Sri Lanka

Analysis of the Draft Right to Information Act

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Introduction

Over the last decade, the right to access information held by public authorities or the right to information (RTI) has been recognised as a human right under international law and in all major regional human rights systems. This is reflected in the UN Human Rights Committee's 2011 General Comment on Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[1] which was ratified by Sri Lanka in June 1980, decisions of the Inter-American Court of Human Rights[2] and European Court of Human Rights,[3] and the *Declaration of Principles on Freedom of Expression in Africa*.[4]

During approximately the same timeframe, almost all of the countries in South Asia, with the exception of Bhutan and Sri Lanka, have adopted national laws giving effect to this right. Within Sri Lanka, an RTI law was approved by the Cabinet of the United National Front government in 2004 but it was not brought before Parliament due to the collapse of that government later that same year. When Maithripala Sirisena was elected President in January 2015, one of the promises in his 100 Day Work Programme was to adopt an RTI law but, for various reasons, this did not happen. This was, however, again a promise of the United National Front for Good Governance which won the August 2015 elections, and a draft Right to Information Act (draft Act) has now been approved by Cabinet. The government has promised to publish the draft Act to obtain feedback from the public and from the country's provincial authorities prior to tabling it in Parliament.

This Analysis of the draft Act is intended to provide local stakeholders with an international perspective on the extent to which the draft respects international standards regarding the right to information. These standards are reflected in the RTI Rating, which was developed by the Centre for Law and Democracy (CLD) and Access Info Europe, which is based on a comprehensive analysis of international standards adopted both by global and regional human rights mechanisms. The Rating is composed of 61 indicators spread over 7 main categories which reflect all of the positive attributes that a strong RTI law should have. It has received widespread global recognition and is relied upon by a range of actors – including such inter-governmental bodies as UNESCO and the World Bank – to assess the strength of RTI laws. The Rating is continuously updated and now covers 102 national laws from around the world.[5]

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[1] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.
[2] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151.
[3] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.
[4] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.
[5] Information about the RTI Rating as well as the assessments of the 102 national laws is available at: http://www.RTI-Rating.org.

A quick assessment of the draft Act based on the RTI Rating has been prepared and the relevant sections of the RTI Rating assessment are pasted into the text of this Analysis. The overall score of the draft Act, based on the RTI Rating, is 120 out of a possible 150 points, broken down as follows:

Section	Max Points	Score
1. Right of Access	6	5
2. Scope	30	26
3. Requesting Procedures	30	22
4. Exceptions and Refusals	30	26
5. Appeals	30	23
6. Sanctions and Protections	8	4
7. Promotional Measures	16	14
Total score	**150**	**120**

This is a relatively high score which would put the draft Act in a very respectable seventh position globally, below, respectively, Serbia, Slovenia, India, Liberia, El Salvador and Sierra Leone. South Asia is a strong region globally in this area which includes other strong performers such as the Maldives (116 points), Bangladesh (107 points) and Nepal (104 points).

Although the draft Act does well in comparison to international standards, as demonstrated by its strong RTI Rating score, there are still important ways in which the draft could be improved. This Analysis identifies areas where improvements are needed and makes specific recommendations for amendments. These include both some technical changes, such as removing duplications, and more substantive changes so as better to reflect international standards.

1. Right of Access and Scope

An important starting point for a strong RTI system is that the right to information should be constitutionally entrenched. The right to information is protected in Article 14A, adopted as part of the Nineteenth Amendment of the Constitution of the Democratic Socialist Republic of Sri Lanka in May 2015. The preamble of the draft Act recognises a number of wider benefits of the right to information, including fostering a culture of transparency, to promote public accountability and good governance, supporting public participation in public life and combating corruption. However, the draft Act does not include any statement calling for its provisions to be interpreted so as to give effect to these benefits.

It is clear from sections 3 and 44 that the draft Act will only apply to citizens, albeit defined to include legal entities of which at least three-quarters of the members are citizens. Better practice is to extend the right to anyone, regardless of nationality or residence. Objections are sometimes raised to this idea, for example on the basis that it might undermine security or place an undue burden on public authorities. Experience in other countries demonstrates clearly that such arguments are without merit. The draft Act already includes exceptions for security-sensitive information, so that this type of information should not be given to either citizens or foreigners. Many countries allow anyone to make a request and there is no evidence that requests from non-citizens significantly increases the administrative burden on public authorities.

