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Analysis of the Draft Right to Information Law

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Introduction[1]

The government of Myanmar made a commitment some time ago to adopt a law giving individuals a right to access information held by public bodies, or a right to information (RTI) law, and it is now moving forward on that commitment. An early draft prepared by the Ministry of Information (MoI) was released in February 2016. This was, however, a weak draft which was rejected by both local stakeholders and international observers. A much stronger draft was released by the MoI in July 2017. Following further consultations both within government and with civil society, another draft was released on 27 December 2017 (draft Law).

This Analysis examines the December version of the draft Law and makes specific recommendations to bring it more fully into line with international standards.[2] Our recommendations are divided into two groups. The first, called 'easy wins', are changes that we believe are relatively easy to make, in the sense both that they will not encounter much opposition and that they will not place too much burden on public bodies. The second, called 'important gains', are changes that we still believe are very important but which may either encounter more opposition or require a bit more effort from public bodies. We urge civil society and the authorities in Myanmar to consider all of our recommendations seriously.

The Analysis is based in part on the RTI Rating,[3] an internationally recognised methodology for assessing the strength of RTI legislation developed by the Centre for Law and Democracy (CLD) and Access Info Europe. According to the RTI Rating, the draft Law scores 94 points out of a possible 150. The specific scores of the draft Law, broken down according to the seven main categories of the RTI Rating, are provided below, alongside the scores from July 2017.

Section	Max Points	Score (Jul17)	Score (Dec17)
1. Right of Access	6	3	3
2. Scope	30	27	23
3. Requesting Procedures	30	15	13
4. Exceptions and Refusals	30	23	18
5. Appeals	30	21	20

[1] For more information about this Analysis, contact Centre for Law and Democracy, info@law-democracy.org, +1 902 431-3688, www.law-democracy.org.

[2] The Analysis is based on an unofficial translation of the draft Law into English. CLD takes no responsibility for errors in the assessment which are based on errors in translation.

[3] Available at: http://www.RTI-Rating.org.

6. Sanctions and Protections	8	8	4
7. Promotional Measures	16	12	13
Total score	**150**	**109**	**94**

It is immediately obvious that the December version of the draft Law is substantially weaker than the July 2017 version, in particular in relation to scope, exceptions and refusals, and sanctions and protections. The December version would be tied for 42nd place from among the 111 countries currently on the RTI Rating, or in about the middle of the list, as compared to a 21st place finish for the July 2017 version. It is clear, then that there is further scope to improve the draft Law.

1. Right of Access and Scope

Easy Wins

As with the July draft, the draft Law sets out, in section 3, a number of wider benefits, such as promoting good governance and sustainable development, but it fails to require public bodies and the oversight body to interpret it so as best to give effect to those benefits. It would be very simple to include a provision along these lines in the law.

Section 40 provides that public bodies shall provide information to requesters, apart from information which is exempt according to the law. This is useful, but it would be even better if this article indicated that the right to access information is a human right. Furthermore, section 39 states, at least in English translation, that citizens can access information "only under this law". This is surely a mistake since citizens should be able to access information through a variety of systems, of which the RTI law represents only one such system.

The definition of information, at section 2(c) is very broad in scope, which represents an improvement over the July draft. Furthermore, section 39 makes it clear that requesters can get both information and records, again in line with better practice. However, it would be useful for the law to state clearly that the right applies to all information and records which are held by a public body, as this idea appears to be missing at present.

The obligation to provide access to information should apply to all bodies which form part of the State, defined broadly. In general, the definition of "public agency" in section 2(d) is broad, covering all three branches of government, different levels of government and bodies formed under the Constitution, among others. By referring to constitutional bodies, however, the definition suggests that bodies that are 'merely' established by law might not be included, although this covers an important range of bodies in most countries. Furthermore, although non-governmental organisations formed with public funds are covered, it is not clear

that other bodies that are created, funded and/or controlled by public bodies would be covered. The definition also includes any "local or international public company". However, it is not entirely clear that this would include a private company which was owned by a public body. The definition also fails to cover private bodies which undertake a public function. Finally, at least in English translation, it appears to cover any "local or international organization", not just those which are publicly funded. This is too broad in scope as there is no rationale for covering bodies which are neither publicly funded nor undertake a public function.

Important Gains

Better practice is to entrench the right to information in the constitution. This is important both symbolically – providing a signal of the importance attached to this right – and at a practical level – since it supports the overriding nature of the right and the rules in the RTI law. There is no guarantee of the right to information in the Myanmar constitution. We understand that amending the constitution is beyond the scope of the current consultation on the draft Law. In due course, however, it would be useful to introduce a constitutional guarantee for the right to information.

