

Reflections on Sri Lanka's RTI Act and RTI Regime



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A Publication of the RTI Commission of Sri Lanka

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Table of Contents

I	<i>List of Abbreviations</i>	6
II	<i>Foreword</i>	8
III	<i>Message from the Chairman</i>	11
IV	<i>Note by the Editor</i>	12
1.	General Thoughts on the Right to Information	
1.1.	<i>Reflections on Two Years of RTI in Sri Lanka - Prashanthi Mahindaratne.....</i>	29
1.2.	<i>Right to Information as a Vital Premise of the Rule of Law in Sri Lanka - Deepika Udagama.....</i>	43
1.3.	<i>The Culture of Secrecy in Sri Lanka's Public Service - Susil Siriwardhana</i>	54
2.	Media and RTI	
	<i>A Law for Journalists – not ‘Churnalists’- Sinha Ratnatunga</i>	64
3.	Legal Reflections on the RTI Act	
3.1.	<i>Critical Evaluation of Two Selected Orders of the Right to Information Commission of Sri Lanka - Jayantha de Almeida Guneratne.....</i>	71
3.2.	<i>RTI in the Realm of the Corporate and Banking Sectors - Harsha Fernando</i>	95

4.	RTI by Marginalized and Conflict Affected Communities	
	<i>The Acid Test of Using the Right to Know to Compel State Accountability - Ashwini Natesan & Aadil Nathani</i>	121
5	Observations on Proactive Disclosure	
	<i>Proactive Disclosure of Information: the Unmet Obligation of our Right to Information - Wijayananda Jayaweera</i>	149
6	Comparative Perspectives on RTI	
	6.1. <i>Sri Lanka's Legal Regime for the Right to Information in Comparative Perspective - Toby Mendel</i>	174
	6.2. <i>RTI Regime in South Africa: Points of Comparative Interest - Richard Calland</i>	190
7	<i>Bibliography</i>	204
8	<i>Notes on Editor and Contributors</i>	216

LIST OF ABBREVIATIONS

ANC	African National Congress
ATI	Access to Information
CA	Constituent Assembly
CBSL	Central Bank of Sri Lanka
CIC	Central Information Commission (India)
COSATU	Congress of South African Trade Unions
DA	Democratic Alliance
DO	Designated Officer
EPF	Employees' Provident Fund
EU	European Union
FAQ	Frequently Asked Questions
FCPA	Foreign Corrupt Practices Act
GOBU	Government Owned Business Undertaking
GoSL	Government of Sri Lanka
IBSL	Insurance Board of Sri Lanka
ICC	International Criminal Court
IDASA	Institute of Democratic Alternatives (South Africa)
IO	Information Officer
IPID	Independent Police Investigative Directorate J&K Jammu and Kashmir
LTTE	Liberation Tigers of Tamil Eelam
MKSS	Mazdoor Kisan Shakti Sangathan
MOU	Memorandum of Understanding
NDA	Non Disclosure Agreement
NGO	Non Governmental Organization
NIC	National Information Commission
PA	Public Authority

PAIA	Promotion of Access to Information Act No. 2 of 2000 (South Africa)
PIA	Pakistan International Airlines
PIO	Public Information Officer
POPI	Protection of Personal Information Act No. 4 of 2013 (South Africa)
PPP	Public Private Partnership
RDA	Road Development Authority
RTI	Right to Information
RTIC	Right to Information Commission (Sri Lanka)
SA	South Africa
SAHA	South African History Archive
SAITM	South Asian Institute of Technology and Medicine
SEC	Securities and Exchange Commission
SLA	Sri Lanka Army
TISL	Transparency International Sri Lanka
TRC	Telecommunications Regulatory Commission
TRC	Truth and Reconciliation Commission
UNHRC	United Nations Human Rights Council

Foreword

In the digital 21st century, the necessity to recognize, promote and protect the fundamental right of persons to seek and obtain information from public bodies is indisputable. This right is essential to ensure that persons have the legal means necessary to verify the accuracy of information, to make informed choices and to hold their governments to account. It is the key to rebalancing the information and power asymmetry between people and their governments.

It is therefore encouraging to have witnessed, since the year 2000, an exponential growth in right to information laws around the world, with a current tally standing at 123 laws worldwide.

In keeping with this trend, Sri Lanka's Right to Information Act (the Act) came into effect on February 4, 2017. Sri Lanka's legislation ranks 4th globally and 2nd in Asia on the Centre for Law and Democracy's Global RTI index.¹ The legislation contains some unique and progressive provisions which are highlighted in Toby Mendel's Comparative Perspective Chapter, including, as he describes it: "...a very impressive package of responsibilities and powers which places the Sri Lankan Commission among the most powerful in the world."²

A strong law is, however, only the first step. The effective implementation of the law is the real test of a meaningful right to information regime. This book, from the Right to Information Commission, presents a comprehensive and critical review of the implementation of the Act since its inception. It provides a

1 'Global RTI Rating' *Centre for Law and Democracy* <<https://www.law-democracy.org/live/rTI-rating/global/>>.