Information is defined broadly in the draft Act but it fails to make it crystal clear that requesters have a right to ask for both information and specific documents. While this distinction may appear to be rather theoretical, there are several cases where it has been abused so as to deny access, and better practice is for the RTI law to explicitly provide for a right of access to both information and documents.

The draft Act contains a broad definition of public authorities, including authorities at different levels of government, all three branches of government and private bodies that should be treated as public authorities for purposes of access to information. The draft Act refers to ownership by public authorities, activities undertaken under a contract or licence from government, and non-governmental organisations (NGOs) which are substantially funded by government or which render a public service. However, one point was deducted on the RTI Rating here because it is not clear that bodies which are controlled by a public authority outside of these contexts are covered. Furthermore, it would be preferable to include any body which is substantially funded by government, not just NGOs which fall into that category (indeed, this could be seen as being discriminatory against NGOs).

Recommendations:

- The right to information law should require its provisions to be interpreted so as best to give effect to the wider benefits of RTI which are recognised in the preamble.
- Everyone, including foreigners, should have the right to make requests for information.
- The law should make it clear that requesters have a right to access both information and documents.
- The definition of a public authority should be expanded to cover all bodies which are controlled by public authorities and also any body, not just NGOs,

which receives substantial public funding.

Right of Access

Indicator		Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	2	Const. Art. 14A
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	3
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.	2	1	Preamble
	TOTAL	**6**	**5**	

Scope

Indicator		Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	0	3
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	4	44
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents).	2	1	3
7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	8	7	44
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	44
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	44
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	2	44
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	2	44

12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	2	2	44
	TOTAL	**30**	**26**	

2. Duty to Publish

The proactive publication provisions are found in sections 8 and 9 of the draft Act. A key problem with the main proactive publication provision, namely section 8, is that it is rooted in the idea of the biannual publication of a 'report', albeit in the form approved by the Commission, containing a number of categories of information. This is simply not consistent with the way that proactive publication works in most countries and with an efficient approach towards this issue. While the digital gap is still significant in Sri Lanka, the enormous efficiencies of online publication still mean that this method needs to be prioritised as it will allow for vastly more information to be made available. Alternative methods of dissemination can be used to supplement online publication so as to ensure that key types of information, including relevant project information, as provided for in section 9, reaches those most affected.

The main categories of information that must be published, as set out in section 8(2), are quite extensive in nature but they also fail to include a number of important types of information. Section 8(2) does not, for example, include information on opportunities for the public to consult with the public authority, detailed internal financial information, or information about public subsidies, licences or authorisations.

Recommendations:

- The system for undertaking proactive publication should be reconsidered in favour of a system which revolves around online publication but which is supplemented by requirements to ensure that information reaches those individuals and communities who are particularly affected by it.
- Consideration should be given to expanding the categories of information which are subject to proactive publication.

Note: The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

3. Requesting Procedures

In general, the draft Act provides for a progressive and user-friendly system for making and responding to requests for information. At the same time, the system could benefit from more detailed and clear elaboration of certain rules. Requests should normally be made in writing, including electronically, but can be made orally where the requester is unable to make one in writing (in which case the information officer must provide the necessary assistance) (section 24(1)). There are fairly comprehensive rules on providing assistance to requesters (see, for example, sections 23(2) and 24(2)), and written acknowledgements are to be provided immediately upon receipt of a request (section 24(3)).

One shortcoming is that the draft Act does not address cases where the public authority which receives a request does not have the information which is being sought. Better practice in such cases is to require the public authority to transfer the request to another public authority which does hold the information or to inform the requester where it is not aware of any other body which holds the information.

The rules on time limits are also rather complicated and not as clear as they could be. Pursuant to section 25(1), an information officer is required to respond to a request "as expeditiously as possible" and in any case within 14 working days. Pursuant to section 25(5), the period may be extended for another 21 days (it is not stated explicitly but we assume this is 21 working days) for complex requests, whereas an additional 14 working days should be enough for this purpose. Furthermore, section 25(2) provides that once a decision has been made, the information is only required to be provided within another 14 days, instead of immediately once any fee has been paid. Where the form of access is via inspection, some time may be needed to arrange this but normally it should be possible to provide information very quickly and far more quickly than 14 working days.