Section 2(g) defines an "eligible person to request information" as a Myanmar citizen and foreigners "living in Myanmar and foreign organizations". This is an improvement over the July draft inasmuch as it at least includes foreigners living in Myanmar. The right to information is an internationally recognised human right. As such, it should apply to everyone, not just to citizens. Furthermore, the draft now appears to exclude local legal entities, which had been included in the July draft (although this may just be a technical error since foreign organisations are covered). Better practice is to allow both individuals and legal entities to make requests for information.

Recommendations:

- The law should require those tasked with interpreting it to do so in the manner that best gives effect to its benefits.
- Section 40 should make it clear that the right of access is a human right.
- Section 39 should be removed.
- The law should make it clear that the right of access applies to any information which is held by a public body.
- The definition of a "public agency" in section 2(d) should make it clear that it includes every body which is created by statute, which is owned, controlled or funded by a public body, whether it is public or private in nature, and which is a private body undertaking public functions.
- On the other hand, local or international organisations which do not meet the conditions note above should not be included.
- In due course, the Constitution of Myanmar should be amended to guarantee the right to information.

- Section 2(g) should make it clear that legal entities have a right to make requests for information and consideration should be given to extending access to all foreigners, not just those resident in Myanmar.

Right of Access

Indicator		Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	0	
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	39, 40
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	3
	TOTAL	**6**	**3**	

Scope

Indicator		Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	1	2(g)
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	2(c)
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	2	39
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	5	2(d)
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	2(d)
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	2(d)
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	1	2(d)
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	1	2(d)

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	1	2(d)
	TOTAL	**30**	**23**	

2. Duty to Publish

Important Gains

Although proactive disclosure is not covered in the RTI Rating, it is an essential element of a robust right to information system. The draft Law includes only very basic provisions relating to the proactive disclosure of information (and even then it is not entirely clear that this is what is being provided for). Section 41(a) calls on public bodies to provide information on the Commission's website "that the public should be aware", while section 41(d) calls on them to "publish information in an up-to-date fashion". This does not, however, constitutes a proper proactive publication system. Part of the problem with these obligations is that they are extremely general in nature so that different public bodies will end up interpreting them in completely different ways (and publishing completely different types of information).

Good practice in this area is to include in the law a list of the specific categories of information that public bodies are required to publish on a proactive basis. That way, each public body would be expected to meet roughly the same proactive publication standards. It is also good practice to grant the oversight body (i.e. the Information Commission) the power to extend this list from time-to-time, as public bodies become more comfortable and experienced with proactive publication.

Recommendation:

- The law should impose a duty on public bodies to publish information proactively, including by providing a specific list of categories of information that must, at a minimum, be published and by granting the Commission the power to extend this list from time-to-time.

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

3. Requesting Procedures

The draft Law scored just 13 out of 30 points on this category of the RTI Rating, less than 50% and the lowest score from among all seven categories. However, this is normally an area where it is possible to do very well on the Rating, so this

represents an area where important improvements could be made. This suggests that significant changes should be introduced in terms of requesting procedures. Some procedural rules can be left to regulations or byelaws adopted under the law, which can more easily be adapted as public bodies come to grips with their new responsibilities. However, the main outlines of the procedures should be spelt out in the primary legislation. Because it is normally quite simple to incorporate good procedures into an RTI law, almost all of the recommendations here are classed as 'easy wins'.

Easy Wins

According to international law, requesters should not be required to provide reasons for their requests. Instead, any request which contains sufficient detail to identify and provide the information to the requester should be accepted. Both of these measures act as safeguards for requesters. Not having to provide a reason for a request ensures that the requester does not need to fear reprisal for asking difficult questions or face delays in the processing of his or her request based on the underlying reasons. Likewise, there is no need to ask requesters for information beyond what is needed to provide them with the information, such as their physical address. The draft Law fails to mention anything about what needs to be included in a request, so fails to meet the prescribed standards for both of these issues.

The provision of assistance to requesters can be a vital part of ensuring the smooth processing of requests, and it can also be a significant benefit for public bodies (because trying to process vague or overly broad requests can waste a lot of time if the requester really just wants something quite specific and has simply phrased his or her request poorly). In some cases, requesters need assistance in formulating their requests and, in particular, in describing clearly the specific information they are seeking. In other cases, requesters may need help to fill out a request, for example due to disability or illiteracy.