2. Toby Mendel, *Sri Lanka's Legal Regime for the Right to Information in Comparative Perspective*, p. 82.

crucial benchmark upon which to measure future progress and, if necessary, upon which to denounce and resist regression.

Some of the key observations made in this publication are worth highlighting.

First, the Commission has performed at a high level with over 600 decisions dealing with a broad range of issues including corruption in the state sector, responding to disclosure requests for information relating to the Government's transitional justice policies and balancing the right to privacy with the overriding public interest. Through this diligent work, the Commission has started to fulfill the important task of developing jurisprudence.

Second, the Government, for its part, has complied with the orders of the Commission and the public authorities are reported to have responded to requests, notwithstanding a seemingly entrenched culture of secrecy. This demonstrates the willingness of the Government, so far, to abide by the requirements of the law and indicates deference to the orders of the Commission.

Third, regression may be rearing its head in the form of the development of exceptions from disclosure in other legislation. Another form of regression, which is only mentioned in passing in the book but which deserves close scrutiny, is constraint on the funding of the Commission and on the administration of the Act within the public service. These, from my own experience in Canada, are some of the most pernicious encroachments to the right to information in any jurisdiction, and caution is strongly advised here for all stakeholders to keep a watchful eye on such developments.

Fourth, the interest of Sri Lanka's citizens in exercising their rights is noted and strategies for continued success are discussed, such as training at all echelons of the public service, awareness

campaigns for the citizens, concerted efforts to increase proactive disclosure, engagement of the media and, perhaps most importantly, leadership from the top tiers of both the government and the public service. Without it, the right to information will not survive.

Sri Lanka has clearly taken a leadership role in Asia with its progressive legislation, the Commission's dedication, diligence and objectivity, its Government's willingness to respect the orders of the Commission and, most importantly, the interest of its citizens in exercising their right to information.

In my experience, the implementation of any Right to Information Regime invariably becomes more and more challenging over time and, as such, vigilance, commitment, resilience and courage from all stakeholders is required to ensure its meaningful survival. Continuous improvement is key to protecting this most fundamental right. This book from the Right to Information Commission will serve all stakeholders well in taking stock of the first two years of the implementation of the right to information in Sri Lanka and will assist them in preserving this most fundamental right.

As an ardent believer and supporter of the right to information as a fundamental tenet of democracy, I will continue to follow with great interest, as I am sure many others will, the progress of the Right to Information Regime in Sri Lanka.

Suzanne Legault
Information Commissioner of Canada
(June 2010-February 2018)

Message from the Chairman

This compilation of *Reflections on Sri Lanka's RTI Act and RTI Regime* is presented by the Right to Information Commission along with the accompanying volume of Selected Orders of the RTI Commission to mark the completion of two years of the operationalisation of Sri Lanka's Right to Information (RTI) Act on 3rd February 2017.

Each article in the collection reflects upon a different aspect of RTI administration during this period, thus inviting the reader to take part in the RTI process in some form or other. It is hoped that this attempt would be instrumental, even in a small measure, in fostering a culture of transparency and accountability in the functioning of government where citizens would be able to more fully participate in public life and promote good governance in the country at large.

I would like to extend my sincere gratitude to the eminent specialists in their respective disciplines who were kind enough to make their contributions in time at our invitation and my deep appreciation of the efforts taken by RTI Commissioner and senior Attorney-at-Law Kishali Pinto-Jayawardena in editing and undertaking the tedious task of bringing out the trilingual volume of essays assisted by Attorney-at-Law Sushmitha Thayanandan, legal researcher of the RTI Commission. Attorneys-at-Law Radika Guneratne, Chrissy Abeysekera, Dumindu Madushan, Thavapriya Thavakumar and Krijah Sivakumar helped with numerous other aspects of the Sinhala and Tamil publications.

I also thank all others who extended their support in this endeavour in numerous ways without which this publication may not have materialized.

Mahinda Gammampila
Chairman
Right to Information Commission

Note by the Editor

On February 3rd 2017, the day that Sri Lanka's RTI Act, No 12 of 2016 ("the RTI Act") was operationalized, a group of fifteen mothers of Tamil ethnicity in the Eastern Province traipsed to police stations brandishing copies of the RTI Act and demanding to know what had happened to their sons and daughters who had disappeared during the end stages of the conflict between the Government and the Liberation Tigers of Tamil Eelam (LTTE) in 2009.

