

Legislative Brief: Right to Information Bill 2015

1. Summary of Key Recommendations on the Right to Information Bill (RTI), 2015

No.	Concern	Recommendation
1.	Explicit inclusion of the Attorney General's Department within the scope of section 5(1)(f)	Remove the explicit reference to the Attorney General's Department as the ambit of the section adequately covers lawyer-client privilege
2.	Inadequate references to e-governance obligations under RTI The Bill requires stipulated information to be displayed and published at the <i>physical premises</i> of public authorities (section 8(4), 26(1) and 38).	Make it mandatory for the Right to Information Commission and public authorities under RTI to publish information on their <i>official website</i> in addition to their physical premises.
3.	No uniform reporting cycle for the submission of RTI reports by public authorities under section 10 .	Make it mandatory for RTI reports to be submitted to the Right to Information Commission on the 31st of March every year
4.	Weak whistle-blower provision under section 41	Strengthen whistle-blower provision to protect individuals making good faith disclosures (that do not correspond to specific RTI requests)
5.	No penalties for delayed RTI requests	Introduce penalties for Information Officers that deny information requests in bad faith
6.	Organisations performing a 'public service' included under the definition of public authorities under section 45	Remove references to 'public service', and retain references to 'public function'

2. Chronology of the Right to Information in Sri Lanka

- 1996: *Freedom of Information Bill*
- 2000: *Proposed Constitutional Reform Package*
- 2003: *Right to Information Bill*
- 2015: *19th Amendment to the Constitution*

(i) *Freedom of Information Bill*

In 1996 the Sri Lanka Law Commission presented a Draft Freedom of Information Bill. The Draft although circulated, was never presented in Parliament

(ii) *Constitutional Reform Package*

From 1995 to 2000 there were a number of attempts to introduce constitutional reform. In 2000, a Draft Constitutional Bill gave the right to information the status of constitutional protection under the fundamental rights chapter. However the Bill was never introduced in Parliament.

(iii) *Right to Information Bill*

In 2002 there was a bi-partisan effort to introduce a freedom of information law. Further, media and civil society organisations such as the Editor's Guild partnered with the government in the drafting and design stages of the Bill. This process culminated in a draft Right to Information Bill that was approved by Cabinet in 2004. However, the United National Party (UNP) government collapsed shortly after the Bill gained Cabinet approval, and hence it was not presented in Parliament.

In 2011 UNP MP Karu Jayasuriya attempted to pass the 2003 draft RTI Bill as a Private Member's Bill in Parliament.¹ Initially, the government persuaded Jayasuriya to withdraw the Bill on account of its own efforts to introduce legislation targeted at promoting the freedom of information.

As this legislation was not forthcoming, in June 2011 Jayasuriya re-introduced the Bill in Parliament. However it was defeated, with 97 members voting against the Bill, and 34 members voting in its favour.²

¹ Dileesha Abeysundara, 'Right to Information Act', *The Sunday Leader*, May 27 2015 at <http://www.thesundayleader.lk/2012/05/27/right-to-information-act/> (accessed on 20 October 2015).

² *Ibid.*

(iv) 19th Amendment to the Constitution

The recently enacted 19th Amendment explicitly guarantees a citizen's right of access to information held by a number of public bodies including Ministers, government departments and local authorities. However, under Article 14A, this right is only enforceable as provided by law. Therefore, in the absence of specific Right to Information legislation – the constitutional protection of the right to information cannot be applied in practice.

3. The 2015 Right to Information Campaign

Enacting a Right to Information Act was one of the pledges in President Maithripala Sirisena's '100 day-programme'.³ Pursuant to this, a consultative process on the right to information began in February 2105. The Bill under discussion was a version of the 2003 Right to Information Bill ('Original Draft Bill').

Civil society activists and journalists ('commentators') were invited to make their recommendations on the Bill. Key concerns of these actors on the draft Bill were as follows:

(a) Broad Exceptions for RTI Denial

The Original Draft RTI Bill had broadly framed exceptions on which RTI requests could be denied.

For example:

Section 5(d) of the Original Draft Bill stated that RTI requests could be denied if the information requested 'would reveal any trade secrets or harm the commercial interests of any person, unless that person has consented in writing to such disclosure'.⁴

Commentators argued that the term 'commercial interests' was vague and could potentially include illegitimate activity so long as it was transactional in nature.⁵

(b) Weak Whistle-blower Protection

Commentators expressed concerns surrounding the framing of the 'whistle-blower clause' in the Original Draft RTI Bill.

Section 38 of the Original Draft Bill provides protection for the release of 'any official information which is permitted to be released or disclosed on a request submitted under this Act'.

Commentators argued that this provision failed to encourage public servants to disclose wrongdoing and financial mismanagement within public authorities. These arguments

³ Maithrimeter, Scoring 100 days out of a 100, at <http://www.manthri.lk/en/maithrimeter> (accessed on 20 October 2015).

⁴ Verite Research, Observations on the Draft Right to Information Bill [February 2015].