In terms of fees, the draft Act does not actually state explicitly that it is free to lodge a request. Although we assume that this is intended, it is useful to make it absolutely clear in the law, for the avoidance of any doubt on the part of different public authorities. The Commission is tasked with adopting a schedule of fees for providing access, which shall be based on "reasonableness" (section 14(c)). However, the draft Act does not stipulate what the fees may relate to and, in particular, does not make it clear that fees shall be limited to the costs of reproducing and sending the information to the requester.

The draft Act fails to include any provision on reuse of information which has been obtained via a request. This is an improvement over the February 2015 draft, section 31 of which specifically provided that receipt of information was not an authorisation to re-publish. However, better practice is to provide for some sort of

regime to authorise the re-use of information. One possibility here is to place an obligation on a central body to adopt an open licence for information produced by public authorities (but not for information held by them but which was produced by third parties, who may continue to hold intellectual property rights in that information).

Recommendations:

- Where a public authority does not hold requested information, it should be required to transfer the request to another authority which does hold the information, if it is aware of such a body, and to inform the requester about the transfer, or to inform the requester where it is not aware of such a body.
- References in the law to days should consistently be to working days and consideration should be given to limiting any extensions of the time limit for responding to a request to another 14 working days.
- Where the decision on a request is to grant access, this should be required to be done as soon as possible after the payment of any fee.
- The law should make it clear that it is free to file a request for information and also limit any fees which may be imposed to the actual costs incurred in of reproducing and sending the information to the requester.
- Consideration should be given to putting in place a proper system for the reuse of information by requesters, which should include a presumption that they are free to reuse information produced by public authorities as they may wish.

Indicator		Max	Points	Article
13	Requesters are not required to provide reasons for their requests.	2	2	24(5)
14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	2	24(5)
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	2	24(5)-(6)
16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.	2	2	23(2), 24(2)
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	2	2	23(2), 24(2)

18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	2	24(3)
19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	0	
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	2	27
21	Public authorities are required to respond to requests as soon as possible.	2	2	25(1)
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	1	25(1), (2)
23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	1	25(5)
24	It is free to file requests.	2	1	24(2)
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	1	14(c)-(e)
26	There are fee waivers for impecunious requesters	2	1	14(d), 25(4)
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	1	
	TOTAL	**30**	**22**	

4. Exceptions and Refusals

In general, the regime of exceptions in the draft Act is well and tightly drafted, with almost all exceptions protecting legitimate interests and being subject to a harm test, and all exceptions being subject to a public interest override. In addition, a very positive feature is section 4, which provides that in case of inconsistency the right to information law shall prevail over any other law. Ideally, it would be useful for this provision to refer specifically to the idea of overriding exceptions or secrecy provisions in other laws. Although strictly speaking this is not legally necessary, it

provides clarity to those tasked with interpreting the law, including information officials.

There are a couple of exceptions which go beyond what is permitted under international law and which are not found in better practice right to information laws. First, section 5(1)(f) generally relates to professional secrecy that is protected by law. However, it also refers more broadly to communications between the Attorney General and other public authorities. Where the Attorney General provides professional legal services to other public authorities which are covered by legal rules on professional secrecy, this would already be covered by the general rule on professional secrecy. Otherwise, there is no warrant for going beyond this and providing exceptional protection for communications from the Attorney General. It may be noted that laws such as the Indian Right to Information Act, 2005 do not contain any specific reference to the Attorney General. As a result, the specific reference to this office in section 5(1)(f) appears to be an attempt to extend the regime of exceptions beyond the legitimate scope recognised under international law.

Second, section 5(1)(k) refers to cases where the disclosure of information would "infringe the privileges of Parliament". It may be noted that the regime of exceptions already protects legitimate interests which may be found in Parliamentary documents, such as security, the economy, privacy and so on. There is no need for Parliament to be covered by any special secrecy rules over and beyond these interests.

By and large, the exceptions in the draft Law are harm-tested, in the sense that they apply only where disclosure of the information would cause harm to the protected interest. However, section 5(1)(i), when read in conjunction with section 29(2)(c), essentially provides third parties with a veto over the disclosure of information provided by them in confidence. This may only be overcome by a decision of the Commission (i.e. where a third party objects to disclosure, the public authority must refuse to release the information but the Commission might overrule this). However, the scope of even the Commission's authority in such circumstances is limited to cases where the "release of the information concerned demonstrably outweighs the private interest in non disclosure" [sic] (we presume this is intended to be a form of public interest override).