This was a novel situation that the police was not equipped to deal with. Many policemen at the receiving end of the questions directed at them by the agitated mothers were majority Sinhalese and did not know how to read the Tamil copies of the Act thrust in their faces. Neither did they know its contents though some were vaguely aware that the Sri Lanka Parliament had passed an RTI Act. Ultimately, the mothers had to explain the important provisions of the Act in the little Sinhalese language that they knew to the astonished policemen.

This may seem like nothing out of the ordinary. Yet in Sri Lanka which had undergone prolonged civil and ethnic conflict since the 1970's, where for decades people lived in conflict zones not asking questions and not challenging authority and where a climate of fear persisted beyond the ending of the war in 2009, this development was significant. The very fact that Tamil mothers in the East felt empowered through a law to demand accountability from state agents was extraordinary. The fact that a dialogue commenced between these women and state law enforcement officers as a result of the RTI inquiries was even more remarkable.

Recently I met some of these same mothers and asked them as to what had happened to their information requests. In some cases, the investigations were still ongoing. In others, the affected family

members had wanted to withdraw from the process. In their own words, ‘the perpetrators were members of the paramilitary operating clandestinely at the time and who have, since then, returned to the villages. They live among us. We do not want to question them.’ But as they said, the very fact that a law empowered them to question state authority and to ask questions was exhilarating; ‘we have set the process of questioning in motion’, they exclaimed.

Elsewhere in Sri Lanka, this elated realization that people can now ‘ask questions’ became evident with the RTI Act coming into force. Communities divided by race, religion and ethnicity used RTI in multiple ways. Perhaps for the first time, people felt that they could actually use a law for their benefit. This was a different reality to the esoteric meaning of law as limited to uninspiring courtrooms with complainants being reduced to the status of stunned spectators listening to the quarreling of lawyers, most often in a language that is alien to them.

Indeed, an interesting facet of Sri Lanka’s RTI experience was that citizens asked for information not only on matters of high public controversy at the national level but also to question the basic governance process in the provinces. One of the very first appeals that came before the RTI Commission concerned an information request by a citizen asking why Sri Lanka’s Road Development Authority (RDA) had not removed a makeshift structure set up on a busy road in the Southern Province by fish vendors in order to sell the ‘catch of the day.’

Following the information request, the RDA removed the construction with due speed. Thereafter, the unsatisfied citizen complained before the Commission asking for disclosure of correspondence between the legal officers of the Colombo RDA branch and its provincial officers as to why they had not adhered to the law in removing the structure prior to the RTI Act, despite

repeated requests of complainants. Finally, upon being noticed to appear before the Commission, the RDA answered his questions and provided the correspondence, indicating a clear dereliction of duty by officials linked to provincial politicians. The exposure of the names of erring officers was a disincentive to further breaches of the law.

Appeal hearings before the Commission have disclosed that when provincial officials tend to use their authority improperly, they are nudged gently by their peers or by information officers to refrain from doing so on the basis that these cases may be publicly exposed under RTI. This gradual empowering of ordinary citizens to question local or provincial state agencies is significant. That however goes almost unnoticed with the media focus being largely limited to prominent RTI challenges against the Office of the President, the Prime Minister and other high state officials/Public Authorities.

These are the attention-grabbing cases, ranging from Commission orders directing the release of ‘missing’ reports of Commissions of Inquiry, information regarding maladministration of the national airline carrier, Sri Lankan Airlines to the disclosure of reasons for the blocking of a controversial news website by Sri Lanka’s telecommunications regulator and details of investment of provident funds by the Central Bank as well as asset declarations of politicians.

While these high-profile challenges are no doubt pivotal to urging a culture of transparency in the country, it is that slow and almost unnoticed empowering of ‘the ordinary citizen’, giving life to a hitherto mostly empty phrase ‘We, the People...’ in the constitutional text that is the notable promise of RTI regimes, happening away from the media spotlight as it were.

These gains took a long time to be realised. The drafting process by which Sri Lanka’s RTI Act came into being, commenced

with a Prime Ministerial committee comprising senior public figures including the then Attorney General, the Legal Draftsman, lawyers, editors and media law academics who drafted an Access to Information Bill in 2004. This draft was approved by Cabinet but could not be presented to Parliament due to political turbulence. During the decade that followed, RTI retreated to the shadows along with the protection of other civil liberties, though valiant attempts were made to resuscitate the 2004 Bill from time to time. It was only following the change of government in 2015 that a second drafting committee fine-tuned the draft resulting in the RTI Act, No 12 of 2016.

