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Personal Information, Public Interest and the Limits of a Substituted Clause: Sections 8(2) and 11(1) of the Right to Information Act After the Digital Personal Data Protection Act, 2023

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ABSTRACT

Section 44(3) of the Digital Personal Data Protection Act, 2023 substitutes clause (j) of section 8(1) of the Right to Information Act, 2005, so that a public authority is under no obligation to disclose “information which relates to personal information”. The qualifications that governed the clause, the absence of any relationship to public activity or interest, the unwarranted invasion of privacy, and the overriding larger public interest, have all gone. On 16 February 2026 the Supreme Court issued notice on three challenges to the amendment, declined a stay, and referred the questions to a larger Bench, where they remain pending.

The petitions and the commentary describe the amendment as abolishing the public interest test. This article argues that the description is textually incomplete, and that the incompleteness matters to how the reference should be answered. Section 44(3) operates on a single clause of a single sub-section. It leaves intact section 8(2), which permits disclosure notwithstanding any exemption where the public interest outweighs the harm; the proviso to section 11(1), which authorises the same weighing for third party information; the obligations of proactive publication in section 4; and section 3(c)(ii) of the amending Act itself, which excludes from that Act personal data a person is legally obliged to make public. The public interest test has not been abolished. It has been relocated from a mandatory ingredient of the exemption to a discretionary power and a procedural safeguard.

That relocation is nevertheless a diminution of the right guaranteed by article 19(1)(a), because a discretion the refusing officer need not consider, and need give no reasons for declining, cannot discharge the same constitutional obligation. The article proposes that the larger Bench structure the surviving overrides rather than strike the provision down, and sets out the directions that would do so.

INTRODUCTION

On 16 February 2026 a Bench of Surya Kant, C.J.I., Joy-malya Bagchi and Vipul M. Pancholi, JJ. issued notice on three writ petitions challenging the Digital Personal Data Protection Act, 2023, declined to stay its operation, and referred the questions arising to a larger Bench.¹

¹ *The Reporters Collective Trust v. Union of India*, W.P. (C) No. 211 of 2026; *Venkatesh Nayak v. Union of India*, W.P. (C) No. 177 of

The central grievance in all three is a single sub-section. Section 44(3) of the Act substitutes clause (j) of section 8(1) of the Right to Information Act, 2005, so that a public authority is now under no obligation to give a citizen “information which relates to personal information”.² What has gone is everything else that clause (j) used to contain: the requirement that the information have

2026; *National Campaign for People’s Right to Information v. Union of India*, W.P. (C) No. 212 of 2026, order dated Feb. 16, 2026.

² The Digital Personal Data Protection Act, 2023 (Act 22 of 2023), s. 44(3).

no relationship to any public activity or interest, the requirement that its disclosure would cause an unwarranted invasion of privacy, and the direction that the information officer may nevertheless disclose it if satisfied that the larger public interest justifies disclosure.

The reaction has been near-unanimous and, in its essentials, correct. Former civil servants, editors, opposition members of Parliament and transparency organisations have all read the substitution as abolishing the public interest test that made section 8(1)(j) workable. The petitions before the Supreme Court are framed the same way. So is most of the academic commentary produced since the Act received assent.

This article argues that the framing is textually incomplete, and that the incompleteness matters a great deal to how the reference should be answered. Section 44(3) is a surgical amendment. It operates on clause (j) of sub-section (1) of section 8 and on nothing else. It leaves untouched section 8(2), which permits a public authority to allow access to information notwithstanding any exemption in sub-section (1) where the public interest in disclosure outweighs the harm to the protected interests.³ It leaves untouched the proviso to section 11(1), which permits disclosure of third party information where the public interest in disclosure outweighs in importance any possible harm or injury to the interests of that third party.⁴ It leaves untouched section 4, which obliges every public authority to publish, on its own motion, a directory of its officers and employees and the monthly remuneration received by each of them.⁵ And it leaves untouched section 3(c)(ii) of the very statute that effected the amendment, which places outside the Digital Personal Data Protection Act altogether any personal data made publicly available by a person who is under a legal obligation to make it public.⁶

The public interest test, in other words, has not been abolished. It has been relocated. It has moved out of the definition of the exemption, where it operated as a mandatory ingredient that the information officer had to apply before refusing, and into two provisions where it operates as a discretionary power and a procedural safeguard. That is a real and serious loss, but it is a different loss from the one the debate has been describing, and it calls for a different remedy.

