Kyrgyzstan: Note on the 2024 Law on the Right of Access to Information

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Kyrgyzstan adopted a new Law on the Right of Access to Information (RTI Law),[1] which came into force in January 2024. This replaced the previous law on this subject, which came into force in 2007.[2] An informal RTI Rating assessment was done of the RTI Law and the results, shown alongside those of the current legal framework, are shown in the table below.

Section	Max Points	Score - 2007	Score - 2024
1. Right of Access	6	4	6
2. Scope	30	23	21
3. Requesting Procedures	30	17	23
4. Exceptions and Refusals	30	12	18
5. Appeals	30	21	22
6. Sanctions and Protections	8	2	2
7. Promotional Measures	16	8	11
Total score	**150**	**87**	**103**

This represents some important improvements over the current situation, earning Kyrgyzstan an addition 16 points. At the same time, far more is needed to bring Kyrgyzstan's legal framework fully into line with international standards. Kyrgyzstan now ranks in 35th position globally from among the 140 countries currently on the RTI Rating, as compared to its previous position of 64th.[3]

[1] Law of the Kyrgyz Republic, No. 217 of 29 December 2023 on the right of access to information. Although adopted by parliament in December 2023, the Law only formally came into force after publication in the official gazette in January 2024.
[2] Law of the Kyrgyz Republic On access to information held by state bodies and local self-government bodies of the Kyrgyz Republic, Law No. 213, 28 December 2006.
[3] See https://www.rti-rating.org/country-data/.

Right of Access and Scope

Kyrgyzstan earns a perfect score of six out of six points on Right of Access. Part of this is based on the constitutional guarantee of RTI in Article 33(3) of the Kyrgyz Constitution and the guarantee of "the right of access to information held by information holders" in Article 2.2. In addition to the objective set out in Article 1 of achieving "maximum information openness, publicity [and] transparency", which may be said to refer to internal (transparency-related objectives), which was also found in the earlier law, Article 5.2 of the RTI Law now also sets out external benefits such as strengthening freedom of expression and combatting corruption. In addition, Article 2.4 requires its provisions to be interpreted in such a way as to maximise the realisation of both the Article 1 objectives and the Article 5.2 benefits.

In terms of scope, Article 2.2 guarantees "everyone" the right to information. Under international standards, consistent with its status as a universal human right, everyone, regardless of citizenship or residency status, should have the right to request information. While the reference to "everyone" in Article 2.2 should be read broadly, it would be preferable for the law to state explicitly that both citizens and foreigners benefit from this right. Positively and consistent with best practice, the RTI Law allows for both natural persons and legal entities to make requests.[4]

In terms of coverage of information, the RTI Law contains a problematic carve out for information which "should not" be in the possession of public authorities, which is listed as one of the grounds for refusing a request for information (Article 21.1(4)). Under international standards, all information held by public authorities should be *prima facie* subject to reactive disclosure obligations, with disclosure limited only in accordance with the regime of exceptions (see below). It is therefore not legitimate to refuse to disclose information simply on the basis that the public authority should not hold that information. Indeed, the fact that information which should not be held is in fact being held could be evidence of mismanagement or illegal activity, such as in illegitimate surveillance programmes, about which the public has a particular stake in knowing.

Articles 2.5(1) and (2) also exclude from the scope of the RTI Law information relating to "proposals, applications and complaints of individuals and legal entities to state or local self-government bodies" and arising in connection with "the application of individuals and legal entities, the procedure for consideration of which is established by procedural legislation". The exact scope of these exclusions is not clear. Where other procedures

[4] See Article 16.1(2) and 16.1(3), which refer, respectively, to information individuals and legal entities must provide when making requests.

provide for different means to access information, better practice is to allow those concerned to choose which system they would like to use to access the information.

The right to make requests applies to information, defined broadly in Article 3(2), but, in line with better practice, this also incorporates documents, which are defined in Article 3(1) as being a form of information. However, the exact public authorities to which the RTI Law applies is somewhat unclear. Public sector entities are defined in Article 3(9) as:

> State bodies, local self-government bodies, state and municipal institutions and enterprises operating on the principles of operational management, economic management and/or self-financing, as well as other legal entities with state or municipal participation.