Section 43(c) does provide that a requester who is having difficulty making a request in a formal way may "request in a convenient way". This seems to be an indirect form of assistance or support to requesters. However, it would be far preferable to place a positive obligation on public bodies to provide assistance to requesters whenever they need it either to formulate their requests clearly or due to disability or illiteracy.

According to section 44, requests shall be registered. This is useful. However, better practice is to require public bodies not only to register requests but also to provide requesters with a receipt acknowledging the request. This will be the only official evidence that a requester will have showing that the request has been lodged at all, which will be necessary if, for example, the public body delays in responding or does not respond at all.

Section 45 provides that, when a public body receives a request for information

which it does not hold or which is "not relevant to your institution", it shall inform the requester about this. It is not clear what the latter refers to (i.e. when information might be deemed not to be relevant to the institution). Better practice is to require public bodies to respond to any request for information which they hold. Where necessary, they may have to consult with other public bodies about whether the information falls within the scope of the regime of exceptions. Furthermore, it is better practice to require public bodies to transfer a request, when they are aware of another body which holds the information, and then to inform the requester about this. At a minimum, in such cases they should be required to inform the requester about the other body.

Section 15 of the July draft required public bodies to provide information in the format stipulated by the requester, subject to certain conditions. This has been removed entirely from the current draft Law. Better practice is to require public bodies to provide information in the format stipulated by the requester unless this places an undue burden on them or poses a risk of damage to the record. This basically provides adequate protection against any possible problems arising from format issues.

The draft Law provides, in section 46, that public bodies should respond to emergency requests as soon as possible and in any case within 24 hours and for other cases within seven working days or fifteen working days where the request "requires a search through previous data, records and lists". This can be extended by another fifteen days where the request "requires a search through a large number of records or records located in different offices, or consultation with other public bodies". These are reasonable timeframes. The only change that is really needed is to stipulate that all requests should be responded to as soon as possible. This only makes sense, since there is no need to delay in responding to a request where that is not necessary (i.e. if a quicker response is possible).

It is important for right to information laws to have clear frameworks for fees. First, it should be free to file a request. Although this is perhaps implied, it is never clearly stated in the draft Law. Second, fees should be limited to the actual cost of reproducing and sending the information (i.e. public bodies should not be able to charge for their time for searching for or preparing information). Section 49 of the draft Law allows public bodies to charge for "the cost to collect and send information", while section 18(b) provides for the Commission to adopt the schedule for the fees. The latter is best practice. But what "collect" comprises needs to be clarified. Best practice is to provide a certain initial number of pages (for example ten or twenty pages) for free. The draft Law does not include a provision along these lines. Finally, there should ideally be a system for waiving fees for impecunious requesters, so as to ensure that everyone has an equal right to access information.

Important Gains

Better practice in right to information laws is to make it clear that, once they have been provided with information, requesters are free to reuse that information as they may wish, perhaps subject to certain limited requirements (for example to acknowledge the source or to respect intellectual property rights held by third parties). There is no mention in the draft Law about rules regarding the reuse of information. If the matter is not already dealt with satisfactorily in another law or policy, it would be useful to include a framework of rules on reuse of information in the RTI law. This could, for example, task the government with adopting an open use licence, perhaps within a set timeframe (say of six months).

Recommendations:

- The law should make it clear that requesters do not have to provide reasons for their requests.
- The law should also set out clearly what information needs to be included in a request for information, which should ideally be limited to the details needed to identify and deliver the information (i.e. some form of address for delivery).
- Section 43(c) should be amended to place a clear positive obligation on public bodies to provide reasonable assistance to requesters whenever they need it.
- In addition to requiring public bodies to register requests, section 44 should also require them to provide receipts to requesters.
- Public bodies should be required to respond to requests whenever they hold information which is being requested. Otherwise, i.e. where they do not hold the information, they should be required to transfer the request to the body which does hold it, if they are aware of such a body, and to inform the requester about this.
- A provision along the lines of section 15 of the July draft should be reinstated into the law, requiring public bodies to provide information in any format stipulated by the requester unless this would place an undue burden on them or pose a threat to the preservation of the record.
- The law should stipulate that public bodies are required to respond to all requests as soon as possible, not just urgent requests.
- The law should state explicitly that it is free to lodge a request and that fees shall be limited to the costs of reproducing and delivering the information. Consideration should also be given to introducing fee waivers for impecunious requesters and to providing an initial number, say ten or twenty, of pages of photocopying for free.
- A basic framework of rules should be introduced into the law on the right freely to reuse information which has been provided in response to a request.