Two propositions follow, and this article defends both. The first is descriptive: the surviving overrides in sections 8(2) and 11(1) are capable, on their own

terms, of reproducing most of the balancing exercise that clause (j) used to require, and any account of the post-amendment position that ignores them is inaccurate. The second is constitutional: the relocation is nevertheless a diminution of the right under article 19(1)(a) of the Constitution, because an unstructured discretion vested in the officer whose refusal is under challenge cannot discharge the same obligation that a mandatory ingredient of the exemption discharged.

The contribution this makes to the pending reference is a route that neither side has argued. The petitioners ask for section 44(3) to be struck down. The Union defends it as a legislative choice about privacy that the Court should not disturb. There is a third course, and it is the one a Constitution Bench is best placed to take: read section 8(2) as importing a duty to consider and to record reasons wherever article 19(1)(a) is engaged, hold that the proviso to section 11(1) applies to personal information concerning third parties, and construe “personal information” in the amended clause (j) consistently with section 3(c)(ii) of the Digital Personal Data Protection Act, so that information a public authority is bound by law to publish falls outside the exemption altogether. The claim is doctrinal and it is deliberately narrow. It does not rest on any empirical study of how information officers have applied the amended clause, and Part VII identifies what evidence would tell against it.

WHAT SECTION 44(3) ACTUALLY DID

The amending words are worth setting out precisely, because almost everything in the argument turns on their reach. Section 44(3) provides that in section 8 of the Right to Information Act, 2005, in sub-section (1), for clause (j), a substituted clause shall be inserted, reading: “information which relates to personal information”.⁷ The instrument of amendment is substitution, the object of the substitution is a single clause, and the field of operation is expressly confined to sub-section (1).

Clause (j) as originally enacted did four things. It identified a category, personal information. It qualified the category by reference to the character of the information, requiring that its disclosure have no relationship to any public activity or interest. It qualified the category again by reference to consequence, requiring that disclosure would cause an unwarranted invasion of the privacy of the individual. And it made the exemption yield to a finding by the information officer or the

³The Right to Information Act, 2005 (Act 22 of 2005), s. 8(2).

⁴*Id.*, s. 11(1), proviso.

⁵*Id.*, s. 4(1)(b)(ix) and (x).

⁶*Supra* note 2, s. 3(c)(ii).

⁷*Supra* note 2, s. 44(3).

Table 1: Clause (j) of section 8(1) before and after the substitution

Element of the clause	Clause (j) as enacted in 2005	Clause (j) as substituted by section 44(3)
Category protected	Personal information	Personal information
Test of character	Disclosure must have no relationship to any public activity or interest	No such requirement
Test of consequence	Disclosure must cause an unwarranted invasion of the privacy of the individual	No such requirement
Public interest override within the clause	Available: the information officer or the appellate authority may disclose if satisfied that the larger public interest justifies it	Not available
Parity with the legislature	Proviso: information which cannot be denied to Parliament or a State Legislature shall not be denied to any person	Generally treated as having fallen with the substituted clause
What the authority must establish in order to refuse	Three propositions, two of them evaluative	One characterisation

appellate authority that the larger public interest justified disclosure. Only the first of those four survives. Table 1 sets out the change.

Compiled by the author from the text of clause (j) as enacted and as substituted.

The consequence for the information officer's task is not merely that a step has been removed. The structure of the decision has changed. Under the original clause the officer had to reach an affirmative conclusion on three questions before refusing, and the applicant's case could be won on any of them. Under the substituted clause the officer reaches a single characterisation, and once the information is characterised as personal the exemption is complete on its own terms. The burden that the original clause placed on the authority to justify secrecy has been reversed into a burden on the applicant to establish something the clause no longer makes relevant.

There is a second and less noticed casualty. The pro-

viso that followed clause (j), guaranteeing that information which cannot be denied to Parliament or a State Legislature shall not be denied to any person, has generally been read as falling with the substituted clause, on the footing that it formed part of clause (j) rather than of sub-section (1) as a whole. That reading is contestable, since a proviso placed at the foot of a sub-section is ordinarily construed as governing the sub-section, and the guarantee it contained makes better sense as a limit on all the exemptions in section 8(1) than as a limit on clause (j) alone. This article does not build on the point, because the weight of opinion is against it and the argument advanced here does not need it. It is flagged because the larger Bench will have to decide it, and because the parity between citizen and legislator that the proviso expressed is the single clearest statement in the Act of why the right exists at all.