⁵ *Ibid.*

focused on the fact that a fear of not meeting the threshold of the section would likely disincentivise public officers from sharing information in good faith.

(c) The Secrecy Clause

Section 31 of the Original Draft Bill stated that ‘the granting of access to any information as a consequence of a request made under this Act shall not be taken to constitute an authorization of approval granted by a public authority or the Commission, of the publication of such information...’

Commentators were critical of this section’s ability to prevent the use and public disclosure of information gathered under the Act. For instance, it was argued that journalists would be prevented from using information from RTI requests in their stories. As such, commentators were of the opinion that this section frustrated the overall purpose of the RTI legislation.

(d) Weak Proactive Disclosure Provisions

Commentators stressed that the RTI legislation should maximize the extent of information disclosed annually by Ministries. As such, they argued that the exclusion of budget allocations and spending from the list of information that required publication in terms of the ‘Ministers Report’ - failed to meet international standards surrounding ‘proactive disclosure’.⁶

(e) No Timelines that Ensure Compliance

Under section 25(1) of the Original Draft Bill, Information Officers were afforded a maximum time period of 14 working days to comply with information requests.

Commentators noted the failure to stipulate that a delay beyond this 14-day period would result in the request being automatically denied. As such, it was observed that neglecting to make this inclusion would result in aggrieved RTI requestors being unable to access remedial mechanisms (i.e. appeal to the Information Commission and Appeals Court) in the event of excessive delay.

(f) Public Service included Within the Scope

The definition of public authorities under **Section 40** of the Original Draft Bill included ‘a semi-public or private entity or organization rendering any public service’.

Commentators cautioned that this definition could render significant confusion regarding entities included in the scope of the Bill. This caution was on the grounds that the definition of ‘public service’ does not have a clear definition in law.

(g) No Remedy for Prohibitive Fees

Section 25(2) of the Original Draft Bill authorises the Information Officer to ‘request for the payment of such additional fee giving details of the fee’. Commentators argued

⁶ Section 8, Original Draft RTI Bill; Verite Research, *op. cit.*

that this power wasn't accompanied with a right to appeal against a fee that was unreasonable or prohibitive.

4. The Right to Information Bill, 2015.

The Right to Information Bill, 2015 received Cabinet approval on 3 December 2015.

Improvements to the Original Draft Bill

(a) Limited Exceptions

The Right to Information Bill, 2015 narrows the scope for denial of RTI requests. For example, the new **section 5(d)** states that an information request can be denied if it 'harms the competitive position of a third party'. This language departs from the broader 'commercial interests' exception discussed above. As such, this prevents RTI requests being denied based on activity that is purely transactional in nature.

(b) Repeal of Secrecy Clause

The 'secrecy clause' in the Original Draft Bill has been removed from the Right to Information Bill, 2015. This removal will ensure that journalists and other stakeholders are able to inform the public on information gathered from RTI requests free from criminal sanction.

(c) Stronger Proactive Disclosure Clause

The Right to Information Bill, 2015 includes 'the budget allocated, indicating the particulars of all plans, proposed expenditures and reports on disbursements made' within the scope of the Ministers Report under **section 8(1)**.⁷ This addition strengthens the financial reporting and accountability of Ministries in terms of 'proactive disclosure'.

(d) Built in Timelines

Section 25(5) of the Right to Information Bill, 2015 states that a public authority may not extend the time period for compliance with an RTI request beyond 21 days. Further, under section 31(1)(c), an individual has a right of appeal in the event the public authority fails to comply with this 21-day period. Collectively, this is likely to strengthen an individual's ability to seek remedial action for excessive delays associated with her RTI request.

(e) Appeal on Prohibitive Fees

Section 31(1)(e) gives an individual that has been aggrieved by excessive fees the right to appeal the decision of the Information Officer. Additionally, **section 14(e)** imposes a duty on the Right to Information Commission to prescribe a 'fee Schedule based on the principle of proactive disclosure, in regard to providing information'. Collectively, these additions are likely to prevent public authorities charging prohibitive and unreasonable fees for RTI requests.

⁷ Section 8(1)(v) Right to Information Bill, 2015.

(f) Strengthens the Role of Information Commission in Data Management

Section 14(h) states that the Right to Information Commission shall 'prescribe guidelines for the proper record management for public authorities'. This additional role will ensure that the Commission plays a larger role in ensuring that data is curated and collected in a uniform manner. Therefore, this addition is likely to increase the effectiveness of RTI compliance in public authorities.

(g) Entrenches Legislative Oversight

In **section 35(1)** of the Original Draft Bill, the Commission had a duty to table a report of its activities 'at least once a year'. Further, this report was to be transmitted to the President – whose duty it was to place it before Parliament.

However, under **section 37(1)** of the Right to Information Bill, the Commission is mandated to table its report directly before Parliament – sending a copy to the President. This revision is likely to increase the legislative oversight and public knowledge over the activities of the Right to Information Commission.

