

Maldives: Note¹ on the Right to Information Act

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The Right to Information Act of the Maldives (RTI Act or Act) was originally adopted in 2014. It creates a strong legal framework for the right to access information held by public authorities or right to information (RTI), earning 113 out of a possible total of 150 points on the RTI Rating, putting it in 20th position from among the 138 countries currently assessed on the Rating.¹ At the same time, there is still room for improvement in the Act. This Note, prepared following an informal request from the Information Commissioner of the Maldives, sets out CLD's analysis of the Maldivian RTI Act, along with our recommendations for reform.

Right of Access and Scope

Article 61(c) of the 2008 Constitution of the Maldives provides:

All information concerning government decisions and actions shall be made public, except information that is declared to be State secrets by a law enacted by the People's Majlis.²

Article 182(b)(6) then provides that “transparency shall be fostered by providing the public with timely, accessible and accurate information”. These are positive rules but they fall well short of a proper guarantee of the right to information. First, Article 61(c) is limited to decisions and actions, as opposed to covering all information held by public authorities (referred to as “State Institutes” in the RTI Act). Second, it effectively allows the People's Majlis to pass any law providing for secrecy, instead of placing conditions on such laws (such as that they must be necessary to protect certain interests such as national security or privacy).

¹ See <https://www.rti-rating.org/country-data/>. The RTI Rating, launched in 2011 and run by the Centre for Law and Democracy (CLD), is the leading global tool for assessing the strength of RTI laws.

² Available in English at: https://www.constituteproject.org/constitution/Maldives_2008?lang=en.

Article 182(b)(6) is, ultimately, too general to provide concrete protection for the right to information.

The RTI Act provides for a strong guarantee of the right to information, in section 4.

Section 20(a) provides that Chapter Seven, on exceptions, shall be interpreted so as to promote and not unduly limit the principles that section prescribes, while section 70 calls for interpretation of the Act to be done so as to enable the right to information. While these are both positive, better practice is for RTI laws to set out clearly the wider benefits that government transparency brings – such as to foster participation, to promote government accountability and to combat corruption – and then to require the law to be interpreted so as best to give effect to those benefits. The provisions in the current Act fall short of that.

The RTI Act scores 26 out of a possible 30 points in terms of scope, or 87%, essentially making it the second strongest from among the seven categories in the RTI Rating. Every “person” has a right to make a request and section 76 explicitly defines this to include natural and legal persons. There is no mention of foreigners, either to include or exclude them, but better practice in this regard is to make it explicit that foreigners are included within the scope of those enjoying the right to information.

Information is defined in section 72(c) broadly to cover content regardless of when or who produced it or how it is stored, but it is limited to information “which does not belong to a third party”. This is an unnecessary limitation given that the right of access only covers information which is “held or managed by” a public authority (section 72(g)), such that the idea of ownership by a third party is not really applicable, and that the exceptions already protect third party rights, for example in the areas of privacy and commercial confidentiality.

Better practice is to provide for a right to access both documents, such as the budget for a given year, and information, such as the amount of money spent on pens over a three-year period. Section 10 of the RTI Act helpfully provides for requests for information which is not held in written form but can be converted into a written format to be treated as a request for a document, but this is not quite the same thing as guaranteeing a right to access both information and documents.

In terms of the executive authorities which are covered by the RTI Act, section 72(f) defines a “State Institute” as including, among other things, “the executive ... independent institutions, independent institutes, security services” and “those bodies party to any State responsibilities, those functioning under the State budget and those receiving assistance from the State budget”. This is broad, depending on how inclusively “independent institutions”

and “independent institutes” are defined. However, it does not necessarily cover all bodies which are owned or controlled by executive bodies. For example, the government could potentially create an entity which was financially sustainable and yet appoint the majority of the board members and hence control the entity. It is not entirely clear whether all such entities would be deemed to be covered by the RTI Act. In addition, this definition would only cover State-owned enterprises if they were deemed to be providing State responsibilities or if they received State funding.