It is unclear exactly which bodies are covered by the terms "state bodies", "state and municipal institutions" and "other legal entities with state or municipal participation". Under international standards, all three branches of government – legislative, executive and judicial – should be covered, along with any constitutional, statutory and oversight bodies, as well as any bodies which are owned or controlled by them. The language of Article 3(9) is not entirely clear as to how far it covers the legislature. Articles 25 and 26 provide for some sorts of disclosure obligations for judicial acts, suggesting the judiciary is covered, but it would be preferable for the RTI Law to state this clearly. There is again a lack of clarity as to how far constitutional, statutory and oversight bodies are covered by Article 3(9). And, again, it is not clear how far bodies which are owned and controlled by these other bodies are covered.

Under international standards, State-owned enterprises should be covered and this is likely the case based on the reference to "enterprises operating on the principles of operational management, economic management and/or self-financing" in Article 3(9).

In addition, under international standards, private bodies which perform a public function or which receive significant public funding should also be subject to RTI obligations, at least in respect of activities which are public in nature or are publicly funded. Article 11.2(1) covers private monopolies while Article 11.2(2) extends coverage to entities which perform "socially useful" duties with public funding. This presumably covers some private bodies covering a public function or operating with public funding, but not all of them. In addition, the term "socially useful" should be defined.

Recommendations

- It should be stated explicitly in the law that the right to information extends to everyone, regardless of citizenship or residency status.

- The scope of Article 21.1(4) should be limited to cases where the public authority does not hold the information and the exclusions in Articles 2.5(1) and 2.5(2) should be removed.
- Consideration should be given to amending Article 3(9) to make it clear that it covers all three branches of government (executive, legislative and judicial), any constitutional, statutory and oversight bodies, and any other bodies which are owned or controlled by these bodies.
- The meaning of "socially useful" in Article 11.2(1) should be clarified and this article should be amended to make it clear that private bodies which perform a public function or which receive significant public funding are covered.

Requesting Procedures

Positively, and consistently with international standards, requesters are not required to justify their requests under Article 16.2. However, Articles 16.1(2) and 16.1(3) of the RTI Law require requesters to provide their names, which is not better practice; instead, individuals should be allowed to make anonymous requests and should only be required to provide contact information (such as an email or physical address) and a description of the information they are seeking.

It is better practice to allow requesters to choose how to communicate their requests. A positive feature of the RTI Law is Article 16.4, which provides for the development of an official form for requests but makes the use of it optional. The RTI Law refers to "written (electronic)" requests in several places. We assume that this means that either is acceptable but it would be good to clarify this explicitly.

International standards call for public authorities to be required to offer assistance where requesters need this to formulating their requests, including to clarify requests which are overly broad or vague. Article 21.1(2) allows public authorities to refuse requests for failing to meet the requirements only after first offering assistance to the requester. While this is positive, the RTI Law should impose a positive duty on public authorities to assist those who require assistance when initially formulating requests. International standards also call for particular obligations to provide assistance to individuals with special needs, such as persons living with disabilities or who are illiterate. The RTI Law does not provide for any such duty. Article 15 does allow requests to be made orally, which is helpful, but there are some problems with this. First, unlike in the procedure for written requests, no timeline is specified for oral requests. Second, the way the rules on oral requests are formulated leaves scope for confusion as to whether these should always be answered orally or whether they may indicate that they wish to get a written response. In any case, better practice in this regard is to provide that assistance should be provided to those with special needs to help them prepare a written request, should they wish to do so.

Article 17.1 requires public authorities to provide the "number and date of registration of the received request" upon request. This could be strengthened by requiring such receipts to be issued automatically, without placing the onus on requesters to ask for them, and by providing for a deadline for issuing such receipts, such as within five days.

Article 14.2 provides that information should by default to be provided in the form in which the request was made, unless another form is "expressly provided for in the request itself", except where the "integrity and safety of the data carrier" may be damaged. In addition, where information exists in more than one language, the information is to be provided in the language requested by the requestor (Article 14.3). These both represent good practice.

Contrary to best practice, the RTI Law does not contain a requirement to respond to requests as soon as possible, although the deadline of 10 business days for responding to written requests in Article 17.2 represents best practice.

