to directly seek data from the concerned PIO. The reply to such an RTI Application will be a letter containing the information instead of photocopies of documents. For instance, an application was made to find out whether a government servant was on duty on a specified date and time in order to falsify his claim that he was an eye-witness to an offence committed at his office. The response, included at Annexure I, merely states the dates and times at which the person was on duty. Copies of roster or attendance-sheet itself were neither sought, nor received. This example indicates how such a letter containing information could be of use in a trial or a suit. This situation is different from those already discussed, as the information provided is not contained in a certified copy of an existing public document that can be directly introduced in evidence. Rather, such a letter is an original document itself, thereby constituting primary, and not secondary, evidence.

To our knowledge, the proof of such letters has never been considered in isolation. In *Munshi Ram*,<sup>49</sup> such responses were considered *along with* the certified copies of documents obtained. The document under consideration before the Court was not only the copy of the driving license obtained under the RTI Act, but also the *response* of the PIO. This response letter stated that a wrong license number was originally allotted by the traffic department but was subsequently changed to a different number. The High Court observed: “A response

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<sup>48</sup> See *Bhinka v Charan Singh* AIR 1959 SC 960.

<sup>49</sup> *Munshi Ram* (n 40).

through RTI is of a public officer and it is a public document and would require no further corroboration in the manner contemplated under Section 77 of the Evidence Act.<sup>50</sup>

This view appears to be incorrect in placing reliance upon Section 77. Section 77 is limited to certified copies of public documents, i.e., secondary evidence of original public documents, whereas responses received from PIOs, being produced in the form of original letters and not photocopies, are primary evidence under Section 62. Original documents are always admissible in evidence under the Evidence Act.<sup>51</sup>

The mode of proof of these documents, however, depends on whether these documents are considered public or private documents. Private documents must necessarily be proved in the ordinary course, which in our case would mean examining the PIO. Therefore, in this Part, we first argue that they must be considered public documents. However, unlike certified copies of public documents, it is unclear whether the originals of public documents can be directly read in evidence. Thus, our second question takes us into a decades-old debate about how primary evidence of public documents, i.e., the originals, must be proved in evidence. However, our response to this question raises issues of hearsay evidence. Therefore, this is the final issue that this part addresses.

### A. Are Letters from PIOs Public or Private Documents?

The P&H High Court in *Munshi Ram* evidently believed letters from PIOs were public documents.<sup>52</sup> This conclusion is also supported by a bare reading of the definition of public documents under Section 74. Amongst others, documents forming the acts or records of acts of public officers, legislative, judicial, or executive are considered public documents.<sup>53</sup> The response of a PIO, who by her very designation is a public officer, issued in the course of her duty under

<sup>50</sup> *ibid* [8]. As observed in the previous chapter, the decision of the P&H High Court was later interpreted by another Bench of the same Court in *Reliance General Insurance* to mean that a witness would need to be examined to prove the attendant circumstances. However, this does not seem to be what *Munshi Ram* itself states. Therefore, it is unclear whether such an interpretation would require a witness to be examined. Regardless, the present discussion of *Munshi Ram* is concerned primarily with the admissibility of such documents. The mode of their proof shall be considered in the proceeding paragraphs.

<sup>51</sup> Indian Evidence Act 1872, ss 62 and 64.

<sup>52</sup> *Munshi Ram* (n 40) [8].

<sup>53</sup> Indian Evidence Act 1872, s 74.

It reads: "The following documents are public documents:-

- (1) Documents forming the acts, or records of the acts-
  - (i) of the sovereign authority,
  - (ii) of official bodies and tribunals, and
  - (iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;
- (2) Public records kept [in any State] of private documents."

the RTI is surely a document forming an act of a public officer. Accordingly, the Court found that the document would be admissible.