Recommendations

- In due course, the Constitution of the Maldives should be amended to provide for a proper guarantee for the right to information.
- A new provision should be introduced into the RTI Act setting out the external benefits of transparency and then those tasked with interpreting the Act should be required to do so in the manner that best gives effect to those benefits.
- Consideration should be given to making it explicit that foreigners have the right to make requests for information.
- Section 72(c) should be amended to remove the exclusion of information that “belongs” to a third party.
- The Act should be amended to provide for an explicit guarantee of the right to request both information and documents.
- Consideration should be given to including any body that is owned or controlled by the government within the definition of a “State Institute” in section 72(f). As part of this, it would be useful to indicate explicitly that State-owned enterprises are covered.

Requesting Procedures

The RTI Act earns 21 out of a possible 30 points, or 70%, in this category of the RTI Rating. This is in the bottom half of the scores earned by the Act in different categories, which is unfortunate given that it is generally not too difficult to earn strong scores in this category. The RTI Act has a number of positive features in this area, such as requiring information officers to provide assistance to requesters and having good rules on fees. At the same time, there are a number of areas where the procedural rules could be improved.

Section 6(a) lists what must be provided on a request and section 6(e) stipulates that no other information may be required to be provided. As the reasons for making the request are not listed in section 6(a), these may not be demanded of requesters. At the same time, it would be preferable to set out explicitly in the law that public authorities may not ask for reasons. Section 6(a) does, however, set out a number of unnecessary requirements for making a request, such as providing one's name, address and phone number (as well as an address for delivery of the information, which might be an email). There is no need to require this information to be provided, beyond an address for delivery of the information, although it can facilitate communications if an option to provide a phone number or email address is provided.

Section 6(a) also requires requesters to stipulate that the request is a request under the RTI Act, while section 6(b) authorises public authorities to develop specific and mandatory request forms, as long as these are not a "cause for inconvenience or unreasonable delay for access to information". While the protections are positive, it is better practice to provide for the development of a central form for making requests, so that it is the same form for each public authority, and to require the acceptance of requests which are not made on the form but which have the requisite information.

Section 6(f) requires public authorities to provide a receipt acknowledging that a request has been made, but no time limit for this is provided; better practice is to require such receipts to be issued promptly and, in any case, within three to five working days.

Section 9 provides for the transfer of requests to other public authorities. This may be done not only where the initial public authority does not hold the information but also where the decision on disclosure "may best be made by another institute" or another public authority "consents to the transfer of a request to that institute". These are unduly broad grounds for transfers. Where a public authority holds the information, it should process the request. If necessary, it can consult with other authorities about how to process the request. Also, section 9(c) provides for transfers to be completed within seven days, but better practice is to limit this to five days or less.

Section 15 provides for various formats for receiving information, which must normally be provided in the format indicated by the requester. According to section 15(c)(1), the information may be provided in another format if, among other things, providing it in the preferred format "would delay the general functions of the State Institute". While it is legitimate to provide information in an alternative format where providing it in the preferred

format would unreasonably interfere with the effective operation of the authority, the phrase “delay the general functions of the State Institute” is not as clear and precise as this.

According to section 7(a), requests must be processed as soon as possible and in any case within 21 days. Best practice is to require requests to be processed within ten working days, given that there is the possibility of an extension for more complex requests.

Section 19 sets out the rules on fees and this does not mention any fee simply for making a request. It would be preferable, however, for the law to state explicitly that lodging a request is free. Section 19(c)(3) provides that the fee should not amount to an obstruction for those who are financially disadvantaged. This is positive but it does not quite amount to a specific fee waiver for the impecunious.

The RTI Act fails to set out any rules on the free reuse of information which has been obtained pursuant to its provisions (or otherwise). Better practice is to set out at least the general framework for the free reuse of information in an RTI law, or potentially in another law, and to require the government to develop a set of reuse licences for different types of information and then to attach them to information when it is disclosed publicly, including pursuant to the RTI Act.

Recommendations

- Consideration should be given to providing explicitly in the law that State Institutes may not ask requesters for the reasons they are making a request.
- Requesters should not be required to provide their name, address and phone number when making a request, just a description of the information sought and an address for delivery of this information.
- Requesters should not be required to indicate that their request for information is a request under the RTI Act. They should also be allowed to make requests either on an approved form or not, as long as the requisite information is provided. Consideration should be given to having the Information Commissioner or some other central body develop a standard form to be used by all public authorities.
- A time limit for providing a receipt should be added to section 6(f).
- Public authorities should be able to transfer requests to other authorities only where they do not hold the information and such transfers should be completed in five days or less.

