

Legislative Brief: Right to Information Bill 2015

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

No.	Concern	Recommendation
1.	Weak whistleblower provision under section 40	<p>Strengthen whistleblower provision to protect individuals making good faith disclosures (that do not correspond to specific RTI requests).</p> <p>Such proactive disclosures are key to revealing corruption and mismanagement within public authorities.</p>
2.	No penalties for delayed RTI requests	<p>Introduce penalties for Information Officers that deny information requests in bad faith.</p> <p>Such penalties are included in the Indian RTI Act.</p>
3.	Including organizations performing a 'public service' under the definition of public authorities under section 43	Remove references to 'public service', and retain references to 'public function'.
4.	Inadequate references to e-governance obligations under RTI. The Bill requires stipulated information to be displayed and published at the physical premises of public authorities (section 8(4), 10 and 26(1))	Make it mandatory for the Right to Information Commission and public authorities under RTI to publish information on their official website in addition to their physical premises
5.	Explicit exclusion of the Attorney General's Department from the scope of section 5(1)(f)	<p>Remove the explicit reference to the Attorney General's Department.</p> <p>The terms 'information [that] consist[s] of any communication, between a professional and a public authority to whom such professional provides services, which is not permitted to be disclosed under any written Law' adequately covers</p>

		lawyer-client privilege. Therefore communications between a public authority and the Attorney General's Department is already protected by the first part of the clause, and explicit reference to the Attorney General's Department is unnecessary.
6.	<p>No uniform reporting cycle for the submission of RTI reports by public authorities under section 10</p> <p>The section only refers to the submission of 'annual reports'</p>	Make it mandatory for RTI reports to be submitted to the Right to Information Commission on 31 st March every year. This will enable precise monitoring.
7.	<p>Under Section 25(3), a citizen can only seek an expedited response to an information request only if it applies to his/her own life and liberty</p>	<p>Amend Section 25(3) to ensure that a request for information that is necessary to safeguard the life or liberty of any person including a person other than the citizen making the request shall receive a response within forty-eight hours.</p> <p>This is to enable families of arrested, disappeared or missing persons to request information from the relevant authorities and receive information without delay. Section 24(5)(c) sets up this possibility, but section 25(3) then narrows its scope by restricting it to information pertaining to the citizen making the request.</p>

2. Chronology of the Right to Information in Sri Lanka

- 1996:** *Freedom of Information Bill*
- 2000:** *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 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 collapse of the United National Party (UNP) government soon after Cabinet approval resulted in the Bill not being 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 in a vote with 97 members voting against the Bill, and 34 members voting in its favour.²

(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 (RTI) 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 2015. The Bill under discussion was a version of the 2003 Right to Informational Bill ('Original Draft Bill').

Civil society activists and journalists ('commentators') were invited to make their

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.*

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

recommendations to 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 Whistleblower Protection

Commentators expressed concerns surrounding the framing of the ‘whistleblower 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 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

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

⁵ *Ibid.*

in terms of the 'Ministers Report' - failed to meet international standards surrounding 'proactive disclosure'.⁶

(e) No Built in 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 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 information requests 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.

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

(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(2)**.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 has failed 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.

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

Section 14(h) states that the Right to Information Commission shall 'issue 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.

⁷ Section 8(2)(v) Right to Information Bill, 2015.

Recommendations on the Right to Information Bill, 2015

(a) Strengthen Whistleblower Protection

The Right to Information Bill, 2015 has not revised the text of the whistleblower provision in the Original Draft Bill.⁸ The continuance of the weak whistleblower provision is likely to dissuade public officers from the 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 whistleblower 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 delayed information requests. This omission is unlikely to incentivise officers to comply with the stipulated timeframes for information request processing outlined in **section 25(5)**. Further, the 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 officers.

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

Section 43(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 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 to upload requisite information on the website of public authorities (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) Allow Any Person to Receive an Expedited Response to Requests Concerning the Life and Liberty of A Person

The Right to Information Bill 2015 displays an inconsistency between sections 24(5)(c) and 25(3). Section 24(5)(c) permits an expedited response where the citizen making the request believes that the information is necessary to **safeguard the life or liberty of a person**. However, Section 25(3) stipulates an expedited response only if the

⁸ Section 40, Right to Information Bill, 2015.

request for information concerns the life and personal liberty of **the citizen making such request**.

Section 25(3) should be amended to ensure that a request for information that is necessary to safeguard the life or liberty of **any person** including a person other than the citizen making the request shall receive a response within forty-eight hours.

This is to enable families of arrested, disappeared or missing persons to request information from the relevant authorities and receive information without delay.

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

(a) Strengthen Whistleblower Protection

Release or disclosure of information by an employee of a public authority.	40. (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
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(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.	39. (5) 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) 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.
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(c) Exclude ‘Public Service’ from ‘Public Authorities’

Interpretation **43.** 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 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 the 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 **10.** Every Public Authority shall submit annual reports to the Commission which shall be made available to the public in it 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) Allow Any Person to Receive an Expedited Response to Requests Concerning the Life and Liberty of A Person

Decision on
requests
submitted under
section 24

25(3) A request for information that is necessary to safeguard the life or liberty of **any person** including a person other than the citizen making the request shall receive a response within forty-eight hours.