The public or private nature of letters sent by executive officials was considered by the Lahore High Court back in the 1914 case of *Fazl Ahmad v. Emperor*.<sup>54</sup> Here, the officer in charge of the village marriage registry had forwarded an entry to the central registry. The entry stated that Mr. A had married Ms. M, who had divorced Mr. F a few months previously. On the next day, the village official wrote another letter to the central registry to not take action on the entry forwarded the previous day, as Mr. F had come to his office and stated that he never divorced Ms. M. The Court observed: "I do not think that such a report was a public document within the meaning of Section 74 of the Evidence Act; and if so, under S. 65, no secondary evidence of its contents could be given and Ex. P.A. should not have been received in evidence by the Magistrate who tried the bigamy case."<sup>55</sup> Notably, the Lahore High Court did not base its finding on the obviously poor probative of such a letter. Rather, it held that such a letter by a public official did not constitute a 'public document' for the purposes of Section 74 of the Evidence Act. Commentators cite this case to claim that letters by executive officials do not constitute public documents.<sup>56</sup> However, this broad claim appears to ignore that the Court's decision was based on the peculiar contents of the letter before it.

Leaving alone letters by public officials generally, responses by RTI officials in particular pose a peculiar question. A response to an RTI application is based on documents in the custody of the government. In the example of the witness on duty in the government hospital, the PIO would base her response on a public document, i.e., the attendance muster. Therefore, the response of a PIO raises issues as it is itself based on other public documents. Two contrary lines of decisions exist in cases involving documents analogous to RTI responses.

In *Oriental Insurance Co Ltd v. Poonam Keserwani*,<sup>57</sup> the letter in question was similar to an RTI response. An officer of the Regional Transport Office had issued a letter or certificate denying the issuance of a particular driving license that the person claimed to have in his name. The party that obtained this letter argued that it should directly be read in evidence as it was a public document. However, the Allahabad High Court held that while the register containing driving license records was a public document, a letter based on this register could not be considered a public document. It reasoned that this was because, unlike the letter, the maintenance of the register was statutorily

<sup>54</sup> 1913 SCC OnLine Lah 49 :AIR 1914 Lah 433 (*Fazl Ahmad*).

<sup>55</sup> *Fazl Ahmad* (n 54) [13].

<sup>56</sup> Shakil Ahmed Khan (ed), *Ratanlal & Dhirajlal on the Law of Evidence* (26th edn, LexisNexis 2017) 469.

<sup>57</sup> 2008 SCC OnLine All 1239 :(2009) 3 All LJ 613 (DB) (*Oriental Insurance*).

mandated and further, it could be inspected by the public.<sup>58</sup> Several decisions involving similar letters or certificates by traffic authorities in insurance claim cases have arrived at similar conclusions.<sup>59</sup> Analogously, it would appear that an RTI response, being based on documents or registers, is not a public document.

However, a decision of the Supreme Court involving another analogous document held to the contrary. In *Kanwar Lal Gupta v. Amar Nath Chawla*,<sup>60</sup> the Supreme Court was concerned with the mode of proof of a chart made by the police, which was based on reports made to the police by twenty-two different public officials. Similar to RTI responses based on an attendance roster or the letter by the traffic department based on a register of licenses, the chart was not the first record of the relevant information. Rather, the information in the chart was based on existing records. Moreover, the maintenance of the chart was not statutorily mandated. Despite this, the Supreme Court held that the chart was relevant under Section 35 of the Evidence Act and was admissible as it was a public document. Those opposing treating RTI responses as public documents could argue that the document in question in *Kanwar Lal* was not a letter, but a chart, whereas the other two cases discussed above, considered letters, finding them to be private documents. Moreover, *Oriental Insurance* and other decisions regarding letters by traffic authorities, though handed down by High Courts, are subsequent to *Kanwar Lal*.

