

# Official Secrets Act and Rafale deal

March 21, 2019

## Manifest Pedagogy

The issue of Security of State, Sovereignty and Integrity of India has been invoked many times in the past few years in the context of Sedition law, IT act and guidelines under it, National Security Act and now Official Secrets Act. Hence this topic is highly relevant for this year exam

## **In news**

Official secrets act to be invoked in Rafael

## **Placing it the syllabus**

1. Indian Polity – Fundamental Rights
2. Governance – Transparency And Accountability
3. Ethics – Ethics of Journalism(not explicitly mentioned) , Transparency And Accountability
4. Internal Security

## **Static dimensions**

- Official Secrets Act 1923
- RTI Act 2005

## **Current dimensions**

- Use of OSA in Rafale deal
- Supreme Court's Bench opinion related to OSA and RTI

# Content

## What is Official Secrets Act?

- The Official Secrets Act 1923 is India's anti-espionage act held over from the British colonial period. It states clearly that actions which involve helping an enemy state against India are strongly condemned.
- It also states that one cannot approach, inspect, or even pass over a prohibited government site or area. According to this Act, helping the enemy state can be in the form of communicating a sketch, plan, model of an official secret, or of official codes or passwords, to the enemy.

## Provisions of OSA

- It is applicable to all Indian citizens residing inside or outside the country (inclusive of government servants)
- It is a comprehensive document relating to official secrets and define a number of offences such as;
  1. Spying
  2. Wrongful communication of any secret official code, password or any such sketch, plan, model, article, note, document or information.
- **Objective of the act:** maintaining the security of the state against the leakage of information, sabotage, and like.

## Provisions related to Prosecution and penalties

- Punishments under the Act range from three to fourteen years imprisonment. A person prosecuted under this Act can be charged with the crime even if the action was unintentional and not intended to endanger the security of the state.
- The Act empowers persons in positions of authority to handle official secrets, and others who handle it in

prohibited areas or outside them are liable for punishment.

- Journalists have to help members of the police forces above the rank of the sub-Inspector and members of the military with investigation regarding an offense, up to and including revealing his sources of information.
- Under the Act, search warrants may be issued at any time if the magistrate determines that based on the evidence there is enough danger to the security of the state.
- Uninterested members of the public may be excluded from court proceedings if the prosecution feels that any information which is going to be passed on during the proceedings is sensitive. This also includes media.
- When a company is seen as the offender under this Act, everyone involved with the management of the company, including the board of directors, can be liable for punishment. In the case of a newspaper, everyone – including the editor, publisher and the proprietor – can be imprisoned for an offense. OSA is controversial to the modern RTI act 2005.

### **Relation with RTI and Its use in Rafale issue**

- In the OSA clause 6, information from any governmental office is considered official information, hence it can be used to override Right to Information Act 2005 requests. This has drawn harsh criticism.
- The Supreme Court is witnessing a battle of sorts between the teenaged Right to Information Act (RTI Act) and the 96-year old Official Secrets Act (OSA) for relevance and meaning.
- The RTI Act was passed in 2005 to give effect to the people's fundamental right to know what the government is doing in their name and how it is spending their tax funds. OSA came into existence in 1923, primarily to punish spies – both local and foreign.
- The British Raj effectively turned it into a closet to

lock up various kinds of information from public scrutiny because it believed the natives could not be trusted. Unfortunately, this trend continues even after independence and the brunt is often borne by fearless journalists and whistle-blowers who expose corruption and wrongdoing in government.

- The latest arena of battle is the highest court of the land. Certain reputable citizens and advocates are seeking review of the clean chit the Supreme Court gave in December to the government's decision to buy 36 Rafale fighter aircraft from Dassault Aviation SA.
- The bone of contention is a set of official papers relating to the decision-making process which the court did not have an opportunity to examine earlier.
- The Attorney General of India initially labelled these papers "stolen" when he found them annexed to the review petition filed in the apex court. Earlier, these documents were splashed across cyberspace by multiple media houses.
- The petitioners are arguing that such information cannot be kept secret in the age of RTI, while the government is claiming breach of privilege citing provisions from the 147-year-old Indian Evidence Act.

### **Arguments in favour of RTI Act by the Supreme**

- **The Supreme Court reminded the government about the existence of the Right to Information Act, which overrides the Official Secrets Act (OSA) 1923.**
- The SC Bench said the information law has revolutionised governance and overpowered notions of secrecy protected under the Official Secrets Act, 1923.
- It was also stated that the **Section 24 of RTI**, mandates even security and intelligence organisations to disclose information on corruption and human rights violations. Finally, Section 8(2), which **compels the government to disclose information "if public interest in disclosure**

**outweighs the harm to protected interests”.**

- Section 22, 24 and Section 8(2) are crucial provisions of the Right to Information which gives primacy to public interest and transparency over the ‘secrets’ even if the organisations were totally exempted from the RTI. Especially when corruption or violation of human rights are possible reasons to hide the information, the access law mandates such information to be disclosed.
- Hence, with this case it is clear that RTI overrides the Official secrets act 1923.