Circular No.27/2016

Sub: - 'Capacity building' to 'Earn and Maintain Independence of VACB' in its functioning – Legal and Procedure dimensions of the five step PE/QV/VE process:

Ref: 1. Judgement of the Hon’ble Supreme Court in WP(C) No.21 of 2004 dated 6th May 2014 (Dr. Subramanian Swamy Vs. Director, CBI)
2. Judgement of the Hon’ble Supreme Court in WP(C) Nos.340, 341 342, 342 of 1997 (Vineet Narain Vs. UOI)
3. Judgement of the Hon’ble Supreme Court in WP(C) No.68 of 2008 (2014) 2 SSC 1 (Lalithakumari Vs. State of UP)
4. Judgement of the Hon’ble High Court of Kerala in WP(C) No.4932/2016 dated 08.07.2016
5. Centre for public interest litigation & Ors. Vs. Union of India (2012) 3 SCC 19
7. UN Convention against Corruption, ratified by India in 2011
8. V.S Achuthanandan Vs. R Balakrishna Pillai & Ors (2011) 3 SCC 317
9. Crl. MC No.5966/2016 of Kerala High Court dated 4.10.16
10. WP (C) No.11822 of 2013 dated 15.07.2015

A Learning and Sharing Forum was conducted at Southern Range, Thiruvananthapuram on 14.10.2016, on the theme of 'How to earn and maintain independence of VACB'. The ideas generated in the brain storming session forms the basis of this Circular. For independence of VACB the following factors are essential.

i) Power of credibility – being believable – how to ‘detox’ see top which VACB Unit
ii) Accuracy, fairness and balance in all activities, enquiries and investigation – Team based discussion and deliberation for each enquiry and investigation

iii) Staying honest and keeping trust of general public;

iv) Ethics and values in professional anti-corruption work, enquiry and investigation;

v) Sensitivity and responsiveness to the dynamic and changing yet resilient larger public interest – each member of the Unit use the eyes, ears and heart to do actions in larger public interest and communicate the same within the Unit.

vi) Transparency – let our actions speak for itself to the larger public.

vii) Accountability

VACB receives numerous complaints / Petitions in the Unit offices and Head Office alleging corruption, on a daily basis. Several complaints are through telephone or email or WhatsApp also. Every sender expects enquiry and action on these petitions. More petitions and demand for ’corruption free governance’ in multiple platforms can be considered as a symptom of the journey towards “Zero – tolerance – to corruption” Policy implementation in our state.

A sender (informant) who sends a petition expects not only a receipt or acknowledgment for his / her petition, but also a quick and fair enquiry. Is enquiry a matter of right of the citizen, when he or she sends a petition? ; whether all petitions require enquiry by VACB ? ; can anyone send a petition making allegations of corruption in order to damage someone’s reputation and show to public the receipt issued by VACB as a proof?. Are false and vexatious petitions to VACB a dampener on quick decision making by honest public servants ? If false and vexatious petitions are received what are the remedies that VACB can have ?. A conceptual framework of the position of petitioner and suspect officers vis-à-vis VACB is given below:
In pursuance of the Supreme Court directions in Vineet Narain Case and subsequent Judgements upholding its principles, 'Public Duty' and 'Public Interest' are of paramount importance while taking decisions by public servants. Public duty is elaborated in the judgement of the Hon'ble High Court in WP(C) No.11822 of 2013 (C) (Karthikeya Varma @Kartik Varma Vs. The Union of India) dated 15th July 2015 is as follows: “public duty’ refers to a correlative 'public right' based on the jural correlatives as legal position, expounded by W.P.(C).Nos.11822/2013, 20071/2013, 1383/2014 & 15389/2014 Wesley N. Hohfeld. In the context of governance or discharge of Governmental function, the 'public right' is synonymous with 'legal obligation'. The public duty thus, is a public function or a legal obligation discharged by a public servant under the command of public right. These public rights necessarily, presuppose existence of positive law of the State or valid Governmental directions. The "public right" or "legal obligation" cannot exist in vacuum, the "right" or "legal obligation" must be relatable to law or an authorised function by the Government. Thus, public duty discharged by a public servant is based on the positive law of the State or valid executive directions”............
Thus, public duty under the PC Act refers to discharge of duty in relation to State, public or community at larger interest.