In our opinion, however, responses by PIOs must be considered public documents. The definition of public documents under Section 74 does not specify the form of the document. It merely states that any document which forms an act or a record of an act of a 'public officer', whether of the executive, legislature, or judiciary, must be considered a public document. It is undeniable that a PIO is a 'public officer'. The response letters, moreover, are issued under a statutory duty. While these responses may be based on other public documents, we are fortified in our view by *Kanwar Lal* that this fact alone does not preclude them from being considered public documents. While preparing a document from another may raise questions about its probative value, it cannot change its nature from a public document to a private document as the latter question is based purely on a public officer having prepared the document in the course of her duty.

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<sup>58</sup> *Ibid* [11]-[14]. On the facts of the case, it appears that the discomfort of the court in admitting such a document arose not from its origin in a public office or not, but from the fact that the contents of the document themselves were hearsay in nature.

<sup>59</sup> See *New India Assurance Co Ltd v Sunder Singh Rathore* 2002 SCC OnLine Raj 991; *New India Assurance Co Ltd v Indu Bala* 2016 SCC Online HP 1449. All these cases were almost identical on facts and arrived at the same conclusion.

<sup>60</sup> (1975) 3 SCC 646 ('*Kanwar Lal*').

## B. How can Letters from PIOs be proved in Evidence?

If letters from RTI officers of the kind given in Annexure I are considered private documents, the PIO would necessarily have to be examined in order to prove his signature and the contents of the letter. Ironically, we encounter an issue if these letters are considered public documents, since then the reply constitutes a primary public document. Two views have been taken with respect to the proof of original public documents as primary evidence.

The *first* view is that the author of the public document must be examined to prove its contents, similar to the proof of private documents. This view is most clearly expressed in the judgment of the Bombay High Court in *CH Shah v. SS Malpathak*.<sup>61</sup> The Court reasoned that Section 79, which raises the presumption of genuineness of the certified copies of public documents does not apply to the originals thereof. Further, the Court observed that in the process of certifying the document, the officer certifying satisfies himself of the authenticity and accuracy of the copy. Finally, the Court stated that Sections 67 and 68 of the Evidence Act, which lay down the requirement of proof of signature of the author of the document, do not lay down an exception for public documents.<sup>62</sup> Based on these three reasons, the Bombay High Court concluded that the author of the public documents must be examined to prove the original as primary evidence.

As per this interpretation, it would be more difficult to prove an original public document than a certified copy of the same document (which can be directly read in evidence), implying that secondary evidence would be easier to lead. While it is true that no provision akin to Section 77 exists for public documents in the original, this leads to an absurd result. The Evidence Act expressly prefers primary evidence over secondary. In fact, Stephen, the framer of the Evidence Act, appears to have realized this absurdity and corrected it. In his *Digest* published in 1885, a few years after the Evidence Act was enacted, he introduced a Section 74 which does not appear in the Evidence Act. This section provides that a public document may be proved by its production before court in the original.<sup>63</sup>

Moreover, the Bombay High Court's rationale, that a certified copy is more reliable than the original as a consequence of the certification, does not bear scrutiny. The process of certifying a copy of the document does not add any sanctity to the *contents* of the document, but merely lends assurance to the fact that the copy is a true reflection of the original. The officer in custody of the

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<sup>61</sup> 1971 SCC OnLine Bom 104 :AIR 1973 Bom 14 (*'CH Shah'*). Also see *Superintendent and Remembrancer of Legal Affairs v Moazzem Hossain* 1946 SCC OnLine Cal 221 : AIR 1947 Cal 318; *In re, Tarit Kanti Biswas* 1917 SCC OnLine Cal 117.

<sup>62</sup> *CH Shah* (n 61) [5].

<sup>63</sup> James Fitzjames Stephen, *A Digest of the Law of Evidence* (New York 1887) 142.

document need not be aware of the authorship or authenticity of the contents themselves. Therefore, to state that a certified copy is more reliable than the original is fallacious.