This is not a legitimate approach. It is appropriate to consult with third parties to obtain their views about the release of information provided by them in confidence, but non-disclosure should always be based on an objective assessment of a risk of harm to a legitimate interest, such as privacy or a legitimate commercial interest. The information officer or public authority should be the one to make this determination, and the third party may then appeal to the Commission if they are

not satisfied with it. Otherwise, there is nothing to prevent completely abusive claims of secrecy on the part of third parties, which could substantially delay the release of information. Furthermore, there is no warrant for restricting the basis for release of such information, even at the Commission level, to public interest cases. Instead, the standard should be whether or not disclosure of the information really would harm a legitimate third party interest (i.e. privacy or commercial confidentiality). Given that there are already exceptions to protect these interests, there is no need for an additional exception along these lines, and these are not found in better practice right to information laws. The purpose of consultation with third parties should simply be to obtain their views, which can then be taken into account but should only be followed if they are convincing.

It may be noted that section 5(1)(e), covering medical records, also does not include a harm test. Given the high degree of sensitivity of such records, they may generally be presumed to be covered under the privacy exception. By the same token, however, section 5(1)(e) is unnecessary because privacy is already comprehensively protected under section 5(1)(a).

Section 5(4) contains a classical public interest override, whereby the exceptions in section 5(1) do not apply where the public interest in disclosure of the information outweighs the harm that would result from this. It is, therefore, unnecessary to include specific public interest overrides within individual exceptions, as is the case with sections 5(1)(a) and (d). Furthermore, section 5(1)(d) misstates the proper public interest override test as being that the public authority *is satisfied* that the larger public interest is served, as opposed to the objective standard of the larger public interest actually being served, as set out in section 5(4).

Section 5(2) recognises an overall time limit for exceptions of ten years, after which information shall become public. This is welcome, especially inasmuch as it sets a relatively short overall time limit on exceptions. However, the limit only applies to four of the 12 exceptions in section 5(1) and even then only partially to one of those four (namely 5(1)(c), on serious harm to the economy relating to overseas trade agreements). A better practice approach is to apply the overall time limit more broadly to all exceptions protecting public secrecy interests, such as national security or the investigation of crime, but then to allow for it to be overridden by a special procedure, such as having the Commission allow this or having a minister issue a special certificate to this effect, in exceptional cases.

Section 5(5) requires information officers to seek the advice of the Commission "with regard to an issue connected with the grant of access to any information which is exempted from being disclosed under subsection (1), within fourteen days". The precise import of this is not clear and, in particular, whether it means that information officers are always required to contact the Commission before

applying exceptions or simply that they may do so. In any case, it is not appropriate. The Commission is the appellate body for issues relating to the application of exceptions and it should not be involved in the original decision as that would undermine its appellate role (this would be like asking a court to which an appeal lay on a legal matter for advice on that legal matter).

Recommendations:

- Ideally, the right to information law should make it explicit that it overrides other legal rules which provide for secrecy to the extent that these go beyond its own regime of exceptions.
- Section 5(1)(f), providing special protection to the Attorney General, and section 5(1)(k), providing special protection for Parliament, should be removed from the law.
- Section 5(1)(f), providing for a third party veto over the release by public authorities of information provided in confidence, should be removed and section 29 should be limited to obtaining the views of relevant third parties about the release of such information, instead of providing them with a veto over its release.
- Consideration should be given to removing section 5(1)(e), protecting medical records, from the law, given that this is already covered by section 5(1)(a), protecting privacy.
- The references to the public interest override in sections 5(1)(a) and (d) should be removed and the override in section 5(4) applied instead.
- The overall time limit in section 5(2) should apply to all exceptions protecting public secrecy interests, but it should be able to be overridden in exceptional cases, pursuant to a special procedure.
- Section 5(5), relating to information officers asking the Commission about the application of exceptions, should be removed from the law.