- Section 15(c)(1) should be amended to refer to the idea of unreasonably interfering with the operations of the public authority or some other such narrow formulation.
- Consideration should be given to reducing the time limit for responding to requests to 10 or at most 15 working days.
- Consideration should be given to adding an explicit provision to the RTI Act stating that it is free to lodge a request for information.
- Consideration should be given to adding an explicit fee waiver for people who are below the poverty line or some such other measure of wealth.
- The RTI Act should include a basic framework for the free reuse of information which has been made public pursuant to it or otherwise.

Exceptions

Earning a score of only 15 out of 30 points or 50% on the RTI Rating, this is by far the weakest category of all for the Maldives. The regime of exceptions is a key part of any RTI law as it governs when public authorities can refuse to disclose information. A proper regime of exceptions should have several elements, including the following core three-part test for exceptions: a list of which precise interests may justify non-disclosure – such as national security, privacy, public order and so on – which aligns with international standards; a “harm test” which allows information to be withheld only where disclosing it would pose a real risk of harm to one of those interests; and a “public interest override” so that where the public interest in accessing the information is greater than the harm from disclosure, the information should still be released.

There are some positive features governing exceptions in the RTI Law, such as a strong public interest override and good rules on notifying requesters in case their requests are refused. But otherwise there are problems with a lot of the indicators in this category.

An initial problem is that while section 3(c) of the RTI Act provides for it to override other laws in case of conflict, section 22(a) provides, as an exception to the right of access, “Information, disclosure of which is an offence under any law of Maldives”, thereby effectively preserving secrecy clauses in other laws, whether they were passed before or after the RTI Act. There is nothing wrong with having exceptions which are recognised in the RTI law elaborated upon in other laws and many countries do this, for example with privacy. However, it is important for the RTI law to set out the main three-part test described above and only allow exceptions in other laws to continue to apply if they meet the standards of

that test. Otherwise, there is a high likelihood that secrecy rules in other laws, some of them perhaps adopted a long time ago, will not meet the standards of the three-part test, including because they were drafted primarily with secrecy rather than openness in mind.

The RTI Act also has a number of provisions which serve either directly or indirectly as exceptions and which do not conform to international standards. Section 8(b) allows public authorities to refuse to process a request where they have responded to a similar request and where, in addition to the information not having changed notably, “sufficient time had not elapsed” since the last request. This gives too much discretion to public authorities in this regard. The condition that the information has not notably changed is sufficient here, as long as it is applied strictly. Section 14(a) provides for disclosure to be deferred where the information is required by law to be published but the time for that has not arrived, where the information has been prepared for the People’s Majlis or for another authority as required by law but not yet presented to the Majlis or such other authority. This is not legitimate. If a document is due to be published imminently, for example within 20 or 30 days, it is not inappropriate to require the requester to wait for that. Otherwise, the time for disclosure under these provisions may be long, extending to many months or even years. As such, the document should be considered for disclosure subject to the exceptions in the law, including for deliberative processes.

Several exceptions are too vague or broad to pass muster under international standards or refer to categories of information rather than an interest that needs to be protected, as required under international law. For example, section 22(d)(2) exempts information which, if prematurely disclosed, may “adversely affect a person or group of persons”. This is too vague. Under international law, specific interests of individuals which justify non-disclosure – such as privacy and commercial interests – should be spelled out clearly in the RTI law. Section 22(d)(3) creates an exception for information where its disclosure would “detriment the privilege of a judicial court or that of the People’s Majlis”. This refers to a category of information rather than an interest which needs to be protected. Section 22(d)(4) covers all information which relates to a trial which was closed to the public. This is too broad because not all information relating to such trials is secret. Other countries limit themselves to providing for exceptions to protect legitimate administration of justice interests or other legitimate interests rather than allowing any information relating to a closed trial to be kept secret. Section 22(d)(5) refers to the “person or dignity” of a child rather than just their privacy and hence is too broad (and, again, is not found in other RTI laws). Sections 25(a)(2) and 25(c) are not limited to information the disclosure of which would harm the legitimate commercial interests of third parties. These may be contrasted with the language of section 30(b), which

is appropriate. Section 28 contains a number of phrases which are too vague; here, again, language can be found in other laws which is more appropriate and yet sufficiently protective of the administration of justice.

