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Legislating the Right to Information



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Editor's Note

Legislative incorporation of the Right to Information (RTI), over and above its recognition as a human right, has been a constant feature of progressive democracies around the world. There is extensive recognition of RTI in soft law, notably international treaty law that may not be directly enforceable within a State; its embodiment in national legislation however, entrenches its practical application and enforcement. Legislating this right gives it contextual relevance and promotes democratic governance that is essentially participatory, transparent, and accountable. RTI law provides a definite point of reference for its progressive realization and reflects the fundamental importance given to RTI as an intrinsic determinant of a rights based approach to governance and development.

Sri Lanka's road to RTI legislation however, has been somewhat disjointed, and circumvented by events and divergent priorities among political parties. Sabrina Esufally provides a lucid outline of the various efforts that have been made since the mid 1990s to introduce RTI legislation, and includes in the discussion various obstacles and challenges in the effort. Among them ironically, are lapses in 'information sharing' among institutions mandated for the task, and the 'secrecy' surrounding latter drafts of the RTI law, which are collectively defeatist of the very 'participation' and 'access' that the right aims to promote and realise. In other observations Esufally attributes the sensitive nature of events and information associated with Sri Lanka's protracted conflict as a plausible reason for the lack of commitment and 'reluctance' on the part of government to adopt a RTI law. However, there is little justification for any further delay to adopt RTI legislation, which is arguably essential for the nature of the holistic development that is envisaged for post-conflict rehabilitation and development. Hence, the efforts thus far are consolidated in this edition of the LST Review, in anticipation that the most current draft of the RTI draft bill will be released soon, in a concerted and committed effort to endorse and implement this law.

The Review also includes a policy brief by 'Article 19', a prominent non-governmental, human rights organization with the specific mandate to promote RTI. The brief outlines the core principles by which RTI legislation should be assessed and evaluated. Foremost among them the principle of "maximum disclosure", that presumes that all information held by public bodies are accessible by the populace at large, subject to very narrow and limited exceptions. These principles reflect standards and a guide to overcoming any practical challenges that may erode the full realisation of RTI. It would be defeatist to adopt an RTI law, which is in practical reality prohibitive to public, in accessing vital information that is key to individual and collective well-being.

The official draft of the RTI Bill, which was last in circulation, is attached for the reference of all interested readers. It is suggested that this draft be read in light of the principles embodied in the policy brief by Article 19. Further, a set of recommendations for improving the draft, by Verite Research, is appended to Esufally's outline of Sri Lanka's history with RTI legislation. The documents will enable a more informed review of the final RTI draft law, in the hope that the draft will be released soon, in keeping with the expressed commitment of the current government.

Rasika Mendis

Editor



International standards: Right to information

A Policy Brief by “Article 19”*

It is increasingly being recognised that governments hold information not for themselves but, rather, on behalf of the public and that, as a result, public bodies should provide access to that information. This recognition is reflected in the explosive growth in the number of access to information laws that have been adopted around the world, as well as the numerous authoritative international statements on the issue.

Today, nearly 100 countries have laws on the books, granting individuals a general right to access information held by public bodies, and imposing an obligation on public bodies to proactively disclose key types of information. In 1990, only 13 countries had such laws. Furthermore, most of the international financial institutions, including the World Bank and all of the regional development banks, as well as a growing number of other inter-governmental organisations, have adopted information disclosure policies.

Access to information laws reflects the fundamental premise that government is supposed to serve the people. There are, however, a number of more practical ideas underlying the recent widespread recognition of the right to information. ARTICLE 19 has described information as “the oxygen of democracy”;¹ information is essential to democracy at a number of levels. The ability of individuals to participate effectively in decision-making that affects them depends, in obvious ways, on information. Elections can never meet their goal – described under international law as ensuring that “[t]he will of the people shall be the basis of the authority of government”² – if the electorate lacks access to information which enables it to form an opinion.

Democracy is also about accountability and good governance. The public has a right to scrutinise the actions of its leaders and to engage in full and open debate about those actions. It must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of

* Article 19 is a London-based human rights organization with a specific mandate and focus on the defense and promotion of freedom of expression and freedom of information worldwide founded in 1987. The organization takes its name from Article 19 of the Universal Declaration of Human Rights, which states:

“ Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.” Article 19, 2012, International Standard – The Right to Information, *Policy Brief by Article 19*, 05 April 2012

¹ *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface. Available online in Russian at <http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf>.

² *Universal Declaration of Human Rights*, Note 1, Article 21.

public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

Access to information is also a key tool in combating corruption and wrongdoing. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted, "A little sunlight is the best disinfectant."

Access to information laws also serve a number of important social goals. The right to access one's personal information, for example, is part of respect for basic human dignity, but it can also be central to effective personal decision-making. Access to medical records, for example, can help individuals make decisions about treatment, financial planning and so on.

Finally, access to information laws can help facilitate effective business practices. Commercial requesters are, in many countries, one of the most significant user groups of such laws. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for enterprises. The potential for increasing the effectiveness of business is an important benefit of access to information laws, and helps answer the concerns of some governments about the cost of implementing such legislation.

The Right of Access: International Standards

A number of international bodies have authoritatively recognised the fundamental and legal nature of the right to freedom of information, as well as the need for effective legislation to secure respect for that right in practice. These include the UN, the Organisation of American States (OAS), the Council of Europe and the African Union (OSCE).

The United Nations

The UN Special Rapporteur on Freedom of Opinion and Expression has addressed the issue of freedom of information in each of his annual reports since 1997. After receiving his commentary on the subject in 1997, the Commission on Human Rights (CHR) called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."³ Significantly, in his 1998 Annual Report, the Special Rapporteur stated clearly that the right to access information held by the State is included in the right to freedom of expression: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to

³ Resolution 1997/27, 11 April 1997, para. 12(d).

information held by Government in all types of storage and retrieval systems....”⁴ His views were welcomed by the CHR.⁵

The UN Special Rapporteur significantly expanded his commentary on freedom of information in his 2000 Annual Report to the CHR, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development.⁶ He also reiterated his “concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs”.⁷ Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content of the right to information.⁸

In their 2004 Joint Declaration, the three special mandates on freedom of expression at the UN, Organisation for Security and Co-operation in Europe (OSCE) and Organisation of American States (OAS) stated:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.⁹

Regional standards

All three main regional systems of human rights – within the Americas, Europe and Africa – have formally recognised the importance of freedom of information as a human right. The following section describes the development of these standards.

Organisation of American States

The OAS Special Rapporteur on Freedom of Expression has frequently recognised that freedom of information is a fundamental right, which includes the right to access information held by public bodies. In his 1999 Annual Report to the Inter-American Commission on Human Rights, he stated:

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make

⁴ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

⁵ Resolution 1998/42, 17 April 1998, para. 2.

⁶ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.

⁷ *Id.*, para. 43.

⁸ *Id.*, para. 44. See section 9.2.

⁹ Joint Declaration of 6 December 2004. To access this document, see the link in note 30.

decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.¹⁰

In October 2000, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression*,¹¹ which reaffirms the right to information in the Preamble:

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions;...

The Principles unequivocally recognise the right to access information:

1. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
2. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

In a case decided in 2005, the Inter-American Commission on Human Rights held that the right to freedom of expression included a right to access information held by public bodies.¹² The case is presently on appeal to the Inter-American Court of Human Rights.