Additionally, the reason Section 77 grants this privileged position to certified copies of public documents is that the certification is by a public officer who is presumed to conduct his actions in a proper manner. However, there is no reason why such a presumption, under Section 114(e) of the Evidence Act, should not be made in favour of public documents in the original as well. Even the original public document will have been signed and/or executed by a public officer who must also be presumed to conduct his actions in a proper manner.

Fortunately, a *second* view has been taken by other High Courts. While not explicitly referring to *CH Shah*, the Supreme Court appears to have impliedly overruled the view taken by the Bombay High Court. As per this second view, the original of a public document can be proved as primary evidence without examining any witnesses.

In *Kanwar Lal*,<sup>64</sup> discussed in the previous section, the Supreme Court was concerned with the mode of proof of a chart made by the police based on reports by public officers in the discharge of their official duties. The Supreme Court held:

“The first respondent then contended that if this chart were treated as evidence, he would be deprived of an opportunity of cross-examining the CID officers who made the reports or maintained the official records from which the chart was prepared. But that is no argument, because even if the reports made by CID officers or the official records maintained by them had been produced by the Inspector General of Police, they would have been admissible in evidence under the first part of Section 35 of the Evidence Act, *without any oral evidence as to their contents being required to be given by the CID officers who made the reports or maintained the official records* (emphasis supplied).”<sup>65</sup>

Thus, the Supreme Court held that the chart, being primary evidence of a public document, could directly be read in evidence without the need to examine further witnesses. The Calcutta High Court subsequently observed that this finding of the Supreme Court amounted to an implied overruling of the position taken in *CH Shah* by the Bombay High Court.<sup>66</sup> Relying on *Kanwar Lal*,

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<sup>64</sup> (1975) 3 SCC 646.

<sup>65</sup> *Ibid* [28].

<sup>66</sup> *Octavious Steel Co Ltd v Endogram Tea Co Ltd* 1979 SCC OnLine Cal 143 : AIR 1980 Cal 83 (*‘Octavious Steel’*) [8].

the Calcutta High Court went on to hold that there was no need to examine a witness to prove such documents in evidence.

Even prior to the decision of the Supreme Court in *Kanwar Lal Gupta*, the Allahabad High Court took a view contrary to that of the Bombay High Court. This decision of the Allahabad High Court was, in fact, mentioned by the Bombay High Court though not followed. The Allahabad High Court had observed that, “if a certified copy of such a document is admissible without further evidence, we see no reason why the original should not be presumed to be genuine when the original itself is produced”.<sup>67</sup>

Similarly, a Full Bench of the Orissa High Court directed that an electoral roll, being a public document, may directly be read in evidence.<sup>68</sup> The Full Bench sought assurance for its conclusion in Section 81 of the Evidence Act. Similar to Section 79, which presumes certified copies of public documents to be true, Section 81 states that Gazettes, newspapers, Acts of Parliament, and documents directed to be kept by any person when kept in the form required by law, and when produced from such custody, are presumed to be true.<sup>69</sup> The Court interpreted Section 81 to mean that all public documents must be presumed to be genuine. As a consequence, the Court held that it was neither necessary to lead evidence as to the origin of the document (or other foundational facts) nor was it necessary to examine its author.<sup>70</sup>

The MP High Court also arrived at the same conclusion through an alternate route. The Court purposively interpreted Section 77, stating that it was enacted merely in order to obviate the need to produce the originals of public documents before courts and thus the originals of public documents do not require additional proof to be read in evidence.<sup>71</sup>

Along with the Supreme Court decision in *Kanwar Lal*, there thus appear to have been a number of High Court decisions allowing originals of public documents to be directly read in evidence, similar to their certified copies.<sup>72</sup> While each judgment used a different route to arrive at the same conclusion, the underlying premise is unimpeachable—secondary evidence cannot be superior to primary evidence of the same document.

Consequently, we believe that if RTI letters or responses are considered public documents, they should directly be read in evidence without requiring

<sup>67</sup> *Sagar Mal v State* 1951 SCC OnLine All 65 :AIR 1951 All 816. This decision was followed in *State v Jangir Singh* 1953 SCC OnLine Pepsu 45 :AIR 1954 Pepsu 84.