Indicator		Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	4	4
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to	10	8	5(1)

	information which is already publicly available, for example online or in published form.			
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	3	5(1), 29(2)(c)
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	4	5(1)(a), (d), 5(2)
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	1	5(2), (4)
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	2	29
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	2	6
35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	2	25, 28
	TOTAL	**30**	**26**	

5. Appeals

The draft Act provides for a robust, three-part oversight system for the right to information which is generally in line with international standards. The system is composed of an internal appeal (section 31), an external appeal to an administrative body (section 32), namely the Right to Information Commission (Commission) established by section 11, and then for an appeal to the courts (section 34).

Pursuant to section 31(1), an internal appeal must be lodged within 14 days of the grounds for the appeal arising and the same time limit is imposed for appeals to the courts from Commission decisions (section 34(1)). These time limits are too short (one could, for example, be out of the country for a period of 14 days and it would normally take longer than this even to consult a lawyer to find out about the viability and potential cost of a judicial appeal). On the other hand, the time limit for deciding an internal appeal pursuant to section 31(3), namely three weeks, is too

long, taking into account that the public authority will already have considered the matter fully and that this is just an internal review of its original decision.

One of the key attributes of a successful administrative system of appeals is the need for the oversight body to be fully independent. A clear attempt has been made in the draft Act to promote the independence of the Commission – for example by prohibiting political figures from being appointed to it (see section 12(2)) – but its independence could be further enhanced. The five members of the Commission are appointed by the President upon the recommendation of the Constitutional Council, with three being nominated, respectively, by the Bar Association, "organizations of publishers, editors and media persons" and "other civil society organizations".

Pursuant to the 19th Amendment to the Constitution, the Constitutional Council is dominated by Members of Parliament (MPs), who comprise seven of the ten members including the Chair, who is the Speaker of the Parliament. The other three members are from civil society and are nominated jointly by the Prime Minister and the Leader of the Opposition. Previously, as provided for in the (now superseded) 17th Amendment to the Constitution, the situation was exactly the opposite, with seven of the ten members not being MPs or even members of political parties. The fact that the Constitutional Council is now dominated by MPs does not necessarily mean that it cannot undertake the job of recommending members of the Commission properly, but it does mean that other protections for the independence of the Commission are correspondingly more important.

One of the problems with the approach in the draft Act is the lack of a clear process for the nomination by external actors of three members of the Commission to the Constitutional Council. While the Bar Association could come up with its own procedure for doing this, the lack of any coordinating or coalition body for either "organizations of publishers, editors and media persons" or "other civil society organizations" means that it is very unclear how these nominations are to be made. Furthermore, it is not even clear what the first of these refers to (for example, who qualifies as a media person).

If any organisation falling within the category could make a nomination, that would mean that it would essentially be up to the Constitutional Council to choose these members (i.e. this would give it a free hand in the choice of four of the five members of the Commission). It would be preferable if the power of nomination were more clearly prescribed, for example by pointing to specific social groups or entities which could come up with credible nominations. At a minimum, there should be a requirement that these groups have been legally established for a period of time (say three years).

Another weakness is that, pursuant to section 12(5), the President nominates the Chairperson of the Commission. Better practice is to allow the Commission to appoint its own Chairperson, from among its members. Furthermore, pursuant to Clause 6 of the Schedule of the draft Act, the Minister of Finance sets the level of remuneration of the members of the Commission, whereas it would be preferable to link this to an established salary structure (for example of judges). Furthermore, according to section 13(3), the Commission must consult with the Minister of Finance in setting the salary of the Director-General, whereas it should have the power to set this own its own (obviously subject to the budget allocation provided to it by Parliament).

Although the tenure of members of the Commission is protected, pursuant to clause 2 of the Schedule members may be removed from office by the President, on the recommendation of the Constitutional Council, on rather vague grounds, including "physical disability or unsoundness of mind" or "moral turpitude" (clause 2 of the Schedule). While it might be necessary, in exceptional cases, to remove a member on these grounds, it would be preferable for this to be done at the behest of the other members, by a majority vote of the members not including the member being impeached.

The Commission is required to decide appeals within 30 days and to adopt more detailed rules regarding the processing of appeals (see sections 32(1) and 43(1)). It should be clear, when such rules are adopted, that it is free to lodge an appeal and that appeals do not require the assistance of a lawyer. The grounds for lodging an appeal should also go beyond the scope of the current rules (see section 31(1)) and include cases where public authorities refuse to accept a request or any other breach or claimed breach of the law.