Council of Europe

In 1981, the Committee of Ministers, the political decision-making body of the Council of Europe (composed of Member States' Ministers of Foreign Affairs) adopted Recommendation No. R(81)19 on Access to Information Held by Public Authorities, which stated:

I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities....¹³

This was followed up by another Recommendation on Access to Official Documents, which includes the following provision:

¹⁰ *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 16 April 1999, OEA/Ser.L/V/II.102, Doc. 6 rev., Chapter III, p. 24.

¹¹ Note 76.

¹² *Marcel Claude Reyes and Others v. Chile*, 7 March 2005, Case No. 12.108.

¹³ 25 November 1981, p. 2.

III. *General principle on access to official documents*

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.¹⁴

The Council of Europe's Group of Specialists on Access to Official Documents is currently preparing a binding treaty on this topic.

African Union

In 2002, the African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa*.¹⁵ The Declaration clearly endorses the right to access information held by public bodies, stating:

IV. *Freedom of Information*

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

¹⁴ Recommendation R(2002)2 of the Committee of Ministers to Member States on Access to Official Documents, adopted on 21 February 2002.

¹⁵ Note 29.

Features of a Freedom of Information (FoI) Regime

A number of the international standards and statements noted above provide valuable insight into the precise content of the right to freedom of information, over and above simply affirming its existence. In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression set out in detail the standards to which freedom of information legislation should conform (UN Standards).¹⁶ The 2002 Recommendation of the Committee of Ministers of the Council of Europe (CoE Recommendation) is even more detailed, providing, for example, a list of the legitimate aims which might justify exceptions to the right of access.¹⁷

These standards find some support in the various freedom of information laws and policies around the world. Although these vary considerably as to their content and approach, the more progressive laws do have a number of common features which reflect these international standards.

ARTICLE 19 has published a set of principles, *The Public's Right To Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),¹⁸ setting out best practice standards on freedom of information legislation. These Principles are based on international and regional law and standards, and evolving State practice. They therefore provide a useful framework in which to discuss the features of access to information legislation.

Principle 1: Maximum Disclosure

"Freedom of information legislation should be guided by the principle of maximum disclosure."

The principle of maximum disclosure holds that all information held by public bodies should presumptively be accessible, and that this presumption may be overcome only in very limited circumstances.

The principle of maximum disclosure encapsulates the basic rationale of freedom of information legislation, and is explicitly stated as an objective in a number of national laws. An important aspect of this principle, widely reflected in national laws, is that the body seeking to deny access to information bears the burden of proving that it may legitimately be withheld.¹⁹

¹⁶ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

¹⁷ Note 313, Principle IV.

¹⁸ Note 300.

¹⁹ *Commonwealth Freedom of Information Principles*, agreed by the 11th Commonwealth Law Ministers Meeting, Trinidad and Tobago, May 1999, Principle 2.

Another aspect of this principle is that the scope of the law should be very broad.²⁰ Everyone, not just citizens, should benefit from the right and an individual requesting access should not have to demonstrate any particular interest in the information or explain the reasons for the request. Information should be defined broadly to include all information held by the body in question, regardless of form, date of creation, who created it and whether or not it has been classified.

The scope of the obligation to disclose in terms of the bodies covered should also be broad. All three branches of government should be covered and no public bodies should be excluded from the ambit of the law. Public corporations should also be covered and many argue that even private bodies which are substantially publicly funded or carry out public functions should be included within the ambit of the law. In South Africa, even private bodies are required to disclose information which is needed for the protection or exercise of any right.

Principle 2: Obligation to Publish

“Public bodies should be under an obligation to publish key information.”

Freedom of information implies not only that public bodies should accede to requests for information, but also that they should publish and disseminate widely documents of significant public interest.²¹ Otherwise, such information would be available only to those specifically requesting it, when it is of importance to everyone. Moreover, publishing information will often be more economical than responding to multiple requests for the same information.

The scope of the obligation to publish proactively depends to some extent on resource limitations, but the amount of information covered should increase over time, particularly as new technologies make it easier to publish and disseminate information.

Principle 3: Promotion of Open Government

“Public bodies must actively promote open government.”

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. In most countries, particularly those which have not yet or have just recently adopted freedom of information laws, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, the success of a freedom of information

²⁰ See the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the “Environment for Europe” process, 25 June 1998, entered into force 30 October 2001, Articles 2(2)-(3).

²¹ See the African Principles, note 29, Principle IV(2).

law depends on changing this culture since it is virtually impossible to force openness, even with the most progressive legislation.²²

The best approach to addressing this problem will vary from country to country but, at a minimum, there will be a need to train public officials. A number of other means of promoting openness within government have been tried in different countries, including, for example, providing incentives for good performers and exposing poor performers, and ensuring oversight through annual reports which provide relevant statistics on the functioning of the FoI regime. Another useful tool to tackle the culture of secrecy is to provide for criminal penalties for those who willfully obstruct access to information in any way, including by destroying records or inhibiting the work of the administrative body overseeing implementation of the law.

The general public also needs to be made aware of their rights under the new legislation, and how to exercise them. Public education campaigns are needed, including through the media. Another useful tool, provided for in many laws, is the publication of a simple, accessible guide on how to lodge an information request.

A third important aspect of promoting open government is promoting better record maintenance by public bodies.²³ In many countries, one of the biggest obstacles to accessing information is the poor state in which records are kept. Officials often do not know what information they have or, even if they do know, cannot locate records they are looking for. Good record maintenance is not only important for freedom of information. Handling information is one of the key functions of modern government and doing this well is crucial to effective public management.

Principle 4: Limited Scope of Exceptions

"Exceptions to the right to access information should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests."

The regime of exceptions is one of the most difficult issues facing those drafting a freedom of information law and one of the most problematic parts of many existing laws. In many cases, otherwise very effective laws are undermined by an excessively broad or open regime of exceptions. On the other hand, it is obviously important that all legitimate secrecy interests are adequately catered to in the law, otherwise public bodies will legally be required to disclose information even though this may cause unwarranted harm.

The presumption in favour of disclosure means that the onus should be on the public body seeking to deny access to certain information to show that it may legitimately be withheld. The ARTICLE 19 Principles set out a three-part test for exceptions as follows:

- the information must relate to a legitimate aim listed in the law;

²² See the UN Standards, note 305.

²³ See the Commonwealth Principles, note 318, Principle 4.

- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

The first part of this test means that a complete list of all aims which may justify withholding information should be set out in the law. Which aims are legitimate is a subject of some controversy. Exceptions should at least be drafted clearly and narrowly.²⁴ The Council of Europe Recommendation lists the following possible grounds for restricting disclosure:

IV. *Possible limitations to access to official documents*

Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i) national security, defence and international relations;
- ii) public safety;
- iii) the prevention, investigation and prosecution of criminal activities;
- iv) privacy and other legitimate private interests;
- v) commercial and other economic interests, be they private or public;
- vi) the equality of parties concerning court proceedings;
- vii) nature;
- viii) inspection, control and supervision by public authorities;
- ix) the economic, monetary and exchange rate policies of the state;
- x) the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

It is not, however, legitimate to refuse to disclose information simply because it relates to one of these interests. According to the second part of the test, the disclosure must pose an actual *risk of serious harm* to that interest.²⁵

The third part of the test states the need for a *public interest override*,²⁶ which requires that even if disclosure of a piece of information would lead to harm, the information should still be disclosed if withholding it would lead to a greater harm. An example of this would be information which exposed corruption in the armed forces. Although this may at first

²⁴ See the Commonwealth Principles, note 318, Principle 3.