<sup>68</sup> *Kirtan Sahu v Thakur Sahu* 1971 SCCOnLineOri214 :AIR 1972 Ori 158 (*Kirtan Sahu*).

<sup>69</sup> Indian Evidence Act 1872, s 81.

<sup>70</sup> *Kirtan Sahu* (n 68) [12].

<sup>71</sup> *Mamta Awasthy v Ajay Kumar Shrivastava* 2011 SCCOnLine MP 331 :AIR 2011 MP 166.

<sup>72</sup> See *Dhanpat v State* 1959 SCC OnLine All 275 : AIR 1960 All 40; *Tukaram S Dighole v Manikrao Shivaji Kokate* (2010) 4 SCC 329.

any corroborating oral evidence. Thus, while the P&H High Court in *Munshi Ram* arrived at the correct mode of proof, it did so through an incorrect route.

### C. Does Reading Directly Public Documents Violate the Rule Against Hearsay Evidence?

The conclusion that public documents should directly be read in evidence raises an issue of admissibility although at first glance, their nature as primary evidence obviates any doubt as to admissibility.

The requirement for oral evidence of the author of the document to prove its contents is based on the rule against hearsay evidence. Contents of a document are nothing but statements by its author and thus admitting a document in evidence without examining its author is akin to permitting leading of hearsay evidence.<sup>73</sup> The exemption for examination of the author for certified copies of public documents under Section 77 of the Evidence Act, therefore, is an exception to the rule against hearsay evidence. Though the author is not examined, the document is not only taken to be genuine in terms of its existence, but its contents are also assumed to be genuine.

Responses by RTI officials, once again, pose a peculiar question. A response to an RTI application is itself based on documents in the custody of the government. In the example of the witness on duty in the government hospital, the PIO would base her response on the attendance muster. The PIO thus bases her response on other documents and not her personal knowledge. To read the response directly into evidence would be to assume the genuineness and truth of the response, and in turn, the genuineness and truth of the documents on which the response was based. In other words, such a response would amount to ‘multiple hearsay’.<sup>74</sup>

A statement amounts to hearsay when it is not in the personal knowledge of the witness. For instance, A says that B told him that B saw X murder Y. The statement by A before court is hearsay because he does not have personal knowledge of the fact. If A were to repeat B’s statement to C and C were present before court, C’s statement would amount to multiple hearsay.<sup>75</sup> Multiple hearsay is treated with the greatest skepticism because as the chain of speakers increases, the reliability and accuracy of the statement decreases, much like a game of ‘Chinese whispers’. The greater the levels of hearsay involved,

<sup>73</sup> See *Dwijesh Chandra Ray Chaudhuri v Naresh Chandra Gupta* 1945 SCC OnLine Cal 199 : AIR 1945 Cal 492; *Madholal Sindhu v Asian Assurance Co Ltd* 1945 SCC OnLine Bom 44 : AIR 1954 Bom 305; *Mohd Yusuf v D* 1961 SCC OnLine Bom 5 : AIR 1968 Bom 112; *Halsbury’s Laws* vol 15(3rd edn, 1964) [533]-[534].

<sup>74</sup> Also referred to as ‘hearsay within hearsay’ or ‘double hearsay’.