There is also some confusion as to the point at which an appeal before the Commission may be lodged. Section 31(4) suggests that such an appeal does not depend on having gone through the internal appeals process, while section 32(1) suggests that an appeal to the Commission lies from a decision (or the failure to adopt a decision) in an internal appeal.

Section 15 of the draft Act gives the Commission the power to hold inquiries, to compel persons to appear before it to give evidence and to review any information held by a public authority. It is not clear, however, whether the Commission has the power to inspect public authorities. This is an important power, for example where an authority claims it does not hold information but the Commission believes that it does.

There are gaps in the draft Act in terms of the powers of the Commission to order remedies, which are not provided for explicitly in the draft Act, although it is implied

by section 32(1). Better practice is to set out clearly the order-making power of the Commission, which should include such things as ordering disclosure of information as well as varying fees and the form in which information is provided. Best practice in this area is also to give the oversight body the power to impose appropriate structural remedies on public authorities which are systematically failing to respect the law, for example to appoint an information officer, to train their staff or to manage their records better.

A serious weakness in the draft Act is that it does not provide for the decisions of the Commission to be formally legally binding on public authorities, or for a system for enforcing such decisions. This is clearly better practice globally. In some countries, this is achieved by giving the oversight body the power to register its decisions with the courts, so that any failure to respect those decisions becomes a contempt of court.

Recommendations:

- Requesters should be given at least 30 days to lodge an internal appeal and the period for taking an appeal to the courts from a decision of the Commission should be significantly longer than this.
- The time limit for deciding internal appeals should be shortened, for example to ten working days or even less
- The law should identify clear social groups or entities to make nominations for membership of the Commission to the Constitutional Council, rather than leaving it up to vaguely defined sets of groups, namely "organizations of publishers, editors and media persons" and "other civil society organizations". At a minimum, the power of nomination should be limited to groups that have been legally established for a minimum period of time, such as three years.
- The Commission should appoint its own Chairperson, from among its members.
- The salaries of members of the Commission should be linked to an established salary structure rather than being set by the Minister of Finance and the Commission should be able to set the salary of the Director-General on its own rather than being required to consult the Minister of Finance on this matter.
- Removal of a member of the Commission should be initiated by a majority vote of the other members, rather than by the President or Constitutional Council.
- The rules for the processing of appeals should make it clear that it is free to lodge an appeal and that appeals do not require the assistance of a lawyer.
- The grounds for lodging an appeal with the Commission should include any

failure to respect the rules in the law relating to the processing of requests.

- The precise point at which a requester may lodge an appeal before the Commission should be clarified, ideally without requiring requesters to go through an internal appeal process.
- The Commission should have the power to inspect public authorities.
- The law should set out explicitly the power of the Commission to order remedies for requesters, including for public authorities to disclose information.
- The law should give the Commission the power to impose structural remedies on public authorities that are systematically failing to respect the law.
- The law should provide explicitly that the decisions of the Commission are formally binding and should put in place a system for enforcing those decisions, for example by registering them with the courts so that any failure to respect them becomes a contempt of court.

Indicator		Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	2	31
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	2	25(7), 29(2)(c), 32
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	2	2	12(1), (6)
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	2	16
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	2	12(2)
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	2	
42	The decisions of the independent oversight body are binding.	2	0	32(1)
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	1	34
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	34
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	1	

46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	4	3	31(1)
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	2	32(1), 43(1)
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	2	32(4)
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	0	
	TOTAL	**30**	**23**	

6. Sanctions and Protections

Sections 39 and 40 of the draft Act set out the system of sanctions for officials who obstruct access. Pursuant to section 39, the Commission may refer certain cases of obstruction – on the part of either the information official or the designated officer, who is responsible for internal appeals – to the "appropriate disciplinary authority". For its part, section 40 provides for a system of criminal penalties for more serious cases of obstruction, which includes both fines and potentially imprisonment, with the power granted to the Commission to institute prosecutions.

This is an interesting and innovative system of sanctions for obstruction of access. While the experience of other countries suggests that criminal penalties are rarely effective, giving the Commission the power to initiate prosecutions may help address a key weakness in other countries, namely the absence or paucity of cases. At the same time, it is unclear how the Commission, which is not a prosecutorial office and which does not have the necessary relationship with the police, would be able to undertake this function.