Two exceptions, while protecting legitimate interests or potentially legitimate interests, do not have a proper harm test. Section 28(a) gives public authorities the discretion to refuse to disclose information where it relates to “an investigation conducted under law or trial proceedings at court enjoying legal privilege”. At least in the English version of the RTI Act, it is not clear that this is strictly limited to information covered by legal privilege (which has a sort of inbuilt harm). Section 32(a) provides a list of exceptions which relate to Cabinet. While there is no doubt that certain information needs to be withheld to protect collective Cabinet responsibility and free and frank discussions within Cabinet, this certainly does not extend to all documents prepared for or submitted to Cabinet (the first two exceptions under section 32(a)). And there is no reason why secrecy interests relating to Cabinet cannot be protected in an RTI law by referring specifically to those interests, instead of broad categories of documents.

Section 32(b) provides for a ten-year sunset clause for secrecy in relation to documents which were submitted to Cabinet while section 33 provides for the same sunset clause for sections 22, 26, 27, 28, 29 and 30. This is positive but it fails to place a time limit on protected deliberations as provided for in section 31, where such sunset clauses are of particular importance.

Section 34 sets out a process for consulting with third parties in relation to information which is of concern to them. This is appropriate and indeed important. However, it allows third parties to block the disclosure of information until all review and appeal procedures have been exhausted. While this may initially appear to be appropriate, in fact it is not legitimate. This is because it is very simple for third parties to engage the review and appeal procedures, even if they know that these will not be successful, merely to delay release of the information. On the other hand, long-standing experience from other countries demonstrates very clearly that it is extremely rare for sensitive third-party information to be released by information officers over the objections of third parties. This is because, among other things, information officers are almost always very deferential to the views of third parties. A better approach is to release the information and allow third parties to lodge claims for any personal losses they may suffer from this.

Recommendations

- The RTI Act should provide for its provisions to override inconsistent secrecy provisions in other laws, to the extent of the inconsistency.
- The reference to “where sufficient time had not elapsed” should be removed from section 8(b).
- A time limit for deferments should be added to section 14(a), ideally of 20 or 30 days.
- The exceptions listed above which are too broad and general should be amended to bring them into line with international standards.
- The exceptions listed above which lack a harm test should be amended to apply only where disclosure of the information would harm a protected interest.
- Sunset clauses, ideally of ten years or less, should apply to all exceptions which protect public secrecy interests.
- Section 34 should be amended to allow the release of information relating to third parties after the first stage of the decision-making process, while also allowing third parties to lodge appeals against such disclosures.

Appeals

In contrast to exceptions, the Maldives earns 28 out of a possible 30 points, or 93% in relation to the category of appeals, making it the strongest category for the country. This is mainly due to robust provisions on the independence and powers of the Information Commissioner, which to some extent reflect a similar approach to that taken in other countries in the region.

At the same time, there are a couple of areas where the system of appeals could be strengthened even further. The RTI Act does not provide specifically that appeals to the Information Commissioner are free and do not require a lawyer. We understand that this is the case in practice, but it is better to base this on binding rules, whether legal or binding policy in nature.

The Information Commissioner appears to have only limited powers to order public authorities to put in place structural measures to improve their performance under the RTI Act. Thus, section 61(a)(8) allows the Commissioner to order public authorities to strengthen their records management systems. Section 62 authorises the Information Commissioner to investigate public authorities where he or she has identified that the authority is not carrying out its functions in accordance with the RTI Act. In that case, section 62(c) mandates the

Commissioner, where he or she investigates and finds that a public authority is found not to have discharged its functions in compliance with the Act, to “order that State Institute to correct them”. This does appear to authorise the Commissioner to order public authorities to take wider corrective behaviour, but it is not as clear as it could be.

Recommendations

- Consideration should be given to amending the RTI Act to provide explicitly that appeals to the Information Commissioner are free and do not require a lawyer. Alternatively, this could be included in regulations under the Act.
- Section 62 should be amended to make it clear that the Information Commissioner can order public authorities to take corrective action to address systemic failures to discharge their obligations under the RTI Act. Ideally, this should provide a list of some of the more common such actions, such as appointing and training an information officer, putting in place a protocol to process requests and so on.