Indicator	Max	Points	Article

13	Requesters are not required to provide reasons for their requests.	2	0	
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	0	
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	43(b)(c)
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	1	43(c)
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	0	
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	1	44
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	1	45
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	0	
21	Public authorities are required to respond to requests as soon as possible.	2	0	46
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	2	46
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	2	46
24	It is free to file requests.	2	1	
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	2	18(b), 49
26	There are fee waivers for impecunious requesters	2	0	
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**	**13**	

4. Exceptions and Refusals

The regime of exceptions lies at the very heart of any RTI law since it serves to draw the line between openness and secrecy. A law that is otherwise perfect but contains a vastly overbroad regime of exceptions will do little to support transparency. For this reason, exceptions to the right of access should always be narrowly tailored. There are three main conditions on exceptions under international law. First, exceptions should be limited to the protection of a set of narrow, clearly defined and legitimate interests. These should be set out clearly in the RTI law and other laws should not be allowed to extend them. Second, information should be disclosed unless this would pose a risk of harm to one or more of the protected interests. Third, even where this is the case, information should still be disclosed where, on balance, this is in the overall public interest.

Easy Wins

When it comes to the harm test, most of the exceptions in the draft Law have a good harm test, such as "harm", "prejudice" or "damage". In three cases, however, the term, at least in English translation, is "can affect", namely for national security (section 51(a)), relations with other countries or international organisations (section 51(b)) and privacy (section 51(e)). This does not necessarily require a risk of harm but simply that there will be some effect on the protected interests, which is not the right standard according to international law. Furthermore, privacy is protected twice, once in section 51(e) and then a second time in section 51(g), which is clearly unnecessary. Since section 51(g) provides a tighter formulation of the exception, it should be retained and section 51(e) removed.

There is also an unfortunate reference in section 48 to the idea that information must be "shared" if this does not disturb public bodies. This is problematical because it seems to suggest that if sharing information did 'disturb' public bodies, it might not be disclosed, which of course is not a proper test for an exception.

One of the key weaknesses with the draft Law in terms of exceptions is that it essentially fails to provide for a public interest override. Section 53 does provide that public bodies and the Commission should assess the scope of exceptions "in the interest of the Union and its citizens", but this is not a proper public interest override. A proper override would provide that information which otherwise falls within the scope of an exception shall nevertheless be released if the public benefit flowing from this outweighs the harm that would be caused to the protected interest. Better practice is also to include a "hard" (absolute) override that requires disclosure, regardless of any exception, whenever the information exposes human rights abuses, corruption or crimes against humanity.

The July draft provided for a clear rule on severability, so that where only part of a document or record was sensitive, that part would be removed and the rest of the document disclosed. This makes obvious sense since there is no justification for

withholding the whole of a document just because part of it is confidential. Unfortunately, the draft Law does not include a rule along these lines.

The draft Law fails to require public bodies to provide appropriate notice to requesters whenever their requests for information are refused. Better practice here calls for requesters to be told about the exact legal grounds which were relied upon to refuse their requests and also to be advised about their right to lodge an appeal against the refusal.

Important Gains

Myanmar, like many other countries, has a legacy of vastly overbroad secrecy laws, including the very outdated and somewhat notorious Official Secrets Act, 1923. For this reason, it is of the greatest importance that the RTI law provide clearly that it shall override other laws to the extent of any conflict.

Section 40 of the draft Law provides that public bodies shall disclose any information apart from information which is exempt "according to this law", while section 47(a) provides that requests can be rejected on the basis that "the information is exempt under this law". These are both positive statements, but they do not quite represent a clear statement of the overriding status of the RTI law.

Most of the exceptions in the draft Law are legitimate according to international law. Three, however, are somewhat problematic, at least in their English translation. Section 51(c)(2) refers to information the disclosure of which could "harm race and religion". This may represent a degree of confusion between the types of speech that may be restricted, of which hate speech is clearly an example, and the issue of access to information. The latter is limited to information which is held by a public body. We do not expect these bodies to hold information which constitutes hate speech. If there are 'uncomfortable' facts held by public bodies, these still need to be disclosed, and debated in public.

Section 51(d) refers to information that could cause "contempt of court". Again, this appears to reflect a confusion between limitations on freedom of expression and limitations on the right to information. Most, if not all, countries have some sort of contempt of court laws, but public bodies should not hold information which falls into this category and, if they do, that should be exposed rather than hidden. As a result, this is not a legitimate exception to the right to information.