In terms of costs, Article 20.1 provides that the preparation of responses to RTI requests is free but it does not explicitly stipulate that it is free to lodge a request. Although this is likely the intention of the legislation, it would be better for this to be indicated explicitly.

According to Article 7.2, publicly available information may be used at people's discretion, subject to intellectual property rights and restrictions found in this law or in other "laws on the distribution, provision, use, and other processing of information". The reference to other laws is a bit unclear and could lead to undue restrictions on reuse being imposed via other legislation. Article 8.1 establishes a broad and unclear category of "confidential information", whereby an individual or legal entity other than a public sector entity may determine the conditions for dissemination of such information.

Recommendations

- Articles 16.1(2) and 16.1(3) should be amended to eliminate the requirement that requesters provide their names.
- The RTI Law should be amended to make it perfectly clear that non-electronic written requests are allowed.
- The RTI Law should be amended to require public authorities to assist requesters in formulating their requests and to provide for a general duty to assist requesters with disabilities or who are illiterate. Article 15 should also be amended to provide for a reasonable deadline for providing information orally.
- Article 17.1 should provide for the delivery of receipts for requests automatically and impose a short deadline on public authorities for doing this.

- Consideration should be given to introducing a requirement for public authorities to respond to requests as soon as possible.
- The law should clarify that it is free to file requests for information.
- Articles 7.2 and 8.1 should be amended to ensure that restrictions on reuse are limited as appropriate, mainly to situations where a third party has intellectual property rights in the information.

Exceptions

The regime of exceptions is a key part of any RTI law as it governs when public authorities may refuse to disclose information. A proper regime of exceptions should have several elements. Key to this is the following core three-part test for refusing to provide information: 1) 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; 2) 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 3) a "public interest override" so that where the public interest in accessing the information is greater than the harm from disclosure, the information must still be released.

There are some positive features regarding exceptions in the RTI Law, notably its requirement that refusals to provide information list the legal grounds for the decision and information on appeal procedures (Article 18.3). However, there are several aspects of the regime of exceptions which fall short of international standards. While Article 2.3 does formally provide that the RTI Law takes priority over conflicting legislation, this is significantly diluted by Articles 2.5(3), 8.3 and 8.4 which expressly uphold several types of secrecy laws, including those governing State secrets, personal information and "containing secrets protected by law". It is legitimate for the nature of exceptions which are recognised in the RTI legislation – such as in the areas of national security and privacy – to be elaborated upon in more detail in other legislation, but these rules should always be subject to the rules regarding exceptions in the RTI legislation.

As a general comment, we note that the regime of exceptions could be significantly simplified as it is currently spread out over a number of provisions and the exact relationship between them is not always clear. Article 8.1 provides: "The right of access to information may be restricted only by law and only to the extent necessary for the purpose of protecting national security, public order, protecting public health and morals, protecting the rights and freedoms of other persons." This test exactly reflects the language of the test for restrictions on freedom of expression which is found in Article

19(3) of the *International Covenant on Civil and Political Rights*.[5] While the guarantee for RTI under international human rights law is derived from that of freedom of expression, the nature of limitations on these two issues is not the same. For example, it is necessary to have defamation laws to protect the reputations of others, but this is not legitimate as a ground to refuse to disclose information held by public authorities. As a result, the grounds of "protecting the rights and freedom" of others and public morals are too broad to be legitimate as exceptions for the purposes of RTI. The RTI Law also provides for an overbroad exception for intradepartmental official correspondence in Article 8.5(3). Articles 26.5 and 26.6, which relate to closed court sessions, also authorise overbroad limitations on access to information since not all information relating to such sessions is legitimately exempt.

Article 8.2(2) of the RTI Law provides for a general harm test which allows information to be withheld only if its disclosure may cause significant harm to the interests listed in Article 8.1. The idea of a harm test also appears in the category of "secret information" in Article 8.5(2), defined as "information, access to which is restricted in accordance with Part 2 of this Article, the disclosure of which may cause harm to a person, society and the state, containing state secrets, professional, bank secrecy, investigation secrecy or other secret provided for by law". While it is positive that this is subject to Article 8.2, the idea that harm has to be to a "person, society and the state" is too limited. It would be preferable just to have the one harm test, as set out in Article 8.2.