Thus the wishes and views of the general public are to be assessed and understood by VACB while deciding on each information of corruption. The Hon’ble High Court in a Judgement in WPC No. 31190, 31205 dated 04-10-16 directed “VACB to investigate corruption cases with open eyes, with open ears, and with an open heart”.

Public in Kerala wants swift and strong actions against corruption, while protecting the honest public servants from harassments in anyway. VACB has a duty to assure that those who have not engaged in any corruption are not victimized / harassed using VACB, through false or vexatious complaints or allegations. Any small mistake on the part of VACB Officers and Units by way of ‘using vested interests’ to harasses an honest public servant is likely to raise demands to ‘bridle VACB Unit’s independence’. Therefore, VACB need to function with a ‘Zero Mistake Strategy’ at Officer Level, Unit Level and at Institutional Level through ‘due diligence, due care and utmost sensitivity’. The due diligence and due care process of preliminary enquiry / QV /VE in VACB is elaborated as a five step process :-

1) Petitions that have clear, authentic address and name are to be acknowledged as the signal from the society for opening VACB’s Eyes, Ears and Heart to corruption. Heart is to be connected to the general feeling the public has, while looking at the subject matter or allegations in the petition for corruption as defined in PC Act 1988, UNCAC ratified by India in 2011, Judgements of the Supreme Court in Vineeth Narain and Dr.Subramanian Swamy cases. All petitions received in a VACB Unit are to be entered in the petition register of the Unit in chronological order.

2) The first step towards this first look (prima facie) into the allegation is to call the petitioner and take a statement by asking relevant questions to unearth whether corruption has occurred or an attempt to corruption has occurred, when, who, how, where etc.
It is always beneficial to ask for contact phone number of the petitioners in the petition itself. If a petition is given directly, the further questioning can be done then and there to elicit more details, to complete the first step early.

3) Since the first step of VACB intervention on petitions is calling the petitioner and taking his detailed statement, anonymous, pseudonymous petitions will not be the basis for initiating a preliminary enquiry / QV / SC by VACB. However, information received in anonymous or pseudonymous letters / phone calls can be used as inputs for existing enquires and investigations or as an intelligence input for I-Cell of the Units.

4) As an effective protection to whistleblowers and honest public servants against false / vexatious / frivolous / hearsay allegations of corruption or misconduct, the enquiry officer shall take a decision at this first step of further questioning the petitioner, as to whether the allegation is true or false. Before or during this questioning of the petitioner some additional information about the subject matter of the petitions and SOs shall be collected through telephone and desk research by the enquiry officer by using any of the channels of communication developed in VACB such as:

- Officer of VACB who is conducting the organisation study where the SOs are working
- Relevant and resourceful persons in the Whistle Blowers Register
- Computer Cell & Electronic Petition Management Cell of the Head office to get details whether there had been any allegations in the past against the SOs - track record checking
- I-cell of the Unit
- Whether any enquiry is conducted earlier on the same matter in the department / PSU / Government / VACB and the result thereof from sources within the relevant department / PSU of the SOs.
• Any other relevant sources and information

5) The first step of the PE, involving the further questioning of the petitioner and other preliminary information collection through desk research and sources is to understand prima facie the following:

• **How** Corruption occurred or likely to occur, if there are strong indications of it in the petition

• **When** the incident / corrupt practice or decision of corruption (abuse or misuse of power) occurred or attempt to corruption is occurring

• Where it happened or likely to happen; the department or office or **locations** of evidence

• What could be the most important **documents** or files to know more about the corruption and who are the custodians of such important documents

• Who are the likely **persons** who have direct knowledge about the subject matter of this corruption?

• How much is the likely **loss** directly or indirectly to public due to this corruption, if any, and how this loss is calculated and how such a loss happens

• If it is an **environmental value erosion**, how the environmental value is deteriorated and how the larger public / community is affected.

• If it is an **amassment of wealth** allegation, which period, where the likely disproportionate assets are, life style details of the SOs, life history details of the SOs, possible benami names, if any etc.