Finally, section 51(i) exempts information "which is related to the personnel protected against existing laws". It is not clear to us exactly what this means, but it does not appear to constitute a legitimate exception to the right of access.

Recommendations:

- The terms "can affect" or "likely to affect", in relation to national security and government relations with foreign entities, in sections 51(a) and (b), should be replaced with proper harm tests, while section 51(e) should be removed, leaving section 51(g) to address privacy.
- Section 48 should be removed from the law or its meaning should be clarified.
- A public interest override should be added to the law so that information shall still be disclosed even where it is otherwise exempt where the public benefit from this outweighs the harm that would result.
- Consideration should be given to adding a "hard" override that provides for disclosure whenever the information in question would expose human rights violations, corruption or crimes against humanity.
- A severability rule should be added to the law.
- The law should require public bodies to provide requesters whose requests have been denied with a written notice indicating the legal grounds which are claimed to justify the refusal and informing them about their right to lodge an appeal against the refusal.
- The RTI law should incorporate a clear override so that it prevails over other laws in case of conflict.
- The three problematical exceptions - in favour of "race and religion", "contempt of court" and "personnel protected against existing laws" – 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	2	40, 47(a)
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 information which is already publicly available, for example online or in published form.	10	7	48, 51
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	4	51(a), (b), (e)
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	4	1	53

	information about human rights, corruption or crimes against humanity.			
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	2	18(c), 54
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	52
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	0	
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	0	
	TOTAL	**30**	**18**	

5. Appeals

An effective RTI regime requires that those whose requests have not been dealt with in accordance with the law, including because they were unjustly denied, have access to a robust appeals process. Officials are often used to working in secrecy and may not always welcome the changes that RTI laws bring. For this reason, it is essential for requesters to have access to an appeals process that is independent and effective.

While it is always possible to appeal to the courts for allegations of a breach of the law, this option is too expensive, not to mention time consuming, for the vast majority of citizens. It is, therefore, crucially important to provide for an appeal to an independent administrative oversight body. This is far less expensive and time consuming than the courts, and experience in different countries has proven that this sort of appeal is essential to the successful implementation of RTI laws.

At the same time, requesters should still be able to lodge an appeal with the courts. This is important to ensure, in appropriate cases, the more in-depth consideration of issues that courts can provide.

Easy Wins

As an initial option, it is useful to provide for an internal appeal, to a higher authority within the same public body, so as to give the body a chance to resolve the matter internally before it goes to an external decision-maker. No internal appeal is envisaged in the draft Law.

The draft Law does provide for an independent administrative level of appeal, in the form of the Information Commission established pursuant to section 5, something that was entirely lacking in the 2016 draft and was introduced for the first time in the July draft. A key need here is for the body to be independent from the public bodies (i.e. government) it is overseeing. The draft Law has a number of very positive elements in this regard, including a strong appointments system, protection of tenure for members once appointed, and requirements of expertise for members.

Another way of bolstering independence is through the budget process. At the moment, sections 55-59 do provide for some protection for the budget process against political interference but this could still be further bolstered. One provision that would help would be a rule that required the government to provide adequate funding for the Commission. Currently, section 55 simply sets out the sources of funding of the Commission but does not place any obligation on the government in terms of the sufficiency of the funding. It would also be useful to provide for some degree of engagement from parliament in terms of agreeing the budget, so as to involve a wider range of actors in the process and, thereby, to try to reduce the risk of political interference.

Better practice is for appeals to be free and not to require legal assistance. The draft Law is silent as to these matters. We assume that this is the intention, but it is better to state this explicitly in the legislation.

Better practice is also to set out at least the basic procedural framework for appeals before the Commission. This should include clear time limits. Section 22 of the draft Law provides that the Commission shall complete the hearing of an appeal, including any mediation process, within 90 days. But it is also useful to include other basic due process guarantees, such as that the parties shall have a right to be heard in the matter.

Important Gains

The Commission has important powers under the draft Law, including to hear witnesses and to review documents. However, it is lacking one power that is found in better practice laws, namely the power to inspect the premises of public bodies. This may be important, for example, where public bodies say they do not hold information but in fact they do (and it can be found by inspecting their premises).

It is better practice is to place the onus of proof in appeals on public bodies to demonstrate that they have complied with the law. It is fairer for the government to shoulder this burden, given that they know far more about the situation (including what the specific information in question entails) and this is also appropriate given that denials of access engage human rights issues.