²⁵ See the UN Standards, note 305.

²⁶ See the Aarhus Convention, note 319, Article 4(4).

sight appear to weaken national defence, eliminating corruption in the armed forces will, over time, actually strengthen it. The need for a public interest override is recognised in Principle IV(2) of the CoE Recommendation, which states:

Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.²⁷

Principle 5: Processes to Facilitate Access

“Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.”

Effective access to information requires both that the law stipulate clear processes for deciding upon requests by public bodies, as well as a system for independent review of their decisions.²⁸ Requests are normally required to be in writing, although the law should also make provision for those who are unable meet this requirement, such as the blind or the illiterate – for example, by requiring the public body to assist them by reducing their request to writing. The law should set out clear timelines for responding to requests, which should be reasonably short. The response to a request should take the form of a written notice stating any fee and, where access to all or part of the information is denied, reasons for that denial along with information about any right of appeal. It is also desirable and practical for the law to allow requesters to specify what form of access they would like, for example inspection of the record, or a copy or transcript of it.²⁹

It is essential that the law provide for various opportunities to appeal the processes noted above. Many national laws provide for an internal appeal to a higher authority within the same public body to which the request was made. This is a useful approach, which can help address mistakes and ensure internal consistency.

It is, however, crucial that requesters have the right to appeal to an independent body to review decisions made by public authorities, which is reflected in most international standards.³⁰ Otherwise, individuals cannot really be said to have a right to access information held by public bodies and much information, for example revealing corruption or incompetence, will never be disclosed. Given the importance of rapid, cost-effective access to information, it is highly desirable that appeals should go first to an independent

²⁷ Note 313.

²⁸ *Id.*, Recommendation V.

²⁹ *Id.*, Recommendation VII.

³⁰ See the Aarhus Convention, note 319, Article 9; African Principles, note 29, Principle IV(2); Commonwealth Principles, note 318, Principle 5; COE Recommendations, note 313, Recommendation IX; and the UN Standards, note 305.

administrative body, and this is provided for in most of the more progressive national laws.³¹

Finally, the law should provide for the right to appeal from the administrative body to the courts. Only the courts really have the authority to set standards of disclosure in controversial areas and to ensure the possibility of a full, well-reasoned approach to difficult disclosure issues.

Principle 6: Costs

"Individuals should not be deterred from making requests for information by excessive costs."

Fees are a controversial issue in freedom of information laws. It is widely accepted that fees should not be so high as to deter requests,³² but practically every law does allow for some charges for access. Different laws take different approaches to fees. Some limit charges to the cost of reproducing documents, perhaps along with a set application fee. Others group requests into different categories, charging less for public interest or personal requests. Still others provide for the provision of a certain amount of information, for example 100 pages, for free and then start to charge after that. Regardless of the approach, it is desirable for fee structures and schedules to be set by some central authority, rather than be each public body separately, to ensure consistency and accessibility.

Principle 7: Open Meetings

"Meetings of public bodies should be open to the public."

The ARTICLE 19 Principles include the idea of open meetings, although in practice it is extremely rare for this to be dealt with in a freedom of information law. Some countries have separate laws on this. The reason it was included in the Principles is that the underlying rationale for freedom of information applies not only to information in documentary form, but also to meetings of public bodies.

³¹ South Africa is a notable exception here. Some countries fear the costs of establishing yet another administrative body. However, these costs are arguably low compared to the benefits of a good freedom of information regime, for example in terms of rooting out incompetence and corruption or in promoting more effective decision-making.

³² See COE Recommendations, note 313, Recommendation VIII.

Principle 8: Disclosure Takes Precedence

“Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.”

Most countries have a range of secrecy laws on their books, many of which are not legitimate or which include illegitimate provisions which are inconsistent with the access to information law. If the principle of maximum disclosure is to be respected, the access to information law must take precedence over these laws.³³ This should, where possible, be achieved by interpreting these laws in a manner which is consistent with the access to information law. However, where potential conflicts cannot be resolved through interpretation, the provisions of the access to information law should overrule those of conflicting secrecy laws. This is not as controversial as it sounds, at least in substance. A good freedom of information law will include a comprehensive set of exceptions which ensure that information will not be disclosed if doing so would cause unjustifiable harm; so there should be no need for this to be extended by secrecy laws.

Over time, a commitment should be made to review all laws which restrict the disclosure of information, with a view to bringing them into line with the freedom of information law.³⁴ This is particularly important in legal systems where it is not possible to provide for the dominance of one law over others.

Principle 9: Protection for Whistleblowers

“Individuals who release information on wrongdoing – whistleblowers – must be protected.”

A freedom of information law should protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing.³⁵ Protection of so-called whistleblowers provides an important information safety valve, ensuring that key information does indeed reach the public. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. In some countries, this protection is set out in a separate law rather than being included in the freedom of information law.

Protection from liability should also be provided to individuals who, reasonably and in good faith, disclose information in the exercise of any power or duty under freedom of information legislation. This effectively protects civil servants who have mistakenly, but in good faith, released information. This protection is important to change the culture of secrecy; civil servants should not have to fear sanctions for disclosing information or they will tend to err in favour of secrecy.

³³ UN Standards, note 305.

³⁴ See African Principles, note 29, Principle IV(2).

³⁵ See African Principle IV(2).



The Right to Information in Context: Exploring the History of the Sri Lankan RTI Campaign

Sabrina Esufally*

Introduction

The right to information is the lifeblood of any modern democracy. In this context, unlocking access to public information can have a number of benefits. These benefits include (a) increasing citizen participation in governance (b) providing incentives to reduce financial mismanagement (c) facilitating better allocation of scarce resources (d) creating accountability for public spending and (e) enabling data-driven policymaking. In recognition of the importance of public information in decision-making, the McKinsey Global Institute places the economic value of better and more open data at USD 3 trillion per year.¹

The Road to Open Government: The Sri Lankan Right to Information Campaign

Sri Lanka's right to information campaign has been primarily centred on advocacy efforts to secure legal recognition of RTI. In this context, media organisations, civil society groups, and political actors have attempted to introduce RTI legislation from as far back as 1995.

In May 1995, the government appointed a Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression. The Committee was mandated to:

Study all existing legislation and regulation affecting media freedom, freedom of expression, and the public's right to information and make recommendations.²

In its final report published in 1996, the Committee recommended the enactment of a Freedom of Information Act. The report stressed that this legislative intervention would be a critical step in adhering to the principle of open government.³ Pursuant to the Committee's recommendations, there were four broad attempts to introduce RTI legislation in Sri Lanka.

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¹ Verité Research, *The Right to Information Bill: The Evolution of Sri Lanka's Right to Know* [April 2015]. See also http://www.mckinsey.com/insights/business_technology/open_data_unlocking_innovation_and_performance_with_liquid_information [accessed on October 30 2105].