Recommendations on the Right to Information Bill, 2015

(a) Strengthen Whistle-blower Protection

The Right to Information Bill, 2015 has not revised the text of the whistle-blower provision in the Original Draft Bill.⁸ The retention of the weak whistle-blower provision is likely to dissuade public officers from voluntary, good faith disclosure of financial mismanagement, poor resource allocation and corruption within their institutions. In this context, it is imperative the Right to Information Bill, 2015 strengthens its whistle-blower protection (*see sample provision below*).

(b) Introduce Penalties for Delayed RTI Requests

The Right to Information Bill, 2015 currently does not make officers personally liable for delaying compliance with information requests. This omission is unlikely to incentivise officers to ensure timely processing of information requests. Further, the present Bill does not sufficiently dissuade officers from unreasonably denying information requests in bad faith.

Therefore, taking example from the Indian RTI Act, it is essential that the Right to Information Bill, 2015 be amended to introduce penalties for non-compliant information officers (*see sample provision below*).

(c) Exclude 'Public Service' from 'Public Authorities'

Section 45(g) states that a public authority can include 'a private entity or organisation that is carrying out a public service or public function'. It is recommended that this

⁸ section 41, Right to Information Bill, 2015.

section omit references to entities carrying out a 'public service' as it is a term that has no clear definition in law.

However, the use of the word 'public function' has legal clarity and commonly relates to entities performing a function usually reserved for the state. Therefore, the use of 'public function' alone is adequate to define the scope of this section.

(d) Strengthen E-Governance in Relation to RTI

The Right to Information Bill, 2015 has scope to strengthen its provisions in relation to e-governance. As such, proactive disclosure and information display clauses should make explicit reference to a duty of public authorities to publish requisite information on the website (in addition to displaying it at their physical location). This focus on e-governance has the potential to strengthen access to and use of the RTI by the general public (*see sample provisions below*).

(e) Remove Explicit Exclusion of the Attorney General's Department from the Scope of RTI

Section 5(1)(f) excludes professional communications that are prohibited from being disclosed under the law from the ambit of the Right to Information Bill, 2015. As such, the scope of this section covers legal advice received by public authorities - on the ground of lawyer-client privilege. Therefore, the specific inclusion of the Attorney General's Department within the ambit of this section is superfluous - as legal communications made by the Department to public authorities are already protected from disclosure.

It is recommended that the section be amended to remove explicit exclusion of the Attorney General's Department from the scope of the Right to Information Bill, 2015.

(f) Uniform Reporting Cycles

Section 10 of the Right to Information Bill, 2015 places the onus on public authorities to submit annual reports to the Right to Information Commission. The section states that these reports should contain details pertaining to information requests (e.g. number of requests, number of delayed requests).

It is recommended that this section be amended to stipulate a date on which public authorities should submit their annual reports to the Commission. This date will ensure uniformity in reporting cycles and enable the Right to Information Commission to monitor the efficacy of RTI compliance across public institutions (*see provision below*).

5. Suggested Amendments to the Right to Information Bill, 2015.

(a) Strengthen Whistle-blower Protection

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

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

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

(b) Introduce Penalties for Delayed RTI Requests

Offences.

40. (3) Where the Right to Information Commission at the time of deciding any complaint for appeal is of the opinion that the Information Officer has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under section 25(1) or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty five hundred rupees each day till the application is received or information is furnished, so however, the total amount of such penalty shall not exceed fifty-thousand rupees.

(c) Exclude 'Public Service' from 'Public Authorities'

Interpretation **45.** In this Act, unless context otherwise requires –

“public authority” means –

(g) a private entity or organization which is carrying out a statutory or public function, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function.

(d) Strengthen E-Governance in Relation to RTI

- Ministers to publish a report
- 8.(4)** The reports referred to in subsection (1), (2) and (3) shall be:-
- (a) published in an official language **and** be made available in electronic form
 - (b) made available for public inspection and copies of the may be issued to any person, on the payment of such fee as shall be determined by the Commission
- Public authority to display details of information officers and fees to be charged
- 26.(1)** Every Public Authority shall display in a conspicuous place within its official premises **and on its official website** a notice specifying –
- (a) contact details of the Commission and the members of the Commission
 - (b) contact details of the Information Officer
 - (c) contact details of the designated officer
 - (d) fees to be charged for obtaining any information from such Public Authority
- Public authority to submit a report
- 38.** Every Public Authority shall submit annual reports to the Commission which shall be made available to the public in its office **and on its official website**, furnishing information such as-
- (a) the total number of requests received during the year and information provided and rejected;
 - (b) the amount of fees collected during the year;
 - (c) the number of requests rejected under section 5;
 - (d) the number of times information was provided at the direction of the Commission; and
 - (e) any suggestions for improving the effectiveness of the regime of transparency.

(e) Uniform Reporting Cycles

Duty of public
authorities to
submit
reports

10. It shall be the duty of every public authority to submit to the Commission annually a report on 31 March or 31 December every year. This report should contain the following information –

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