On commencement, the position has been unnecessarily confused. The Act received assent on 11 August 2023 but was brought into force in stages. The Digital Personal Data Protection Rules, 2025 were notified on 13 November 2025, and the amendment to section 8(1)(j) took effect with that commencement, ahead of the amendments made by the same section to the Information Technology Act, 2000 and the Telecom Regulatory Authority of India Act, 1997, whose operation was deferred.⁸ The sequencing is itself telling. Of everything section 44 does, the provision that narrows citizens' access to information about the State was the first to be switched on, and the provisions that regulate how the State and industry handle citizens' data are the ones that wait.

It should also be said what section 44(3) did not purport to do, because the petitions and the commentary sometimes elide it. It did not repeal section 8(2). It did not amend section 11. It did not touch section 4. It did not define "personal information" for the purposes of the Right to Information Act, and it did not insert into that Act any definition at all. The amended clause (j) is therefore a category without a statutory content, sitting inside a statute that continues to contain two independent public interest overrides and an unamended obligation of proactive publication. Part IV takes up what follows from that.

⁸The Digital Personal Data Protection Rules, 2025, notified Nov. 13, 2025. On the phasing generally see Ministry of Electronics and Information Technology, Government of India, *available at*: <https://www.meity.gov.in> (visited on Aug. 28, 2026).

THE RIGHT ON THE OTHER SIDE OF THE BALANCE

Before the surviving overrides can do any work it is necessary to be clear about what they would be working for. The right to information in India is not a creature of the 2005 Act. It was located in article 19(1)(a) of the Constitution three decades earlier, when the Supreme Court held in *State of U.P. v. Raj Narain* that in a responsible government where all agents of the public must be responsible for their conduct, there can be but few secrets, and that the people have a right to know every public act.⁹ *S.P. Gupta v. Union of India* carried the reasoning further, treating disclosure of information about the functioning of government as the rule and secrecy as a narrow exception justified only by strict public interest.¹⁰ In *Union of India v. Association for Democratic Reforms*, The court said that a voter's right to know about a candidate's past, like their assets and criminal history, comes from Article 19(1)(a). They also told the authorities to share this information even though there was no law requiring them to do so at that time.¹¹

The 2005 Act is not the source of the right but a tool that helps enforce it, as stated in the Preamble. The Preamble explains that the Act outlines the practical system for ensuring citizens' right to information, with the aim of promoting transparency and accountability in how public authorities operate. A statutory exemption in such an Act limits a basic right, and its validity depends on Article 19(2). That is a proposition of some consequence for the pending reference, because it means that the question is not whether Parliament may prefer privacy to transparency as a matter of policy, but whether the particular restriction it has enacted satisfies the constitutional standard for restricting article 19(1)(a).

Two structural features of the Act follow from that characterisation and they bear directly on the argument in Part IV. The first is that "information" is defined expansively in section 2(f) to include records, documents, memoranda, opinions, advices, orders, log-books, contracts, reports and data material held in any electronic form, and the definition contains no carve-out for information about persons.¹² The second is that the exemptions in section 8(1) are drafted as departures from an obligation that section 3 confers on all citizens, and section 8(2) is expressed to operate notwithstand-

ing them. A statute which frames disclosure as the obligation and exemption as the departure, and which then subjects the departures to an express overriding power, is not one in which a single exempting clause can be read as self-executing. The interpretive presumption runs the other way, and it is a presumption drawn from the Act's own architecture rather than from any general preference for openness.

On the other side, privacy has since 2017 been a fundamental right of the same rank. *K.S. Puttaswamy v. Union of India* held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under article 21 and as part of the freedoms guaranteed by Part III, and it laid down the test that an invasion must satisfy: legality, a legitimate State aim, and proportionality between the object and the means.¹³ It is the third limb that matters here, and it is routinely misused in the debate on section 44(3). Proportionality is a standard for testing restrictions; it is not a warrant for a rule that protects an interest more completely than the right requires. A blanket exemption is not a proportionate measure merely because the interest it serves is a fundamental right.

The place where the two rights were reconciled, before the amendment, was clause (j) itself. That is what the Constitution Bench held in *CPIO, Supreme Court of India v. Subhash Chandra Agarwal*.¹⁴ The Court there treated the protection given by clause (j) as limited rather than absolute, held that disclosure turns on the satisfaction of the competent authority that the larger public interest justifies it, and held that the degree of privacy protection available to a public servant in respect of his public functions is lower than that available to a private individual, so that the public interest in disclosure is correspondingly more likely to prevail. The information at issue, whether judges had declared their assets to the Chief Justice, was held not to be exempt.