<sup>75</sup> See JR Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edn, Bloomsbury Publishing 2014) 213-9.

the higher the possibility of distortion and falsity. Consequently, in jurisdictions such as the United States of America ('USA') and the United Kingdom, multiple hearsay is not permitted though it would otherwise fall within a usually accepted exception to the hearsay rule. Multiple hearsay is only permitted when both (or all) the levels of hearsay fall within accepted exceptions to the hearsay rule.<sup>76</sup>

A simple example can be seen in the Federal Rules of Evidence in the United States of America. Similar to Section 34 of the Indian Evidence Act, the Federal Rules of Evidence permit records of activities regularly conducted like books of account to be admitted directly in evidence, although directly reading such a document itself is hearsay evidence as seen above. The Federal Rules add another condition. They state that these documents can directly be led in evidence only if the record was made by someone with personal knowledge of its contents.<sup>77</sup> This is because if the original information was not within the personal knowledge of the person making the entry, it would amount to multiple hearsay. Another example is that of ancient documents. In the USA, like in India,<sup>78</sup> documents of a certain antiquity can directly be read in evidence, without examining the author.<sup>79</sup> However, several USA courts have held that if the contents of the ancient document were hearsay (for instance, if the author writes 'A told me that she got married on March 11, 1895'), that portion of the contents of the ancient document that are hearsay cannot be admitted in evidence.<sup>80</sup>

Therefore, direct reading in evidence of such letters leads to issues of admissibility. The question of multiple hearsay does not arise if the PIO is

<sup>76</sup> In USA, the applicable provision is Rule 805, Federal Rules of Evidence. It reads:

"Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Similarly, in the United Kingdom, Section 121, Criminal Justice Act, 2003 reads:

"Additional requirement for admissibility of multiple hearsay

- (1) A hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless—
  - (a) either of the statements is admissible under sections 117, 119 or 120,
  - (b) all parties to the proceedings so agree, or
  - (c) the court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose.
- (2) In this section "hearsay statement" means a statement, not made in oral evidence, that is relied on as evidence of a matter stated in it."

<sup>77</sup> Federal Rules of Evidence, r 803(6). It reads: "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:... (6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;..."

<sup>78</sup> Indian Evidence Act 1872, s 90.

<sup>79</sup> Federal Rules of Evidence, r 803(16).

<sup>80</sup> See Gregg Kettles, 'Ancient Documents and the Rule Against Multiple Hearsay' (1999) 39 Santa Clara Law Review 719.

examined in court, since she can state before court on what basis the information was supplied. The only hearsay involved would be the original public document on which she based her information. On the other hand, if the document is read in evidence without examining the officer, it would amount to admitting multiple hearsay evidence: the first being admitting the PIO's response letter, and the second being the original documents on which the response is based.

Unfortunately, the judicial treatment of this problem, to our knowledge, has been non-existent.<sup>81</sup> Even the two lines of cases discussed in the previous sub-section, which considered whether documents analogous to RTI responses should be treated as public or private documents, did not consider issues of hearsay. The chart prepared by the police in *Kanwar Lal*, being based on reports by other officials, also amounted to multiple hearsay when the authors of the chart were also not examined. Similarly, in *Oriental Insurance*, had the letter by the traffic department been read in evidence it would have been the second level of hearsay – the first being the register on which the letter was based. Therefore, we cannot place much store in either precedent to guide the issue at hand. Courts have taken for granted that an original document must be admissible and that the question merely revolves around the manner of its proof, without offering any reasons for the former.

We fill this gap by proposing four reasons for why RTI responses should be held to be admissible:

*First*, the fear that an RTI response involves two levels of hearsay evidence or 'multiple hearsay' is partially exaggerated. A common notice in orders of the Central Public Information Commission reads as follows:

“Under the provisions of the RTI Act only such information as is available and existing and held by the public authority can be provided. The PIO is not supposed to create information that is not a part of the record. He is also not required to interpret information or furnish replies to hypothetical questions.”<sup>82</sup>

<sup>81</sup> The only consideration of the issue of hearsay evidence was in *Octavius Steel*. However, the Court there merely stated that it was following *Kanwar Lal*. The reason the Calcutta High Court gave was that in *Kanwar Lal*, while the Supreme Court did not consider the issues relating to hearsay evidence, it did dismiss the argument that the police officers would not be subjected to cross-examination as being without merit. However, the argument that the official would not be subjected to cross-examination is not the same as highlighting the nature of the evidence being hearsay. Two other safeguards against hearsay evidence are absent: the oath and the demeanour of the witness. However, even if the two arguments are considered co-extensive, the Calcutta High failed to notice that we are here considered not merely with hearsay, but *multiple hearsay*.