² Kishali Pinto-Jayawardena & Gehan Gunatilleke, 'One Step Forward, Many Steps Back: Media Reform Examined' in *Embattled Media: Democracy, Governance and Reform in Sri Lanka* (Institute of Commonwealth Studies).

³ *Op. cit.*

First, in 1996, the Sri Lanka Law Commission prepared a draft Freedom of Information Bill. This draft although circulated, was never presented in Parliament.⁴

Second, from 1995 – 2000, there were a number of attempts at Constitutional reform. Pursuant to these attempts, in 2000 a Draft Constitutional Bill was drafted that sought to make improvements to the Fundamental Rights chapter of the Constitution.⁵ In addition to this, the Bill afforded the right to information the status of Constitutional protection. However, this Bill was never introduced in Parliament.⁶

Third, in 2002 there was a bi-partisan effort between the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP) to introduce a freedom of information law. Media and civil society organisations such as the Editor's Guild and the Centre for Policy Alternatives collaborated with government representatives during the drafting process.⁷ These efforts culminated in a draft RTI Bill, which received Cabinet approval in 2004.⁸

At this juncture, it is critical that the draft RTI Bill be understood in the context in which it was developed. During the drafting stage, the government was engaged in fragile peace talks with the Liberation of Tamil Tigers Eelam.⁹ This political context resulted in concerns surrounding the RTI's potential to expose sensitive information and undermine national security. Ultimately, this was a context that limited incentives for the government to endorse a robust 'right to know'. Notwithstanding this, the Bill was never debated in parliament as the collapse of the United National Party (UNP) government in 2004 brought the RTI campaign to an abrupt end.

Last, in 2011 UNP MP Karu Jayasuriya attempted to pass the 2003 draft RTI Bill as a Private Member's Bill in Parliament.¹⁰ Initially, the government persuaded Jayasuriya to withdraw the Bill on account of its own efforts to introduce legislation targeted at promoting the freedom of information. As this legislation was not forthcoming, in June 2011 Jayasuriya re-introduced the Bill in Parliament. However, it was defeated in a vote with 97 members voting against the Bill, and 34 members voting in its favour.¹¹

Public Information and the Good Governance Mandate

President Maithripala Sirisena's 100-day programme was targeted at ushering in a new era of good governance and facilitating a culture of transparency. To this end, the President pledged to enact four critical pieces of legislation. Namely, (a) the 20th Amendment dealing with electoral reform (b) the 19th Amendment dealing with the restoration of independent

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Dileesha Abeysundara, Right to Information Act <http://www.thesundayleader.lk/2012/05/27/right-to-information-act/> [May 27 2015] (accessed on 20 October 2015).

¹¹ *Ibid.*

commissions and term limits on the executive presidency (c) the Right to Information Bill and (c) the National Audit Bill.¹²

Pursuant to the enactment of the 19th Amendment in April 2015, Sri Lanka's Constitutional framework now explicitly guarantees a citizen's right of access to information held by a number of public bodies - including Ministries, government departments and local authorities.¹³

However, Under Article 14A of the 19th Amendment – the right to information can only be enforced in the event it is provided for by law. Therefore, in the absence of a separate RTI enactment – the Constitutional protection afforded to a citizen's right to access public information is rendered meaningless.

The Re-Emergence of Sri Lanka's Right to Know

The consultative process on the 2015 RTI Bill commenced in February 2015.¹⁴ The Bill under discussion was a version of the 2004 RTI Bill as discussed above. These consultations represented a marked shift in public consultation and policy formation from the previous government. In other words, civil society activists, prominent journalists, and government agents were now seen as active stakeholders in drafting the 2015 RTI Bill.

During the consultative process, stakeholders expressed concerns surrounding certain provisions in the Draft Bill.¹⁵ These concerns included clauses in the Bill that dealt with restrictions on the sharing of requested information and the broad framing of exceptions on which information requests could be denied.¹⁶

However, although the amended RTI Bill received Cabinet approval prior to the General Election of August 2015 – it is yet to be tabled on the order paper of Parliament.¹⁷

In this context, there were at least two inhibitors to ratifying the RTI legislation prior to the General Election.

First, the consultative process surrounding the RTI lacked clarity in leadership and transparency in its outcome. This was largely due to the fact that two different focal Ministries were tasked with driving the ratification process on the RTI Bill. Namely, the Ministry of Mass Media and the Ministry of Public Administration and Home Affairs under MP Karu Jayasuriya. Further, the extent of interaction, division of labour and information

¹² "Maithrimeter", Scoring 100 days out of a 100 <http://www.manthri.lk/en/maithrimeter> (accessed on 20 October 2015).

¹³ Article 14A (1)(a), (b), (c), (d).

¹⁴ Verité Research submitted its observations on the Draft RTI Bill to the Media Ministry on 24 February 2015.

¹⁵ Observations and recommendations made by Verité Research (Pvt) Ltd are attached to this article

¹⁶ Section 5, Section 31 RTI Bill.

¹⁷ Draft Bill on Right to Information gets Cabinet Approval <http://www.news.lk/news/sri-lanka/item/7301-draft-bill-on-right-to-information-gets-cabinet-approval> [April 23 2015] (accessed on 20 October 2015).

sharing between these two Ministries was unclear during the consultative process. Subsequently – as there appeared to be multiple sites responsible for drafting the RTI legislation – a number of conflicting drafts of the Bill emerged in the public domain. Further, these drafts often formed the basis for civil society consultations on the Bill. This served to weaken the civil society advocacy platform on RTI – as its recommendations failed to feed into a uniform and consistent drafting pipeline. Further, of particular concern, is the fact that the official version of the RTI Bill that secured Cabinet approval in April 2015 is yet to be made a public document.

Second, the passage of RTI legislation failed to capture the public imagination in the same manner as the reform of the executive presidency under the 19th Amendment or electoral reform under the 20th Amendment. The scant press coverage on RTI indicates that it did not form an intrinsic component of the public discourse on President Sirisena's good governance agenda. Consequently, this weakened public demand for and scrutiny over an RTI enactment – a factor that significantly lowered the political incentives necessary to ensure the passage of the Bill prior to the General Election.

Conclusion

The passage of the RTI Bill has the potential to transform Sri Lanka's governance mechanisms. However, it is essential that civil society organisations and journalists recognise the critical role they play in protecting the RTI Bill from being jettisoned from the government's good governance agenda. In this context, it is necessary that these organisations create bottom up support structures that recognise and raise awareness surrounding the public utility of information. Such support structures will eventually ensure that a citizen's right to information is safeguarded and accessible beyond the Bill's passage through the legislature.

Annexure

Observations on the Draft Right to Information Bill, Compiled by Verité Research (Pvt) Ltd

Denial of Access to Information

1. The denial of the right to information on the grounds of 'infringement of personal privacy' in Section 5(1)(a) is too broad.

Recommended substitution: 'Information which relates to personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of privacy of the individual' (see Indian RTI Act, Section 8(j)).

2. The term 'International Organization' in Section 5(1)(b)(iii) should be clearly defined and should not include international private entities.
3. The use of the term 'commercial interests' in Section 5(1)(d) is too broad.