It is worth being precise about the status of that decision after the amendment, because it is often overstated in both directions. *Subhash Chandra Agarwal* did not hold that clause (j) was constitutionally required to contain a balancing test. It construed the clause that Parliament had enacted. Parliament has now enacted a different clause, and a construction of the old words cannot survive the words. What does survive is the Court's reasoning about why the balance had to be struck at all, which was grounded in article 19(1)(a) and in the reduced privacy expectation of a public functionary acting publicly. That reasoning is about the Constitution,

⁹ *State of U.P. v. Raj Narain* (1975) 4 SCC 428.

¹⁰ *S.P. Gupta v. Union of India* 1981 Supp SCC 87.

¹¹ *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294.

¹² *Supra* note 3, s. 2(f).

¹³ *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

¹⁴ *CPIO, Supreme Court of India v. Subhash Chandra Agarwal* (2020) 5 SCC 481.

not about the drafting, and it is not displaced by a substitution.

The contrary line of authority should be acknowledged rather than passed over. In *Girish Ramchandra Deshpande v. Central Information Commissioner* the Court treated the service record, promotions, assets and liabilities of a public servant as personal information within clause (j), and declined disclosure in the absence of a demonstrated larger public interest.¹⁵ That decision has been used by information officers for more than a decade as a near-automatic ground of refusal, and it shows that clause (j) was already being applied in a way that came close to the blanket rule which section 44(3) has now written into the text. The honest description of the amendment is therefore that it codifies the worst existing practice rather than that it invents a new one, which strengthens rather than weakens the case for a constitutional correction.

WHAT SECTION 44(3) DID NOT TOUCH

Section 8(2) of the Right to Information Act reads: “Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.”¹⁶ Three features of that provision decide much of the argument in this article. It operates notwithstanding the exemptions in sub-section (1), so it is unaffected by any change to their content. It is expressed in the language of a weighing, in terms almost identical to the words removed from clause (j). And it has not been amended, considered for amendment, or referred to in section 44 at all.

The proviso to section 11(1) refers to the second survivor. Section 11 covers information that is connected to or provided by another company and has been considered confidential by that company. The information officer must inform the third party and give them a chance to respond. Then, it says that disclosure can be allowed unless it involves trade or commercial secrets that are legally protected. In such cases, disclosure is only permitted if the benefit to the public is more important than any potential harm or damage to the third party’s interests.¹⁷ Personal information about someone other than the applicant is the paradigm case of third party information. Every refusal under the

amended clause (j) that concerns a named individual therefore falls, on its facts, within the procedure that section 11 prescribes, and the weighing exercise that clause (j) no longer requires is one that section 11 continues to authorise.

The third survivor is section 4. A public authority needs to create and share a list of its officials and workers on its own. This list should include the monthly pay each official and worker gets, such as the pay system listed in their rules. It should also have the names, job titles, and other details of the people who handle public information for the authority.¹⁸ These are obligations of proactive disclosure, owed to the public at large, independent of any application. They are also, on any ordinary use of language, obligations to publish personal information. If the amended clause (j) is read as an unqualified bar on disclosing personal information, the same statute simultaneously commands a public authority to publish the salary of every one of its officers and permits it to refuse the identical information when a citizen asks for it. A construction that produces that result cannot be right.

The fourth survivor is in the amending Act itself, and it is the most useful of the four. Section 3(c)(ii) provides that the Digital Personal Data Protection Act does not apply to personal data that is made or caused to be made publicly available by the Data Principal to whom it relates, or by any other person who is under an obligation under any law in force in India to make such personal data publicly available.¹⁹ The remuneration published under section 4(1)(b)(x) is personal data that a public authority is under a statutory obligation to make publicly available. It is therefore outside the protective scope of the Digital Personal Data Protection Act by that Act’s own terms. Parliament cannot sensibly be taken to have intended, by an amendment made in the ninth chapter of that Act, to confer on information a degree of protection under the Right to Information Act that the Act conferring it expressly withholds.

There is a prior question that the substitution has made unavoidable, and it supplies a fifth point in the same direction. The Right to Information Act has never defined “personal information”. While clause (j) carried its three qualifications the omission did not much matter, because the qualifications did the work of confining the category: information whose disclosure had a relationship to public activity fell outside the clause whatever its subject matter. Strip the qualifications away and the undefined phrase becomes the whole of the exemption. An information officer refusing a request now

¹⁵ *Girish Ramchandra Deshpande v. Central Information Commissioner* (2013) 1 SCC 212.

¹⁶ *Supra* note 3.