<sup>82</sup> *Parimal Shah v CPIO* 2014 SCC OnLine CIC 8517. The notice appears almost verbatim in several other orders. For instance, see *Samir Kumar Kundu v CPIO* 2016 SCC OnLine CIC

This makes it apparent that the function of the PIO is merely to reproduce existing information. The PIO cannot reply with her opinion or inferences based on the existing information. Even though in such responses, the underlying document is not sought, the PIO is merely reiterating their contents. Therefore, the function of the PIO is largely akin to that of producing a copy through a comparison with the original, which is a permissible form of secondary evidence under Section 63(3).

*Secondly, in any case*, even in USA, the exception to the multiple hearsay rule is where both levels of hearsay fall under exceptions to the rule against hearsay evidence.<sup>83</sup> For instance, in case of ancient documents, if the hearsay statement mentioned therein was an ‘excited utterance’ or *res gestae*, it would be admissible. Our case is similar. Both levels of hearsay are public documents, which are a recognized exception to the rule against hearsay evidence.

Moreover, RTI responses would not be the only instance of multiple hearsay permitted in the case of public documents. For instance, certified copies of registers of births and deaths are directly admissible in evidence under Section 76.<sup>84</sup> However, the Registrar or the keeper of the register makes entries in the register on the basis of information supplied to her by the parent or hospital. She is not expected to be present at the birth or death herself. Thus, the entries in the register cannot be said to be based on her personal knowledge. If the contents of this register were directly read in evidence, this would also amount to an instance of multiple hearsay.

*Thirdly*, the presumption of genuineness under Section 77 extends only to certified copies of those documents which the public has a right to inspect.<sup>85</sup> Thus, the presumption appears to be based on the fact that any falsity would be easily rebutted through an inspection of the original. Similarly, the right to information under the RTI Act includes the right to inspect the documents maintained by the relevant authority.<sup>86</sup> Therefore, any falsity in a response from a PIO could be rebutted with similar ease through an inspection of the underlying record. The presumption of genuineness of the underlying record must hence be extended to the reply itself.

*Fourthly*, it is important to examine why public documents are considered an exception to the rule against hearsay. This is because of the presumption

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15721; *Satyanjan Prasad Singh v CPIO* 2016 SCC OnLine CIC 20320; *Arbind Kumar v CPIO* 2019 SCC OnLine CIC 1991.

<sup>83</sup> Federal Rules of Evidence, r 805.

<sup>84</sup> *See Mohd Salim v Shamsudeen* (2019) 4 SCC 130.

<sup>85</sup> Indian Evidence Act 1872, s 77. Section 76 lays down which documents the presumption under Section 77 belongs to. Section 76 begins with the words: “Every public officer having the custody of a document, *which any person has a right to inspect*, shall give that person on demand a copy...” (emphasis supplied).

<sup>86</sup> Right to Information Act 2005, s 2(j).

that government officials carry out their duties correctly and honestly, without any reason to falsify these documents.<sup>87</sup> The same presumption which attaches to the making of the original document, also attaches to the function of the PIO. As a functionary who disposes off hundreds of applications seeking information a year, it must be presumed that she replies honestly and diligently.

Thus, considering responses by RTI officials to be public documents and directly reading them in evidence raises questions of hearsay. While, precedents are silent on this issue, we believe that the fears of hearsay raised here are unwarranted.