Both India and Maldives frame this exception as 'information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party' – which is narrower and more precise in scope.

Note: Commercial interests may invariably be jeopardised by the disclosure of certain types of information held by a public authority.

E.g. If a tender award is suspected of being improper or based on bias, the disclosure of information pertaining to the award may harm the commercial interests of the entity benefiting from the award.

The overriding public interest clause contained in Section 5(2) of the Draft Bill, which empowers the Right to Information Commission to direct the disclosure of information even when it is initially refused, is inadequate. A culture of transparency should not prioritise the 'commercial interests' of any entity, and should only protect 'commercial confidence, trade secrets or intellectual property'.

4. Reference to the 'Commission' in Section 5(2) of the Draft Bill precedes the introduction of the Right to Information Commission in Section 11.
5. Reference to 'Information Officer' in Section 5(4) precedes the introduction of Information Officers in Section 23.

Duties of Ministers and Public Authorities

6. There is no clear remedy in the case of failure to comply with a request made under Section 9 of the Draft Bill.

7. The duty placed on public officers to maintain adequate records in Section 7(1) should not be in a 'form consistent with its operational requirements'. Rather, it should be in a manner that facilitates the right to information under the Act. This may well require a deviation from current operational requirements to ensure easier and more efficient access to requested information.

Establishment of the Right to Information Commission

8. Section 12(1)(b)(iv) is incomplete.
9. Sections 14(c) and 22 make reference to the availability of an appeal to the Commission under Section 32 of the Draft Bill. However, Section 32 does not appear to envisage such an appeal, and only refers to an appeal to a 'person designated'. It appears that these sections refer to Section 33 of the Draft Bill.

Appointment of Information Officers and Procedure for Gaining Access to Official Information

10. There needs to be a mechanism in place under Section 25 for the transfer of a request in the event the subject matter of the information requested is more closely associated with the functions of another Ministry or public authority.
11. Section 25(2) authorises an Information officer to 'request for the payment of such additional fee giving details of the fee'. However, there is no appeal available to an applicant where an Information Officer sets an unreasonable or prohibitive fee.
12. Under Section 28 of the Draft Bill, the officer rejecting the request should also be bound to give the applicant the particulars pertaining to the appeals process (i.e. timelines etc.).
13. Section 31 requires further clarity. It should be clear that the section is not meant to bar a person from publishing information obtained through a request under the Act (e.g. journalists, researchers).

Appeals against Rejection

14. Section 32(1) refers to sub-section 2 of Section 28, but no such sub-section exists.

General

15. Section 38 of the Draft Bill does not provide adequate protection to 'whistleblowers'. It only provides for the release of 'any official information which is permitted to be released or disclosed on a request submitted under this Act'. It therefore does not grant protection to encourage public servants to disclose their good faith belief of wrongdoing.

Note: In South Africa, the Protected Disclosures Act (2000) protects those who disclose unlawful or irregular conduct. A leading RTI organisation ('Article 19') suggests the following best practice provision in its model RTI Law:¹⁸

(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

Interpretation

16. Compared to India's RTI Act, notable types of 'official information' have been omitted in the interpretation clause contained in Section 40 of the Draft Bill:

- Circulars
- Orders
- Contracts
- Logbooks
- Reports
- Opinions
- Advices
- Press releases

17. India's RTI Act defines the 'right to information' to include:

- Inspection of work, documents and records
- Taking notes, extracts or certified copies of documents or records
- Taking certified samples of materials
- 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

¹⁸Section 47 of Model Freedom of Information Law,
<http://www.article19.org/data/files/pdfs/standards/modelfoiaw.pdf>.

Incorporating the above information in the Draft Bill will strengthen its practical application once enacted, particularly in relation to the 'form' in which information is requested (See Section 27(1)).



The Right to Information Bill

L.D.O 24/2003

AN ACT TO PROVIDE FOR THE RIGHT TO INFORMATION; SPECIFY GROUNDS ON WHICH ACCESS MAY BE DENIED; THE ESTABLISHMENT OF THE RIGHT TO INFORMATION COMMISSION; THE APPOINTMENT OF INFORMATION OFFICERS; SETTING OUT THE PROCEDURE FOR OBTAINING OFFICIAL INFORMATION AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

Preamble.

WHEREAS there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right to official information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in good governance and actively participate in combating corruption in the country's public life

BE it therefore enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows :-

Short title.

1. This Act may be cited as the Right to Information Act, No. of 2015 and shall come into operation on the day immediately following the date of the expiration of a period of three months of the date of certification in terms of Article 80 of the Constitution. A notification regarding the date on which this Act is due to come into operation shall be published in the *Gazette*, not less than three months prior to such date.

Application of the Provisions of the Act

Right of access to information.

2. Subject to the provisions of section 5 of this Act, every person shall have a right of access to official information which is in the possession, custody or control of a public authority.

Provisions of this Act to prevail over other written law.

3. The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law, and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.

Duty to disclose reasons for a decision.

4. Every officer in any public authority giving a decision which affects any person in any way, shall be required on request made in that behalf by the person concerned, to disclose to that person in writing the reasons for arriving at such decision.

Denial of Access to Official Information

When right of access may be

5. (1) Subject to the provisions of subsections (2) and (3) of this

denied. section a request under this Act for access to official information shall be refused, where –

- (a) the disclosure of such information would constitute an invasion of personal privacy of any person, unless the person has consented in writing to such disclosure;
 - (b) disclosure of such information –
 - (i) would cause serious harm to the defence of the State or its territorial integrity or national security;
 - (ii) would cause serious danger to life or safety of any person; or
 - (iii) would be or is likely to be seriously prejudicial to Sri Lanka's relations with any State or international organization, where such information was given by or obtained from such State or international organization, in confidence;
 - (c) the disclosure of such information could cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies relating to:-
 - (i) exchange rates or the control of overseas exchange transactions;
 - (ii) the regulation of banking or credit;
 - (iii) taxation;
 - (iv) the stability, control and adjustment of prices of goods and services, rents and other costs and rates of wages, salaries and other incomes;
- or
- (v) the entering onto of overseas trade agreements;
 - (d) the disclosure of such information would reveal any trade secrets or harm the commercial interests of any person, unless that person has consented in writing to such

disclosure;

- (e) the information could lead to the disclosure of any medical records relating to any person, unless such person has consented in writing to such disclosure;
- (f) the information consist of any communication which is not permitted to be disclosed under section 126 of the Evidence Ordinance;
- (g) the information is required to be kept confidential by reason of the existence of a fiduciary relationship;
- (h) the disclosure of such information could:-
 - (i) cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders; or
 - (ii) enable the existence or identity of a confidential source of information in relation to law enforcement or national security, to be ascertained;
- (i) the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure;
- (j) the information relates to an examination conducted by the Department of Examinations or a Higher Educational Institution or by a semi-public or private body or Council rendering a public service which is required to be kept confidential, including any information relating to the results of any examination held by such Department, Institution or semi-public or private body or Council.

(2) Where a request for official information has been refused on any of the grounds referred to in paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) or (j) of subsection (1), the Commission shall, on application made in that behalf by the person who made the request, direct the disclosure of such information, if the Commission considers that the public interest in the disclosure outweighs any damage to the interest protected under any such paragraph.