¹⁷ *Supra* note 4.

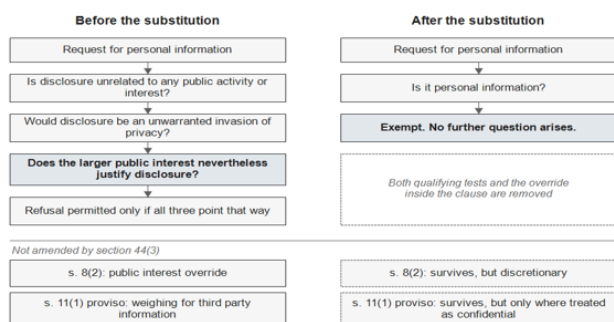
¹⁸ *Supra* note 5; and *id.*, s. 4(1)(b)(xvi).

¹⁹ *Supra* note 6.

decides the case by characterisation alone, and the Act gives no guidance on how to characterise.

The only person or law that can provide that information is the one that caused the problem in the first place. Section 2(t) of the Digital Personal Data Protection Act says that “personal data” is any information about a person that can be used to identify them.²⁰ Reading the amended clause (j) in the light of that definition is not a strained exercise, since the amendment and the definition are in the same Act, and it produces three limits that the present practice does not observe. Information about a body corporate, a firm or a public authority is not personal information, because the definition is confined to individuals. Information which does not identify an individual, including aggregated or anonymised material and most file notings recording a decision rather than a person, is not personal information. And information already outside the Digital Personal Data Protection Act under section 3(c)(ii) cannot be personal information for the purpose of an exemption inserted by that Act. None of these limits is available if the phrase is left to mean whatever an information officer takes it to mean.

Put together, the four provisions describe a position materially different from the one the debate assumes. Figure 1 sets out the routes to disclosure of personal information before and after the substitution.



Section 44(3) operates only on clause (j) of section 8(1). The balancing exercise it removed from the clause continues to be authorised by the two provisions below the line, which the amendment did not touch.

Figure 1: Routes to disclosure of personal information under the Right to Information Act, 2005, before and after section 44(3). Prepared by the author.

Two objections to this reading should be met immediately. The first is that section 8(2) confers a power on the public authority and not a right on the applicant, and that a power which the authority need not exercise is no substitute for an ingredient of the exemption which it had to apply. That objection is sound as far as it goes, and Part V is devoted to it. It goes to the constitutional adequacy of the surviving route, not to its existence.

²⁰ *Supra* note 2, s. 2(t).

The second objection is that section 11 is procedural and that its proviso cannot enlarge what section 8 permits. This is the more serious of the two and it deserves an answer rather than an assertion. Section 11(1) is not drafted as a rule of hearing alone. Its proviso is expressed in substantive terms, it identifies the interest to be weighed, and it names the only category, trade and commercial secrets protected by law, that is placed beyond weighing. A proviso that carves out one class of information from the balancing it authorises is a proviso that authorises balancing for every other class. Reading it as merely procedural would leave the carve-out with nothing to operate on.

None of this is an argument that the position after the amendment is as good as the position before it. It is not. A litigant who must persuade an information officer to exercise a discretion is in a worse position than one who can point to an ingredient the officer has failed to establish, and an applicant who must invoke a proviso in a different section is in a worse position than one who could rely on the exemption's own terms. The point is narrower and it is directed at the pending reference. The question before the larger Bench is not whether the balancing exercise has been abolished from the Right to Information Act, because it has not. It is what constitutional consequences follow from its having been moved.

WHY THE RELOCATION STILL MATTERS

The difficulty is not merely that the balancing has moved. It is that in moving it Parliament has changed four things at once, and each of them weakens the position of the citizen in a way that has to be justified under article 19(2).

The first is the character of the obligation. Clause (j) as it stood imposed a condition precedent to refusal. Section 8(2) confers a discretion to disclose. The difference is not one of degree. An officer who refuses under the amended clause (j) without advertent to section 8(2) at all has committed no error on the face of the order, because the section says “may” and imposes no duty to consider. The applicant's appeal must therefore be founded not on a failure to apply the law but on a failure to exercise a discretion, which is a materially harder case to make.

The second is the identity of the decision-maker. Clause (j) named the Central or State Public Information Officer or the appellate authority as the authority to be satisfied on public interest, and so put the question squarely within the appellate hierarchy. Section

8(2) speaks of “a public authority”. Whether an Information Commission, exercising appellate jurisdiction under section 19, may itself direct disclosure under section 8(2) where the public authority has not, or whether it is confined to remitting the question, is a point on which the Act is not explicit and on which practice has varied. Under the old clause the point did not arise, because the public interest question was an element of the exemption which the appellate forum was bound to decide for itself.