Sanctions and Protections, and Promotional Measures

The Maldives does relatively well on both the Sanctions and Protections, and the Promotional Measures categories of the RTI Rating, earning 7 out of 8 points or 88% on the first and 12 out of 16 points or 75% on the second.

In terms of Sanctions and Protections, the RTI Act provides for sanctions for officials who wilfully obstruct access to information contrary to it and for protections for both those who in good faith release information pursuant to the Act and whistleblowers (those who release information about wrongdoing). Section 67(c) of the Act gives the Information Commissioner the power to impose fines of up to MVR 25,000 (approximately USD 1,600) on any person who commits one of a list of four acts which obstruct access to information. It is not entirely clear whether a “person” for this purpose includes a public authority as well as individuals. It would seem so, as section 67(c)(1) refers to both “State Institutes” and “Information Officers”. However, it would be useful to make it absolutely clear that this covers both individual officials and public authorities as such.

In terms of Promotional Measures, and in relation to records management, section 39(a) provides generally that public authorities are required to manage their information so as to facilitate its disclosure. Section 39(c) provides for the Information Commissioner to adopt

“general norms to be followed in managing information securely in State Offices, their preservation, archiving, disposal and disclosure”. Section 36(c)(1) then requires Information Officers to formulate policies and principles on information management, in accordance with “the principles laid down by the Information Commissioner under section 38 of this Act”. As section 38 does not really refer to records management, it is possible that this was intended to be a reference to section 39 rather than section 38.

This is a positive set of rules on records management but it could be clearer as to the precise roles and responsibilities involved. Apart from the presumed mistaken reference to section 38 instead of section 39, it is not clear why the Information Commissioner is to adopt “general norms” on records management while information officers are to adopt “policies and principles” in this area. Better practice is simply to have a central body adopt governing standards on records management and then for each public authority to be required to comply with those standards (whether or not by adopting additional policies or practices). Then, the central body should be required to provide training on the standards and also play a role in monitoring whether they are being implemented. The latter is to some extent covered by section 61(a)(9), which provides for fines for any breach of the rules in the RTI Act, following a complaint. However, a more general power to monitor and address breaches, notwithstanding the lodging of a complaint, would be useful.

Section 37(e) of the RTI Act requires public authorities to publish information on the information they hold. This is useful but best practice is to require public authorities to publish a full list of all of the documents they hold or at least a list of the categories of documents they hold.

Section 40 authorises the Information Commissioner to provide “suitable training” to the “designated relevant staff” at each public authority. This is again useful but better practice is to require each public authority to ensure that its staff receive appropriate training in this area, thus transforming a power of the Commissioner into an obligation for public authorities. While the first priority will be to train information officers, in due course all staff should receive some training on RTI.

Section 55 requires the Information Commission to prepare an annual report on its work and accounts for the previous year, to forward this to the People’s Majlis and to publish it. In addition, each public authority is required, pursuant to section 42, to prepare its own annual report on the requests it has received, how it has processed them and its other activities under the RTI Act, and then to forward this to the Information Commissioner. These are positive measures and will help to ensure that both the parliament and the general public are able to

monitor what is going on under the RTI Act. However, better practice is to require the Information Commissioner's report to cover not only that office's own activities but also to provide an overview of all activities under the RTI Act, based on the reports it receives from each public authority.

Recommendations

- Consideration should be given to amending section 67(c) of the RTI Act to make it clear that fines may be imposed on both individuals and public authorities as such.
- The system for records management should be clarified, ideally by providing for the Information Commissioner to set binding standards in this area, and extended, ideally by providing for the Information Commissioner to provide training on records management and also to monitor and enforce the standards.
- Consideration should be given to requiring public authorities to publish a full list of the documents they hold or at least a list of the categories of documents they hold.
- In addition to giving the Information Commissioner the power to offer training to relevant staff of public authorities, the latter should be required to ensure that their staff receive appropriate training.
- In addition to covering its own activities, the annual report of the Information Commissioner should be required to provide a more general overview of all activity taken to implement the RTI Act, including aggregated information about the requests received by public authorities and how they were processed.