(3) Notwithstanding the provisions of subsection (1), a request for information shall not be refused on any of the grounds referred to

therein, other than the grounds referred to in paragraphs (a), (e), (f), (g), (h) and (j) of that subsection, if the information requested for is over ten years old.

(4) Where an Information Officer is confronted with an issue connected with the grant of access to any information which is exempted from being disclosed under subsection (1), such Information Officer shall be required to seek the advice of the Commission on that issue and thereafter act according to the advice given by the Commission.

**Severability
under certain
circumstances.**

6. Where a request for information is refused on any of the grounds referred to in section 5, access may nevertheless be given to that part of any record or document which contains any information that is not exempted from being disclosed under that section, and which can reasonably be severed from any part that contains information exempted from being disclosed.

Duties of Ministers and public authorities

**Public
authorities to
maintain and
preserve its
records.**

7. (1) It shall be the duty of every public authority to maintain all its records in such manner and in such form as is consistent with its operational requirements, duly catalogued and indexed.

(2) All records being maintained by every public authority, shall be preserved –

- (a) in the case of new records which are opened after the coming into operation of this Act, for a period of not less than ten years from the date on which such record is opened; and
- (b) in the case of those records already in existence on the date of the coming into operation of this Act, for a period of not less than ten years from the date of the coming into operation of this Act.

**Ministers duty
to publish a
report.**

8. (1) It shall be the duty of –

- (a) every Minister to whom any subject has been assigned under paragraph (1)(a) of Article 44 of the Constitution; and
- (b) the President, in respect of any subject or function which the President has assigned to himself and of any subject or function of which the President remains in charge, under paragraph (2) of Article 44

of the Constitution,

to publish **annually before the 31st of March of every year, a report in such form as shall be determined by the Commission as would enable a person to exercise the right to access granted under section 2 of this Act, containing the following particulars: –**

- (i) particulars relating to the organization, functions, activities and duties of the Ministry assigned to the President or the Minister of such Minister, as the case may be, and of all the public authorities falling within the functions so assigned;
- (ii) the powers, duties and functions of officers and employees of the Ministry and of the public authorities referred to in paragraph (i), and the respective procedures followed by them in their decision making process;
- (iii) the norms set for the Ministry and the public authorities referred to in paragraph (i), in the discharge of their functions, performance of their duties and exercise of their powers;
- (iv) rules, regulations, instructions, manuals and any other categories of records under the control of the Ministry and of the public authorities referred to in paragraph (i), which are used by its officers and employees in the discharge of their functions, performance of their duties and exercise of their powers;
- (v) the details of facilities available to citizens for obtaining official information from the Ministry and the public authorities referred to in paragraph (i); and
- (vi) the name, designation and other particulars of the Information Officer or Officers appointed to the Ministry and to the public authorities referred to in paragraph (i).

(2) Notwithstanding the provisions of subsection (1), it shall be the duty of the President and of every Minister as the case may be, within six months of the coming into operation of this Act, to publish in such form as may be determined by the President or such Minister, as the case may be, a report containing the information referred to in paragraph (i) to (vi) of that subsection.

(3) The reports referred to in subsections (1) and subsection (2) shall be:-

- (a) published in the official languages and wherever possible be made available in electronic form; and**
- (b) made available for public inspection and copies of the same may be issued to any person, on the payment of such fee as shall be determined by the Commission.**

Duty of the President and Ministers to inform public about the initiation of projects.

9. (1) Three months prior to the commencement of any work or activity relating to the initiation of any project, it shall be the duty of the President or the Minister as the case may be, to whom the subject pertaining to such project has been assigned, to communicate to the public generally, and to any particular persons who are likely to be affected by such project, in such manner as specified in guidelines issued for that purpose by the Commission, all information relating to the project that is available with the President or the Minister, as the case may be, as on the date of such communication.

For the purpose of this section, "project" means any project the value of the subject matter of which exceeds :-

- (a) in the case of foreign funded projects, one million United States dollars; and**
- (b) in the case of locally funded projects, five million rupees.**

(2) The President or a Minister, as the case may be, shall be required on written request made in that behalf by a member of the public, to make available updated information about a project referred to in subsection (1), throughout the period of its development and implementation. The information shall be made available on the payment of such fee, as shall be determined by the Commission for the purpose.

Duty of public authorities to submit reports etc.

10. It shall be the duty of every public authority to submit to the Commission annually, a report containing the following information –

- (a) the number of requests for information received;**
- (b) the number of requests for information which were granted or refused in full or in part;**

- (c) the reasons for refusal, in part or in full, of requests received;
- (d) the number of appeals submitted against refusals to grant in part or in full, requests for information received; and
- (e) the total amount received as fees for granting requests for information.

Establishment of the Right to Information Commission

**Establishment
of the Freedom
of Information
Commission.**

11. (1) There shall be established for the purposes of this Act, a body called the Right to Information Commission (in this Act referred to as the "Commission").

(2) The Commission shall by the name assigned to it by subsection (1), be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.

**Constitution
of the
Commission.**

12. (1) The Commission shall consist of:-

(a) the Secretary to the Ministry of the Minister in charge of the subject of Media; and

(b) the following persons to be appointed by the Minister (in this section referred to as an "appointed member"):-

(i) one person nominated by the Sri Lanka Press Institute;

(ii) one person nominated by the Organization of Professional Association (OPA);

(iv) one person nominated by

(v) one person nominated by the Bar Association of Sri Lanka and

(v) one person nominated by the Ministry handling the subject of Media

The persons so nominated should have distinguished themselves in public life and should not be members of any political party and should

not, at the time of appointment and while functioning as a member of the Commission, have not/are not or do not become a Member of Parliament or of any Provincial Council or a local authority and do not hold any public or judicial office.

(2) The members of the Commission shall be appointed by the President on the recommendations of the Constitutional Council, and subject to the provisions of subsection (3) of this section, shall hold office for a period of five years. The President shall nominate one of the members of the Commission to be its Chairman.

(3) A member of the Commission shall cease to be a member, where -

- (a) he or she resigns his or her office earlier by writing addressed to the President;
- (b) he or she is removed from office by the President on the Constitutional Council forming an opinion that such member is physically or mentally incapacitated and is unable to function further in office;
- (c) he or she is convicted by a court of law for any offence involving moral turpitude; or
- (d) he or she is deemed to have vacated office by absenting himself or herself from three consecutive meetings of the Commission, without obtaining prior leave of the Commission.

**Appointment
of
officers and
employees of
the
Commission.**

13. (1) The Commission may appoint such officers and other employees as it considers necessary to assist the Commission in the discharge and performance of its duties and functions under this Act.

(2) The officers and other employees appointed under subsection (1), shall be subject to such terms and conditions of service as shall be determined by the Commission and be paid such remunerations as determined by the Commission in consultation with the Minister in charge of the subject of Finance.