## V. CONCLUSION

India currently faces a daunting judicial backlog.<sup>88</sup> The recording of evidence in particular is extremely time-consuming. As a consequence, there has been a push towards avoiding the examination of witnesses of a formal nature. For instance, in addition to the pre-existing provisions like Section 77 of the Evidence Act and Sections 292 to 295 of the Code of Criminal Procedure, Section 291A was introduced in the Code of Criminal Procedure to obviate the need to examine Magistrates who conduct Test Identification Parades.<sup>89</sup> Similarly, the use of Section 296 to record the evidence of 'formal witnesses' via affidavit rather than in-person has also been increased. In light of the mounting backlog, thus, there is a clear understanding of the need to change an antiquated process, especially for 'formal' witnesses.

Requiring parties to examine PIOs to prove RTI responses and documents thereunder would be a colossal waste of scarce time and resources. These responses speak for themselves, establishing their own nature and origin. To require witnesses, whether the PIO or the applicant, to lay the foundation for the same would be to play out a charade to no one's benefit and everyone's detriment.

Further, the aim of the RTI Act was to provide reliable information and increase transparency in a democracy. Since this information is procured from the state in the official manner defined by the state, it is absurd that the state by its laws then insist that a litigant go through a painstaking and cumbersome process to prove these documents. Given the ample presumptions across the Evidence Act for other documents concerned with the state, it is unreasonable that RTI replies meant for transparency should be require a complex procedure to prove.

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<sup>87</sup> Indian Evidence Act 1872, s 114(e)

<sup>88</sup> See Law Commission of India, *Arrears and Backlog: Creating Additional Judicial (wo)manpower* (Law Comm No 245, 2014) <<http://lawcommissionofindia.nic.in/reports/Report245.pdf>> accessed 16 May 2020.

<sup>89</sup> Section 291A was introduced by the Code of Criminal Procedure (Amendment) Act, 2005.

This is even more problematic when considered from the perspective of a right to fair trial under Article 21. Litigants must often prove RTI replies that go against the interests of the state in the litigation, and would then be required to have officials come and effectively testify against the interests of the department. A frequent example of the above would be documents pertaining to an investigation which officers have sought to suppress but are revealed through RTI replies. Requiring a police officer to come and prove a reply which goes against the case of the police itself puts the defense in an awkward position, for they have to call as their own witness an official who has a clear interest against them in the outcome of the trial. It is unfair to put a litigant in such a dilemma when the document has been procured from the state as per its own regulations to begin with. Such a requirement might even render the right to information nugatory.

The present issue also brings to focus the importance of the stage of admission and denial, both in civil suits and criminal trials. RTI documents may often be admitted by the opposing party (presumably the state). If judges insist on reasons being provided for doubting the authenticity of the documents in case of a denial, which is not currently the practice, the determination of whether witnesses need to be examined could become a lot more streamlined.

The law with respect to the admissibility and proof of such documents, unfortunately, remains unclear. A series of single-bench decisions across High Courts have only added to the confusion. Legislative or Supreme Court intervention to clarify issues that have arisen, preferably in the direction of foregoing with the examination of such witnesses, would be welcome.

## VI. ANNEXURE I

The image below is of an RTI Application that was filed to prove that a witness to an offence at a hospital was, in fact, not present on duty at the time of the hospital. Names and other details have been redacted to ensure privacy.

BRIHANMUMBAI MAHANAGARPALIKA

PUBLIC HEALTH DEPARTMENT

[Redacted] Hospital.



[Redacted]

07-06-2017

Sub- Application for information under RTI Act 2005

With reference to your letter received in this office on 23-05-2017, the required information is herewith

	Description of the Information required	Information
L.	Kindly furnish the true copy of request letter, memo & reply of memo, regarding leave (without pay) taken by the employee laboratory worker Shri [Redacted] on [Redacted] along with duty time from [Redacted] to [Redacted]	As per hospital records Shri [Redacted] was absent on [Redacted] as he had exhausted all his casual leaves he was marked leave without pay on these days. He had attended his night duty on [Redacted] in the male ward of the hospital.

As per the above note the RTI has been answered

प्रमुख वैद्यकीय अधिकारी

[Redacted signature area]