The third is the standard against which the weighing is done. Clause (j) required the officer to weigh disclosure against an unwarranted invasion of privacy, a formulation which itself carried the idea that some invasions are warranted. Section 8(2) requires the public interest in disclosure to outweigh “the harm to the protected interests”. Once clause (j) protects personal information at large, without reference to invasion or to warrant, the protected interest against which the weighing is done becomes correspondingly abstract. The officer is invited to weigh a concrete public interest against a category.

The fourth is the burden and its direction. Section 19(5) says that in any appeal process, the person who denied a request must show that their decision was correct.²¹ That allocation is intact and it was not amended, but its content has been hollowed out for clause (j) cases. Under the original clause the officer discharging the onus had to establish three things, two of which were evaluative and both of which the applicant could contest on the material. Under the substituted clause the officer discharges the onus by establishing one thing, and it is a characterisation which in most cases will be obvious and uncontested. A burden of proof is only as demanding as the proposition it attaches to, and section 44(3) has reduced the proposition to a formality without touching the section that allocates the burden. This is the clearest illustration of the general point: the amendment achieves its effect not by removing safeguards but by emptying them, which is why an analysis confined to what the amendment deleted misses most of what it did.

Taken together these four changes are what makes the constitutional question a real one rather than a rhetorical one. The State’s answer to a challenge under article 19(1)(a) cannot be that a route to disclosure exists somewhere in the statute. It has to be that the route is one a citizen can actually use. A discretion which the decision-maker is under no duty to consider, which may not be exercisable by the appellate forum, which

is measured against an abstract interest, and which the authority need give no reasons for declining to exercise, is not obviously such a route. That is the proposition the Union will have to defend, and it is a narrower and more answerable proposition than the one the petitions currently put in issue.

It is worth noticing that this is a familiar constitutional problem in an unfamiliar setting. Where a statute confers an unstructured discretion that determines whether a fundamental right is enjoyed, Indian courts have not struck the statute down as a matter of course. They have read into the discretion the obligations that make it reviewable: relevant considerations, reasons, and an appellate remedy. The remedy for a discretion that is too free is ordinarily to structure it, and a Constitution Bench is exactly the forum that can do so authoritatively.

There is one further reason for preferring structure to invalidation, and it is institutional rather than doctrinal. Section 8(1)(j) has already been construed by a Constitution Bench in *Subhash Chandra Agarwal*. If the amended clause is struck down, the old clause does not revive of its own force, and the Right to Information Act is left with no provision at all protecting personal information, which is a result no party has asked for and which would itself raise a question under article 21. Reading the surviving overrides so that they carry the balancing exercise avoids that vacuum.

THE ASYMMETRY THE DIGITAL PERSONAL DATA PROTECTION ACT CREATES

The argument so far has treated section 44(3) as an amendment to the Right to Information Act. It is also, and this has attracted less attention than it deserves, one half of a single legislative movement. The same Act that narrows the citizen’s access to personal information held by the State widens the State’s access to personal information held about the citizen.

Section 7 of the Digital Personal Data Protection Act permits processing without consent for a list of legitimate uses, several of which are available to the State and to its instrumentalities in the performance of functions and the provision of subsidies, benefits, services, certificates, licences and permits.²² Section 17(2)(a) allows the Central Government, through a notice, to exempt any State instrumentality from the entire Act, if it is in the interest of India’s sovereignty and integrity, the security of the State, friendly relations with foreign countries, maintaining public order, or prevent-

²¹ *Supra* note 3, s. 19(5).

²² *Supra* note 2, s. 7.

Table 2: The two directions of section 44 of the Digital Personal Data Protection Act, 2023

	Citizen's access to personal information held by the State	State's access to personal data held about the citizen
Governing provision	RTI Act, s. 8(1)(j), as substituted by DPDP Act, s. 44(3)	DPDP Act, ss. 7, 17(2)(a) and 36
Effect	Personal information becomes an exempt category without qualification	Processing without consent for listed legitimate uses; exemption of an instrumentality of the State from the whole Act; power to call for information
Instrument required	Amendment by Parliament, now in force	Executive notification under s. 17(2)(a)
Express proportionality condition on the face of the provision	None in the amended clause	None
Commencement	In force with the notification of the Rules on 13 November 2025	Core processing obligations deferred under the phased commencement

ing the incitement of a cognizable offence related to any of these.²³ Section 36 empowers the Central Government to require the Data Protection Board, and any Data Fiduciary or intermediary, to furnish such information as it may call for.²⁴ None of these provisions is subject to a proportionality condition on the face of the statute, and the exemption under section 17(2)(a) is exercisable by executive notification rather than by rule laid before Parliament.