**Duties and
functions of the
Commission.**

14. The duties and functions of the Commission shall be, to –

- (a) monitor the performance and ensure the due compliance by public authorities, of the duties cast on them under this Act;

- (b) make recommendations for reform both of a general nature and directed at any specific public authority;
- (c) hear and determine any appeals made to it by any aggrieved person under section 32 and applications made to it under subsection (2) of section 5 of this Act;
- (d) lay down guidelines based on reasonableness, for determining fees to be levied by public authorities for the release of any official information by them under the provisions of this Act;
- (e) determine the circumstances in which information may be provided by an Information Officer, without the payment of a fee;
- (f) lay down guidelines specifying the manner in which information and updated information on the development and implementation of a project is to be made available to the public;
- (g) co-operate with or undertake training activities for public officials on the effective implementation of this Act; and
- (h) publicise the requirements of this Act and the rights of individuals under it.

**Powers of the
commission**

15. For the purpose of performing its duties and discharging its functions under this Act, the Commission shall have the power to hold inquiries and require any person to appear before it and to examine such person or to require such person to produce any official information which is in that person's possession or power.

**Fund of the
Commission.**

16. (1) The Commission shall have its own Fund into which shall be credited all such sums of money as may be voted upon from time to time by Parliament for the use of the Commission and any money that may be received by the Commission by way of donations, gifts or grants from any source whatsoever, whether in or outside Sri Lanka.

(2) There shall be paid out of the Fund all such sums of money required to defray the expenditure incurred by the Commission in the discharge and performance of its duties and functions.

**Financial year
and audit of**

17. (1) The financial year of the Commission shall be the calendar

accounts. year.

(2) The Commission shall cause proper books of accounts to be maintained of the income and expenditure and all other transactions of the Commission.

(3) The provisions of Article 154 of the Constitution relating to the audit of the accounts of public corporations shall apply to the audit of the accounts of the Commission.

**Part II of
Finance Act, 38
of 1971 to
apply.**

18. The provisions of Part II of the Finance Act, No. 38 of 1971 shall, *mutatis mutandis* apply to the financial control and accounts of the Commission.

**Members etc,
of the
Commission
deemed to be
public officers.**

19. The members and officers and all other employees of the Commission shall be deemed to be public officers within the meaning and for the purposes of the Penal Code and every inquiry held by the Commission under this Act shall be deemed to a judicial proceeding within the meaning of the Code of Criminal Act, No. 15 of 1979.

**Application of
the Bribery
Act.**

20. The Commission shall be deemed to be a scheduled institution within the meaning of the Bribery Act and the provisions of that Act shall be construed accordingly.

**Exemption
from
prosecution.**

21. No criminal or civil proceedings shall lie against or any member of the Commission or any officer or other employees appointed to assist the Commission, for any act which in good faith is done or omitted to be done in the course of the discharge and performance of their duties and functions under this Act.

**Procedural
requirements
to be
published.**

22. The Commission shall within six months of its establishment, formulate and give adequate publicity to the procedural requirements for the submission of appeals to the Commission under section 32 and for the submission of applications under subsection (2) of section 5 of this Act.

Appointment of Information Officers and Procedure for gaining Access to official information

**Appointment
of
an Information
Officers and
their duties.**

23. (1) Every public authority shall for the purpose of giving effect to the provisions of this Act, appoint within three months of the coming into operation of this Act, one or more officers as Information Officers of such public authority.:

Provided that until such time that an Information

Officer is appointed under this subsection, the Head or Chief Executive Officer of a public authority shall be deemed to be the Information Officer of such public authority, for the purposes of this Act.

(2) It shall be the duty of an Information Officer to deal with requests for information made to the public authority of which he/she has been appointed its Information Officer, and render all necessary assistance to any person making such request to obtain the information being request for.

(3) The Information Officer may seek the assistance of any other officer as he or she may consider necessary, for the proper discharge of the duty imposed on him or her under subsection (2), and where assistance is sought from any such officer, it shall be the duty of such officer to render the assistance requested for by the Information Officer.

Procedure for obtaining official information.

24. (1) **Any person who is** desirous of obtaining any official information under this Act shall make a request in writing to the appropriate Information Officer, specifying the particulars of the information requested for:

Provided that, where any person making a request under this subsection is unable due to any reason to make such request in writing, he or she shall be entitled to make the request orally and it shall be the duty of the appropriate Information Officer to **reduce such request to writing** on behalf of the person making the request.

(2) For the purpose of this section –

“writing” includes writing done through electronic means; and

“appropriate Information Officer” means the Information Officer appointed to the public authority from which the information is being requested for.

Decision on requests submitted under section 24.

25. (1) An Information Officer shall, as expeditiously as possible and in any case within fourteen working days of the receipt of a request under section 24, make a decision either to provide the information requested for on the payment of a fee or to reject the request on any one or more of the grounds referred to in section 5 of this Act and shall forthwith communicate such decision to the person who made the request. Where a decision is made to provide the information requested for, access to

such information shall be granted within fourteen days of arriving at such decision:

Provided that where the request for information concerns the life and personal liberty of the person making such request, the response to it shall be made within forty-eight hours of the receipt of the request.

(2) Where providing the information requested for requires the payment of any fee in addition to the fee referred to in subsection (1), the Information Officer shall request for the payment of such additional fee giving details of the fee and specifying the date before which such additional payment should be made by the person concerned.

(3) Notwithstanding the requirement made for the payment of a fee under subsections (1) and subsection (2) of this section, the Commission may determine the circumstances in which information may be provided by an Information Officer, without the payment of a fee.

Public authority to display fees to be charged.

26. A public authority shall be required to display in a conspicuous place within its official premises, a notice specifying the fees being charged for obtaining any official information from such public authority. The fees so specified shall be determined by the public authority on the guidelines issued by the Commission for the purpose.

Manner in which official information is to be provided.

27. (1) Where decision has been made to grant a request for information, such information shall be provided in the form in which it is requested for, unless the Information Officer is of view that providing the information in the form requested for would be detrimental to the safety or preservation of the relevant document or record in respect of which the request was made.

(2) Where an Information Officer is unable to provide the information in the manner requested for, it shall be the duty of such officer to render all possible assistance to the person who made the request, to facilitate compliance with such request.

Refusal of a request to be communicated.

28. Where a request for information is refused by an Information Officer, it shall be the duty of such Officer to specify the following information in the communication sent under subsection (1) of section 25, to the person who made the request—

- (a) the ground or grounds on which such request is being refused; and
- (b) the period within which and the person to whom an appeal against such refusal may be preferred.

Where
information
requested for
was supplied
by
a third party.

29. (1) Where a request made to an Information Officer by any person to disclose official information relates to, or has been supplied by a third party and such information has been treated as confidential at the time the information was supplied, the Information Officer shall, **within seven days of the receipt of such request**, invite such third party by notice issued in writing, to make his or her representation for or against such disclosure, within seven days of the receipt of the notice.

(2) An Information Officer shall be required in making his decision on any request made for the disclosure of official information which relates to or has been supplied by a third party, to take into consideration the representations made by such third party under subsection (1), and shall, where any objections are raised by such third party, deny access to the information requested for:

Provided however, the Commission may, on application made in that behalf by the person making the request, direct the disclosure of the information in question notwithstanding any objections raised by the third party against its disclosure, where the Commission considers that the public interest in the disclosure outweighs any damage that may be caused to the third party concerned by its disclosure.

(3) Notwithstanding anything to the contrary in section 25, an information Officer shall within thirty days of the receipt of the request for information, and where third party concerned having been issued with a notice under subsection (1) has failed to respond within the time granted for making representations, make a decision as to whether or not to disclose the information requested for and give notice in writing of such decision, to the third party concerned.