It is perhaps useful to include section 39 but the experience of other countries suggests that internal disciplinary systems are rarely if ever effective in the right to information context. This is due in part to a combination of their internal nature and the fact that the culture of secrecy means that there are often strong internal disincentives to promoting respect for the right to information.

In light of these challenges, it might be useful to consider putting in place an administrative system of fines which would be easier to apply than the criminal sanctions found in section 40 and at least potentially more effective than the disciplinary sanctions found in section 39. In India, such fines are imposed directly

by the oversight bodies (the Information Commissions) but it might also be possible for other bodies to impose fines, for example a human rights commission.

The draft Act does not establish a system for addressing the problem of public authorities which systematically fail to meet their information disclosure obligations. This can be useful to address the problem of persistent non- or underperforming public authorities and to send a signal to all public authorities that failure to implement the law will not be accepted.

Protections are provided for in sections 21, 30 and 41. The first provides for the funds of the Commission to cover any costs incurred by a member or officer of the Commission in a legal case relating to acts done in good faith pursuant to the law. Section 30 provides that no civil or criminal liability shall attach to any official for anything done in good faith pursuant to the law. Finally, section 41 provides that no one shall be subject to any punishment of a disciplinary or related nature for releasing information which is permitted to be released in response to a request.

This is a strong system of protections. However, consideration should be given to expanding the last form of protection to cover any good faith action pursuant to the law, in an analogous way to the other two protections. Otherwise, officials will find themselves protected against legal sanctions for good faith but mistaken actions under the law, but not against disciplinary measures.

The draft Act fails to provide protection for whistleblowers, individuals who, in good faith, release information which exposes wrongdoing. This is recognised as a very important information safety valve, which helps ensure that information of public interest reaches the public, even in the absence of a request for such information (which it may be difficult for members of the public to make, if they are not aware of the existence of the information).

Recommendations:

- Consideration should be given to putting in place an administrative system of fines, overseen either by the Commission or by another administrative body. Consideration should also be given to how to make the system envisaged in section 40 of the draft Act effective, perhaps by imposing some obligations on the police and/or prosecutorial officials where the Commission recommends a prosecution.
- A system for imposing sanctions on public authorities which systematically fail to respect the right to information should be developed.
- Consideration should be given to expanding the scope of protection against disciplinary measures to cover good faith actions pursuant to the law.

- The law should provide protection for whistleblowers.

Indicator		Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	2	39, 40
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	2	21, 30, 41
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2	0	
	TOTAL	**8**	**4**	

7. Promotional Measures

The draft Act contains a strong package of promotional measures which will help ensure that it is successfully implemented. There are, however, a couple of ways in which this system could be improved.

Section 8(2)(b)(iii) provides for the proactive disclosure of "rules, regulations, instructions, manuals and any other categories of records, which are used by its officers and employees in the discharge of their functions". This is helpful, although the precise import of the reference to "other categories of records" is not clear. Best practice is to require public authorities to publish a full list of the records they hold, while better practice is to require them to publish a list of the categories of records they hold.

Section 14(f) provides for the Commission to "co-operate with or undertake training activities for public officials". This is positive but it is essentially discretionary in nature. Better practice in this area is to require public authorities to ensure that their officials receive appropriate training on the right to information.

Sections 10 and 38 both require public authorities to produce annual reports and thus duplicate each other. The lists of items to be included in these annual reports differs slightly; the lists should be consolidated into one list containing all of the items currently found on the two lists. The items on the list should be required to be

provided in disaggregated detail. For example, section 10(e) refers to the total amount of information received in fees, whereas the report should break this down by request (i.e. so that it is clear how many requests fell into different fee bands).

Recommendations:

- Consideration should be given to requiring public authorities to publish lists of all of the documents they hold or at least lists of the categories of documents they hold.
- Consideration should be given to requiring public authorities to ensure that their officials receive appropriate training on the right to information.
- Sections 10 and 38 should be integrated into one provision in a manner that ensures that all of the items on each of the current lists appears on the consolidated list and it should be clear that information is required to be provided in a disaggregated fashion.

Indicator		Max	Points	Article
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	2	23
55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	2	14
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	2	14(g), 22, 26
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	2	7, 14(h)
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	1	8(2)(b)(iii)
59	Training programmes for officials are required to be put in place.	2	1	14(f)
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	2	10, 38
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	2	37
	TOTAL	**16**	**14**	