Article 9 lists a number of important public interests which, when engaged, do not allow for the information to be kept secret. However, it would be preferable for the RTI Law to set out a general public interest override, with the Article 9 list as a non-exclusive set of examples of such overrides.

There are also some gaps in the regime of exceptions. Better practice is to make it clear that information must be released once an exception ceases to apply and to provide for sunset clauses whereby exceptions would cease to apply after a given period of time (for example, 15 or 20 years). The RTI Law lacks such rules. It is also better practice to require public authorities to consult with third parties when information they have provided on a confidential basis is subject to a request, so as to get either their consent to release the information or their views as to why it should not be released (which should then be taken into account in assessing this). Article 8.7 requires consent from those who provided confidential information before it can be released, but we assume this is not part of the process of determining whether the information is confidential in the first place.

[5] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

Recommendations

- The regime of exceptions in the RTI Law should be amended so that it sets out the primary rules on exceptions, in line with the three-part test, and then overrides secrecy provisions in any other legislation which fail to conform to those standards.
- The references to the "rights and freedoms of other persons" and "morals" should be removed from Article 8.1.
- A general public interest override should be added to Article 9 to supplement the list of specific public interests listed there.
- A rule requiring information to be released once an exception ceases to apply and to provide for sunset clauses whereby exceptions would cease to apply after a given period should be added to the RTI Law.
- The RTI Law should require public authorities to consult with third parties who have provided information on a confidential basis when there is a request for that information.

Appeals

The RTI Law provides for three different levels of appeal, namely internal, to the Ombudsman (Akyikatchy) and to the judiciary. This is in line with better international practice as far as it goes. However, experience around the world has demonstrated that having a dedicated, independent administrative body for the second level of appeal, such as an information commissioner, is far more effective. Allocating an information oversight role to an existing body, such as an ombudsman, tends to result in it being treated with less priority and given less resources, as well as less expertise being developed in relation to it. Many countries with a population the size of or smaller than Kyrgyzstan have appointed dedicated information oversight bodies and there is no reason why Kyrgyzstan should not also do so. On the other hand, many countries combine this function with personal data protection oversight, given that they are closely related, which does lead to certain administrative efficiencies.

The protections for the independence of the Ombudsman, as set out in the Law on Ombudsman (Akyikatchy) of the Kyrgyz Republic[6] (Law on the Ombudsman), are fairly strong although they could be strengthened by adding requirements of expertise to the

[6] https://www.rti-rating.org/wp-content/uploads/2020/05/Law_On_Ombudsman_2002-Kyrgyzstan.pdf.

prohibitions on individuals with political connections being appointed (as set out in Article 6.7 of the Law on the Ombudsman).

The appeals system itself could be strengthened in various ways. For all appeals, the rules should place the burden of proof, i.e. of demonstrating compliance with the law, on the public authority concerned, taking into account the considerable advantage that it has by virtue of having access to the information on which the contested decision is based. This is not provided for in the RTI law. The RTI Law also fails to specify that internal appeals are free of charge. For these appeals, appellants are also required to identify the "superior body" or the name of the official (Article 46.2(1)) against who the appeal is lodged, which seems unnecessary.

Oversight bodies need to have sufficient investigative and enforcement powers for appeals to be effective. International standards call for them to have the powers to review classified documents, to call witnesses to testify, to inspect the premises of public authorities, to issue binding decisions, to order appropriate remedies, including the declassification of information, and to impose appropriate structural measures on the public authority, such as to provide more training or adopt better records management practices.

The Law on Ombudsman appears to give the Ombudsman the power to inspect premises (Article 8(5)), to obtain documents (Article 8(6)) and to call witnesses (Article 8(17)). However, the power to obtain documents is allowed only "through the procedure established by the legislation of the Kyrgyz Republic" (Article 8(7)), which is vague and could limit the ability of the Ombudsman to access classified information in practice. The Law on Ombudsman is also not very clear as to the power of the Ombudsman to order remedies for requester and he or she does not appear to have the power to impose appropriate structural measures on public authorities.