Finally, better practice is also to give the oversight body the power to order public bodies to put in place structural measures to address systemic problems in implementing the law. While it is important to provide redress to individual complainants, in many cases the problem is general in nature, and requires a more structural solution. For example, the public body may not have appointed an information officer or have provided that officer with training. Or it may not have managed its records properly so it cannot find the information which is sought. In such cases, the Commission needs to have the power to order the public body to remedy these structural problems. Unfortunately, that power is missing from the draft Law.

Recommendations:

- Consideration should be given to providing for an internal appeal so that public bodies have an opportunity to address problems quickly and efficiently on an internal basis before they go to an external decision-maker. In this case, strict time limits of between five and ten days should be imposed on the processing of this level of appeal.
- Consideration should be given to bolstering the independence of the budget allocation process, for example by requiring the government to provide the Commission with adequate funding and by engaging parliament in setting and/or approving the budget.
- The law should state explicitly that appeals are free and do not require legal assistance.
- The law should provide for at least a general framework of rules for the processing of appeals, among other things so as to ensure that basic due process guarantees are respected.
- In addition to its current powers, the Commission should have the power to conduct an inspection of the premises of public bodies.
- The law should place the onus of proof in an appeal on the public body.
- The Commission should be given the power to order public bodies to undertake structural measures to remedy systemic failures to implement the RTI law.

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	0	
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	50
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security	2	2	5-16, 30-38

	of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.			
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	1	55-59
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	2	6, 8
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	1	21
42	The decisions of the independent oversight body are binding.	2	2	23
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	2	21(c)
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	
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	4	50
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	1	20(b), 22
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
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**	**20**	

6. Sanctions and Protections

The July draft scored a perfect eight points on the RTI Rating in this category, but this has dropped to just four points with the current draft Law. On the positive side, it does impose sanctions on those who undermine the implementation of the Act. The Commission has the power both to refer criminal cases to the courts (see section 18(e)) and to refer disciplinary matters to responsible departments (section 24), while the law also creates a number of criminal offences (see sections 60-62). Furthermore, the draft Law provides for immunity for officials who disclose information in good faith under the law (see section 64).

Easy Wins

However, the draft Law fails to provide for protection for whistleblowers, i.e. those who, in good faith, release information which discloses wrongdoing. It is

useful to include at least basic rules on this in an RTI law although, over time, it is useful to enact dedicated legislation to protect whistleblowers.

Important Gains

As with remedies, it is not enough for sanctions to focus only on individuals. Often the problem is rooted generally within the public body and the solution also needs to be general. Best practice in this area is to provide for sanctions for public bodies which are systematically failing to meet their obligations under the RTI law.

Recommendations:

- The law should incorporate at least a general framework of rules for the protection of whistleblowers until such time as Myanmar may adopt dedicated legislation in this area.
- Consideration should be given to providing for sanctions to be imposed on public bodies which systematically fail to meet their obligations under the RTI law.

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	18(e), 24, 60-63
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	64
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 Law does well in terms of implementing measures which promote a culture of openness while also informing the public of its rights, garnering 13 out of a possible 16 points on this category of the RTI Rating, beating the 12 points scored by the July draft. Nevertheless, the draft Law falls modestly short in a couple of respects.

Easy Wins

First, in line with the failure of the draft Law to impose any proactive publication obligations on public bodies, it also fails to require public bodies to create and publish lists of the documents they hold and then to make this information available to the public. This can provide an invaluable guide to those who are looking for information.

Second, according to section 18(h) of the draft Law, one of the duties of the Commission is to provide training to officials. However, the draft Law fails to meet better practice standards in this area by requiring pubic bodies to provide adequate training to their officers.

Finally, sections 18(g) and 41(e) require, respectively, the Commission and public bodies to report on what they have done to implement the law. But the draft Law fails to require these actors to publish these reports, so that the public can access the important information they contain.

Recommendations:

- Public bodies should be required to publish lists of the documents they hold, or at least of the categories of documents that they hold.
- Public bodies should also be required to ensure that their officials receive appropriate training on the proper implementation of the right to information law.
- The law should require public bodies and the Commission to publish the reports they produce on what they have done to implement the law.

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	41(a), (b), (f), 42
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	18
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	18(d)
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	2	18(a), 41(c)
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	0	
59	Training programmes for officials are required to be put in place.	2	1	18(h)

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	41(e)
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	18(g)
	TOTAL	**16**	**13**	