Protection
against action.

30. Where access to any information has been granted by an Information Officer under this Act, no action or proceedings, civil or criminal shall lie against such Officer or the public authority concerned by reason of granting access to such information.

Granting
access
not to
constitute an
authorization
for
publication.

31. The granting of access to any information in consequence of a request made under this Act shall not be taken to constitute an authorization or approval granted by a public authority or the Commission, of the publication of such information by the person to whom the access was granted.

Appeals Against Rejections

**Appeals
against
a rejection of a
request.**

32. (1) Any person whose request for official information is refused by an Information Officer may, within thirty days of receipt of the communication relating to such refusal under subsection (2) of section 28, prefer an appeal to the person referred to in such communication, being the person designated to hear any such appeal.

(2) The right of a person to prefer an appeal under subsection (1) shall be without prejudice to his her right to make an application to the Commission under subsection (2) of section 5.

(3) The decision on any appeal preferred under subsection (1) shall be made by the person designated to hear such appeal, within one month of the receipt such appeal.

**Appeals to the
Commission.**

33. Any person aggrieved by:-

- (a) the decision made in appeal under subsection (1) of section 32, may within two weeks of the communication of such decision; or
- (b) the failure to obtain a decision on any appeal made within the time specified for giving the same under subsection(3), may within two weeks of the expiry of the period so specified,

appeal against that decision or the failure, as the case may be, to the Commission and the Commission may within thirty days of the receipt of such appeal or the expiration of the time limit for a decision on the appeal, affirm, vary or reverse the decision appealed against and remit the request back to the Information Officer concerned for necessary action.

**Appeals to the
Supreme Court.**

34. (1) A person aggrieved by the decision of the Commission made under section 28 shall have a right of appeal to the Supreme Court against the decision of the Commission. Every such appeal shall be forwarded in the manner prescribed by the relevant rules of the Supreme Court.

(2) Where any appeal is preferred to the Supreme Court under subsection (1), such Court may affirm vary or reverse the decision appealed against, and shall have the power to make any other order that it may consider necessary to give effect to its decision on appeal.

Appeal may be made on behalf of an aggrieved party.

35. An appeal under section 32 or section 33, as the case may be, may be made by any other person on behalf of an aggrieved party, where such person is duly authorized in writing by the aggrieved party to prefer the same.

General

Commission to prepare a report of its activities.

35. (1) The Commission shall cause to be prepared a report of its activities as often as it may consider necessary, so however, that it shall prepare at least one report in each calendar year. The Commission shall transmit a copy of every report prepared to the President, who shall cause a copy each of the reports so transmitted to be placed before Parliament.

(2) A copy of the report prepared under subsection (1) shall, within two weeks of it being placed before Parliament, be made available for public inspection at the office of the Commission and wherever possible, a copy of the same may be made available on its website.

Offences.

37. (1) Any Information Officer who –

- (a) refused a request made for information without giving reasons for such refusal;
- (b) refused a request made on any ground other than a ground specified in subsection (1) of section 5 of this Act; or
- (c) fails without any reasonable cause to make a decision on a request made within the time specified under this Act for making such decision,

shall be guilty of an offence under this act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than twenty five thousand rupees.

(2) Every person who without cause:-

- (a) fails or refuses to appear before the Commission when requested to do so by the Commission;
- (b) appears before the Commission, and fails or refuses to be examined by the Commission or to produce any official information which is in that

persons possession or power;

(c) fails or refuses to comply with or give effect to a decision of the Commission;

(d) resists or obstructs the Commission or any officer or other employee of the Commission, in the exercise of any power conferred on the Commission or such officer or employee, by this Act,

shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than twenty five thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

(3) Any officer whose assistance was sought for by an Information Officer under subsection (3) of section 23 and who fails without reasonable cause to provide such assistance, shall be guilty of an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not less than twenty five thousand rupees.

(4) A fine imposed for the commission of an offence referred to in subsection (1), (2) or (3) of this section, shall be in addition and not in derogation of any disciplinary action that may be taken against such officer by the relevant authority empowered to do so, for the failure to carry out a duty imposed under this Act.

Release or disclosure of official information by an employee of a public authority.

38. Notwithstanding any legal or other obligation to which a person may be subject to by virtue of being an officer or employee of any public authority, no officer or employee of a public authority shall be subjected to any punishment, disciplinary or otherwise, for releasing or disclosing any official information which is permitted to be released or disclosed on a request submitted under this Act.

Regulations.

39. (1) The Minister may make regulations in respect of all matters required by this Act to be prescribed or in respect of which regulations are necessary to be made in order to give effect to the provisions of the Act.

(2) Every regulation made under subsection (1) shall be published in the *Gazette* and shall come into operation on the date of such publication or on such later date as may be specified in the regulation.

(3) Every regulation made under subsection (1) shall, forthwith

after its publication in the *Gazette* be brought before Parliament for approval and any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done thereunder.

(4) The date on which any regulation is deemed to be so rescinded shall be published in the *Gazette*.

Interpretation.

40. In this Act, unless the context otherwise requires –

"Higher Educational Institution" means a University, Campus or University College established or deemed to be established or made by the Universities Act, 16 of 1978;

"Information Officer" means an Information Officer appointed under section 23 of this Act;

"local authority" means a Municipal Council, Urban Council, Provincial Council or a Pradeshiya Sabha and includes any authority created or established by or under any law to exercise, perform and discharge powers, duties and functions corresponding or similar to the powers, duties and functions exercised, performed or discharged by any such Council or Sabha;

"official information" includes any correspondence, memorandum, draft legislation, book, plan map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, video tape, machine readable record, computer records including emails and other documentary material, regardless of its physical form or character and any copy thereof;

"person" means a citizen of Sri Lanka or any body of persons, whether corporate or unincorporated or registered in Sri Lanka;

"public authority" means –

(a) a Ministry of the Government;

(b) any body or office established by or under the

Constitution other than the Parliament and the Cabinet of Ministers;

(c) a Government Department;

(d) a public corporation;

(e) an Educational Institution or Higher Educational Institution;

(f) a company incorporated under the Companies Act, No.17 of 1982, in which the State, or a public corporation or the State and a public corporation together hold a majority of the shares;

(g) a local authority;

(g) a semi-public or private entity or organization rendering any public service; and

(h) any department or other authority or institution established or created by a Provincial Council;

Sinhala text to prevail in case of inconsistency.

37. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

Recommendation for revision of existing constitutional provision on freedom of expression

Substantive Right

- Replacement of the existing Article 14(1)(a) with the following;
 - (1) Every person shall have the right to hold opinions without interference.
 - (2) Every person shall have the right to freedom of expression; this right shall include freedom to express, seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

This formulation is substantially the same as in the Draft Constitution of 2000 except that the freedom to hold opinions is also included

Restrictions

- Subsection (1)- the freedom to hold opinions should not be subjected to any restriction which is the modern standard
- Subsection (2) - restrictions on freedom of expression provision (current Article 15(2)) should be amended so that the basis of restriction based on parliamentary privilege be taken out. *This was also a recommendation of the RKW Goonesekere Committee on Media Law Reform*

Kishali

January 20th 2015

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