Set against section 44(3), the pattern is difficult to miss. Table 2 places the two movements side by side.

Compiled by the author from the provisions cited in this Part.

The point is not that either half is independently indefensible. States need to process personal data to govern, and privacy is a legitimate reason to restrain dis-

closure. The point is about direction. A single statute has made the flow of personal information between citizen and State substantially one-directional, and it has done so without either half being weighed against the other, because they were enacted in different chapters serving different declared objects. The Statement of Objects and Reasons for a data protection Bill does not naturally invite scrutiny of what the Bill does to an information statute in its penultimate chapter.

The institutional half of the picture points the same way, and it explains why the reference is not confined to section 44(3). The petitions also put in issue the constitution of the Data Protection Board, whose members are appointed and whose terms and service conditions are prescribed by the Central Government, and which is the body that will adjudicate on the processing of personal data by data fiduciaries including instrumentalities of the State. A regulator so constituted is not an obvious counterweight to the exemptions in section 17(2)(a) or the power in section 36. Whatever view is ultimately taken of the Board, the relevance of the point to the present argument is limited but real: the citizen who is refused information under the amended clause (j) is being told that his interest in disclosure has been subordinated to a privacy regime, and it is fair to ask how far that regime in fact binds the authority refusing him.

That has a bearing on how the larger Bench should approach the proportionality inquiry. The State's legitimate aim in section 44(3) is said to be the protection of informational privacy. If the same Act exempts instrumentalities of the State from the entirety of its privacy obligations by executive notification, the aim is being pursued selectively, and selectivity is relevant to whether a measure is proportionate. A restriction on article 19(1)(a) justified by the need to protect personal data sits awkwardly alongside a power to disapply the protection of that data whenever the executive considers it expedient.

COUNTERWEIGHTS

The strongest objection to the argument in Parts IV and V is that it concedes too much. If the surviving overrides really can carry the balancing exercise, then the amendment has changed very little, and the challenge to section 44(3) loses much of its force. The petitioners might reasonably say that an argument which saves the provision by construction does the Union's work.

The concession is real and it should be stated plainly. On the reading advanced here, section 44(3) survives. What it does not do is achieve what the Union has been

²³ *Id.*, s. 17(2)(a).

²⁴ *Id.*, s. 36.

understood to claim for it, which is a rule of blanket exemption. The choice the larger Bench faces is not between striking the provision down and leaving the citizen without a remedy. It is between a reading in which the amended clause is a complete answer to any request touching an identifiable individual, and a reading in which it is one exemption among several, subject to two overrides that Parliament chose not to disturb. Only the second reading is consistent with the rest of the Act, and a construction that avoids an internal contradiction is to be preferred to one that creates it.

A second objection comes from the other direction. Reading section 8(2) as importing a duty to consider and to record reasons, it may be said, converts a permissive power into a mandatory one and rewrites the section. The answer is that the duty proposed is not a duty to disclose but a duty to address. A public authority refusing an application on the ground of clause (j) would be required to state whether it has considered section 8(2) and, if it declines to exercise the power, why. That is the ordinary content of a reviewable administrative discretion affecting a fundamental right, and it changes the word “may” not at all.

A third objection is that the analysis places more weight on section 11 than the provision will bear, because section 11 is triggered only where the third party has treated the information as confidential. That is a genuine limitation on the argument and it narrows the proviso’s reach. It does not, however, help the public authority, because information which the third party has not treated as confidential is precisely the information for which the privacy justification is weakest. The limitation therefore cuts the class of cases in which the section 11 route is available while strengthening the case for disclosure in the cases it excludes.

It is worth stating what would tell against this analysis. If the orders of the Information Commissions made since the amendment took effect show that applicants are in fact invoking section 8(2) and the proviso to section 11(1), and that Commissions are deciding those contentions on the merits and directing disclosure where the balance favours it, then the constitutional grievance is smaller than argued here and a structuring remedy is unnecessary. If, conversely, those orders show that clause (j) is being applied as a complete answer with no reference to either provision, the case for the directions proposed in Part VIII is correspondingly stronger. That is an empirical question about adjudicatory practice, this article does not claim to have answered it, and a study of Commission orders across a defined period would be the natural next step.