The Ombudsman's decisions are not binding and are referred to in the Law on the Ombudsman as "recommendations" (Articles 11.3 and 11.4). Although the Ombudsman may refer "any obstacles to an investigation" to the Prosecutor General to take "appropriate measures" (Article 13.1) and, more broadly, to appeal to the Constitutional Court about compliance with laws concerning "human and civil rights" (Article 8(3)), this is very different from having the power to issue directly binding orders, which is better practice in this area (and also likely a consequence of not establishing a dedicated information oversight body).

Recommendations

- Consideration should be given to establishing a dedicated oversight body for information issues, such as an information commissioner.
- Consideration should also be given to enhancing the independence of the Ombudsman by introducing some positive requirements of expertise for individuals who are appointed to that position.
- The RTI Law should be amended to impose the burden of proof in all appeals on public authorities.
- The RTI Law should state explicitly that internal appeals are free of charge and the requirement in Article 46.2(1) that appellants identify the "superior body" or official should be repealed.
- The Law on the Ombudsman should be amended to provide for clearer authority for the Ombudsman to gain access to classified information and for time limits for deciding appeals.
- The Ombudsman's decisions in information appeals should be binding and the law should set out clearly what remedies he or she may order. The power to impose structural remedies on public authorities should also be provided for.

Sanctions and Protections, and Promotional Measures

Ensuring there are appropriate sanctions for failing to respect right to information rules is an important means of promoting compliance with an RTI law. Article 43 of the RTI law provides that those "guilty of violation of the obligation to provide information or other requirements of this Law shall be held liable in accordance with the legislation in the field of state civil and municipal service and the legislation on offenses". This could be strengthened by articulating clearly specific offences for destroying documents and undermining the right to information through other means. The RTI Law fails to provide for a system of sanctions where public authorities systematically fail to respect the rules.

Sanctions should be accompanied with sufficient protections for acts undertaken in good faith to implement the RTI Law, in particular via disclosing information. Neither the RTI Law nor the Law on the Ombudsman provide immunity for staff of the Ombudsman's office or other officials for acts undertaken in good faith to implement the RTI Law or for the good faith release of information pursuant to the RTI Law. There are also inadequate legal protections for those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers). The list of categories of information in Article 9 to which access is not restricted includes "violations of the law by public sector entities and their officials", but this does not constitute actual immunity from liability under any law for public sector employees who disclose such information in good faith. The Law on

Protection of Persons Reporting on Corruption provides limited protection for reporting only on corruption.[7]

While the RTI Law contains certain promotional measures, some of these are insufficient, in part because, although the Ombudsman has a promotional role in respect of human rights generally, he or she has not been given any specific promotional role in respect of the right to information. This extends to raising public awareness about this right, although it is positive that each public authority is required to do this through actions in its own area of operations. Article 24.2 requires public sector entities (a subset of all public authorities) to report generally on their activities but there is no specific reporting requirement for them in respect of their activities under the RTI Law. Such reports, which should be required to include statistics on requests received and how they were processed, are an important means of measuring progress and challenges in implementing RTI. Similarly, the Ombudsman is required, pursuant to Article 11 of the Law on the Ombudsman, to report annually to the legislature, there is no mention of including RTI implementation in that report.

Recommendations

- Sanctions should be introduced for destroying documents and undermining the right to information through other means, for both individuals and public authorities.
- Staff of the Ombudsman and other officials should be granted immunity for good faith acts undertaken to implement the RTI Law, including the good faith release of information.
- Whistleblower protection should be expanded to cover not only reporting on corruption but also on other instances of wrongdoing.
- All public authorities should be required to report annually on what they have done to implement the RTI Law and the Ombudsman should be required to report specifically on RTI implementation both by his or her office and by all public authorities.

[7] Moreover, the UNCAC (UN Convention on Corruption) Coalition reports that the law "has not been implemented in practice". See United Nations Convention against Corruption, Statement submitted by UNCAC Coalition, a non-governmental organization not in consultative status with the Economic and Social Council, CAC/COSP/2023/NGO/10, 27 November 2023, p. 4, https://www.unodc.org/documents/treaties/UNCAC/COSP/session10/NGO/CAC-COSP-2023-NGO10.pdf.