• **Life style** and / or **general reputation** of the SOs on the yardstick of the seven general principles of conduct in public life as listed in Circular No.25/2016

6) Above first step of the preliminary enquiry shall be completed within 5 days of receipt of the petition in the Unit (in the Unit and not in the hand of the Enquiry Officer).
7) Upon completion of the above first step on a petition / allegation, a decision shall be taken as to whether the petition / allegations are:
   - Baseless, without any foundation, but based on hearsay information or rumour.
   - False
   - Events happened long back and there is no possibility to get adequate materials and / or there is no plausible explanation for the long passage of time to make the allegation.
   - Fabricated to damage the reputation of one or a few public servants, out of vengeance or jealousy to block professional / career growth or damage the reputation.
   - Frivolous matter not justifying the time and resources of criminal justice system
   - No way connected to the definitions and interpretations of corruption in the United Nations Convention Against Corruption, PC Act or in the above referred higher court judgements.
   - Already enquired by competent authority / disciplinary authority and decisions are taken on such enquiry by competent authority, which is just, fair and appropriate.

In the above eventuality the PE shall be stopped with the first step and a reply will be given as per Circular 01/2016. A formal VACB number to the preliminary enquiry will be given by the Unit as per Circular 23/2016, if the petition passess the first step only; if not the matter will be closed in the petition register itself.

8) While further questioning the petitioner, possibility of EVA as per Circular 07/2016 shall be earnestly explored by the enquiry officer. In every petition an EVA possibility shall be explored and if possible further steps in that direction will be taken.

9) The **second step of the PE is to assign a VACB number** to the enquiry as per Circular 23/2016 and to make a list of the most
essential documents and the most critical witnesses to substantiate prima facie the allegations that passed the first step. Such minimum essential documents / Files are to be perused, attested photo copies taken and the critical witnesses are questioned during this **second step of factual aspects verification.** Witnesses are to be checked for real independence and un-biasness. Even if there is only one witness, that is sufficient, provided he / she is an independent witness (Bipin Kumar Mondal Vs, State of Bengal (2011) 2 SC (Cri) 1502 (2010) 12 SCC 91 ; Edward Vs. Inspector of Police, Andaman Police Station in Crl. Appeal No.774 of 2007).

10) The **third step of the PE** is to check the legal aspects. The **legal aspects verification** includes which section of Law and what Laws are seemingly violated, procedural aspects, norms that where relevant for the subject matter etc. Legal aspects also include checking whether the same subject matter is pending for adjudication in any Court of Law and therefore sub-judice, or is already a settled matter in the Court. Relevant and latest final judgements of the Supreme Court on the subject matter and corruption can be referred.

11) The **fourth step** is to check the Special Circumstances, **Special Situation** and Context of an executive decision or action or use of power/ authority. Precedents can also be checked as executives sometimes are guided by precedents erroneously, even though dishonest or fraudulent intention may not be the guiding aspect.

12) The **fifth step** is the final **inference making stage** where the **factual, legal and situational aspects** gathered during the second, third and fourth steps are integrated during the second, third and fourth steps are integrated to understand whether prima facie (first look onto the subject matter ..... ; on the face of it) cognizable offence are committed, who are the actual suspect officers, loss / gain etc. In this step decision on the next steps as per Circular 01/2016 and 02/2016 are to be taken by the enquiry
officer in consultation with the Unit Head, if the Enquiry Officer is not the Unit Head.

13) All the aspects, learning, lessons that come to light during the preliminary enquiries conducted in a Unit / Range are to be utilized during the “concurrent vigilance” vigil-visits, organisation studies, ‘environmental risk vigilance’ and other vigilance awareness / preventive / ‘creative vigilance’ programmes so that flow of further petitions get reduced eventually. Thus each enquiry can be used for progress in the implementation of the ‘Zero Tolerance to Corruption’ and ‘Corruption free Governance’ policy.

14) Such “learning / lessons from enquiries” shall be a mandatory agenda for discussion during each monthly conference held by the SP to strengthen ‘Creative Vigilance’ / ‘Concurrent Vigilance’ / ‘Capacity Building’ / ‘Environmental Risk Vigilance’ / EVA / Population Segment Vigilance.

Dr. Jacob Thomas

To

1) All IOPs, DySPs, SPs of all Units – for strict compliance
2) LA / ALA – for guidance as per latest and relevant Apex Court judgements and legal aspects
3) Computer Cell – to support with updated data base
4) APMC and EAPMC
5) M Cell – to monitor the report due from Units as per Circular 1/16, 2/16 and subsequent Circulars
6) CAs to the Director, Addl. DGP / SP (Int.)
7) R&T Cell – for capturing the consolidated lessons, learning from enquiries for identifying themes / issues for further research.