A CALIBRATED RESOLUTION

Five measures follow from the diagnosis, ranked by the protection they secure against the intrusion they involve. The first three are available to the Court on the reference. The last two are for Parliament and the Commissions.

a) A duty to consider, and reasons. The larger Bench should hold that where a request engages article 19(1)(a), a public authority refusing disclosure under clause (j) of section 8(1) must consider whether the public interest in disclosure outweighs the harm to the protected interest within the meaning of section 8(2), and must record its conclusion with reasons. The direction structures a discretion rather than creating a right, it leaves the statutory language untouched, and it restores the reviewability that the amendment removed. It is the highest value measure because it costs the authority nothing beyond a paragraph and converts an unappealable characterisation into an appealable decision.

b) The section 11(1) proviso applies to personal information. The Court should hold that where the information requested relates to an identifiable third party and has been treated by that party as confidential, the procedure and the proviso in section 11(1) apply notwithstanding that the refusal is founded on clause (j), and that the weighing which the proviso authorises is to be performed and recorded. This does no violence to the section, which was always meant to govern exactly this class of request, and it supplies the notice and hearing that the amended clause otherwise dispenses with.

c) A harmonious construction of “personal information”. The Court should construe “personal information” in the amended clause (j) consistently with section 3(c)(ii) of the Digital Personal Data Protection Act, so that personal data which a public authority is under a legal obligation to make publicly available, including everything falling within section 4(1)(b) of the Right to Information Act, is outside the exemption altogether. This is the least intrusive of the three judicial measures because it applies the amending Act’s own definitional architecture to the amendment it made, and it disposes at a stroke of the largest single category of misuse, which is the refusal of establishment and remuneration information that the authority was bound to publish in any event.

d) A legislative restoration, drafted narrowly. Parliament should insert into clause (j) a proviso in the terms of the words it removed, confined to information relating to the discharge of public functions by a

person holding public office or employment. That formulation answers the privacy objection to the original clause, which was that it exposed the wholly private affairs of public servants, while preserving the accountability function which is the reason the right exists. It is a narrower provision than the one that was repealed and it should not be difficult to defend.

e) Guidance from the Commissions, and disclosure of practice. The Central Information Commission should issue guidance on the application of sections 8(2) and 11(1) to clause (j) refusals, and should publish disaggregated data on the outcome of appeals founded on the amended clause. The second half of this is as important as the first. The absence of any public record of how the amended clause is being applied is what allows both sides of the present debate to assert its effects without evidence, and it is what makes the empirical question identified in Part VII unanswerable at present.

One further point on remedy, addressed to the form of the order rather than its content. Because section 8(1)(j) has already been construed by a Constitution Bench, and because striking down the substituted clause would leave the Act with no provision protecting personal information at all, a declaration structuring the surviving overrides is a more conservative disposition than invalidation, not a less protective one. It preserves the legislative choice, it fills no vacuum, and it leaves Parliament free to legislate again with the constitutional standard stated.

CONCLUSION

Section 44(3) of the Digital Personal Data Protection Act, 2023 is a serious diminution of the right to information, and the petitions before the Supreme Court are right to say so. They are wrong, or at least imprecise, about the mechanism. The public interest test has not been removed from the Right to Information Act. It has been removed from the exemption and left standing in section 8(2) and in the proviso to section 11(1), where it operates as a discretion and as a procedural safeguard rather than as a condition of refusal. The obligations of proactive publication in section 4 are untouched, and section 3(c)(ii) of the amending Act itself places outside the data protection regime the very information that section 4 compels a public authority to publish.

What follows is that the constitutional question is narrower and more tractable than the one now framed. It is not whether Parliament may prefer privacy to transparency. It is whether an obligation arising under article 19(1)(a) can be discharged by a discretion which the officer refusing disclosure need not consider,

need not exercise, and need give no reasons for declining. Stated that way, the answer is available without invalidating anything, and it is available through the ordinary technique of structuring a discretion that determines the enjoyment of a fundamental right.

The contribution this article makes is therefore to relocate the argument rather than to add to it. The reform conversation and the pleadings have been organised around what section 44(3) took away. The more useful question, and the one a Constitution Bench is uniquely placed to answer, is what it left behind, and whether what it left behind can be made to work. On the reading advanced here it can, provided the Court is willing to say that section 8(2) must be considered, that the proviso to section 11(1) applies, and that information a public authority is bound by law to publish was never personal information within the meaning of the exemption at all.

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