One important principle kept in mind during both drafting processes was the establishing of an independent RTI Commission formed of nominees of stakeholders of RTI (media, lawyers and civil society) to act as a pro-transparency arbiter between the state and the citizen. It is the Commission, rather than the police or the state prosecutor which initiates criminal action on offences being committed under the Act. It is also the Commission which decides on the fees schedule applicable to the release of information. As one contributor to this Volume of Reflections on Sri Lanka's RTI Act and RTI Regime puts it;

'this is a very impressive package of responsibilities and powers which places the Sri Lankan Commission among the most powerful in the world...an independent oversight body is one of the key contributing factors to the success of an RTI law. Sri Lanka has gone above and beyond in this respect.'

(Toby Mendel, 'Sri Lanka's Legal Regime for the Right to Information in Comparative Perspective')

While that is so, it is no doubt equally important that independent oversight bodies are given adequate financial and

human resource support. The failure of Governments to ensure a streamlined process ensuring adequate financial resources to independent Commissions has led to these bodies having to struggle with oftentimes deliberately obstructive bureaucrats. Slowly but inevitably, these bodies are rendered mere showpieces for a Government to boast about but with little to show beyond the law in theory.

These successes and challenges of an emerging information culture in Sri Lanka are well captured in the various essays that we publish. In her contribution, senior attorney Prashanthi Mahindaratne points out that though the ‘RTI law has led to the revelation of information of great relevance...,’ during the last two years, several obstacles impede the full working of its potential.

These include ‘lack of full comprehension and appreciation in the public sector of the fundamental norm of RTI – namely that the rule is to disclose, while exclusion from disclosure is the exception.’ As she observes, ‘public officials must see RTI not as a newly introduced administrative headache to be dispensed with through tactical moves.’

She proposes that a supporting government policy and well thought out strategy on the implementation of the RTI law must be better developed by the nodal agency (the Ministry of Media), with the training of not only information officers but also their seniors and heads of institutions who are often designated officers handling appeals from initial refusals of information requests.

Meanwhile, the involvement of all stakeholders in the process rather than only the RTI Commission and the Ministry of Mass Media is vital. As we will see, her concern as to the absence of a robust media discourse on RTI is later echoed by veteran editor and key proponent of Sri Lanka’s RTI process, Sinha Ratnatunga.

Sri Lanka’s RTI law involves civil society organisations in a dual capacity; as stakeholders in advocating its use as well as

potential objects of the transparency standards that RTI upholds. It may be observed editorially that committed practice in both these contexts can only result in a stronger civil society, more able to withstand the blows of hostile governments. This is notwithstanding fears of some that RTI laws may be used to harass civil activist groups, which apprehensions are not borne out by regional or global patterns.

As far as use of the RTI Act itself is concerned, Mahindaratne's proposition is that 'there should not be insensible use of a sensible law' by civil society. As she emphasizes;

'...strategically in its early years, the law must be allowed to develop organically, claiming for itself public legitimacy and support rather than the Commission and the courts being thrust into the centre of high political controversies that have the potential to deal a body-blow to the emerging RTI culture.'

Moreover, she identifies a potential problem with grave repercussions to RTI being the enactment of future laws containing overly broad exclusions to RTI. This is a danger already recognised by the RTI Commission (see Public Statement, 1st June 2018) and by other writers in this publication (see Toby Mendel 'Sri Lanka's Legal Regime for the Right to Information in Comparative Perspective').

In the second essay in this Volume, senior academic and Chairperson of Sri Lanka's National Human Rights Commission, Deepika Udagama emphasizes the importance of the right to know as a fundamental premise of the Rule of Law. The conceptual underpinnings of RTI is very clear; while it relates to citizens using information to 'challenge the government and seeking to prevent abuse of public power and misuse of public resources, a right to information regime also has an intrinsic dimension in that it enables

citizens to ‘just know’ about public decisions irrespective of whether they achieve a particular outcome or not. That knowledge is an empowering aspect of participation in civic life.’

While the experiences of the RTI Commission and citizens have largely been positive during the past two years and even perhaps ‘life-changing’, the manner in which the public interest override in Section 5(4) of the Act has worked in the favour of a pro-disclosure policy is of particular interest. She notes that it is satisfying that Sri Lanka’s RTI law has not followed regional practice in declaring national security and intelligence agencies exempt (apart from information disclosure on corruption and human rights violations) from the reach of RTI.

She administers a valid caution; ‘instead of entities being privileged, each case must be assessed on its merits in ensuring that an appropriate balance is struck between a legitimate state interest and the public’s right to know.’ This is important in the ‘hard cases’ that arise where information is sought to be denied using national security as a general exemption. As she emphasizes, ‘access to information can prevent government abuse and reduce corruption even in regard to, for example, military procurement which have long been the subject of intense public security in Sri Lanka.’

But future challenges to RTI in Sri Lanka are inevitable in a context where regional advocates are striving with their backs to the wall, to protect the gains of the right to know even in India, where victories from sustained civic campaigns have been most pronounced. Activists are mustering all the power they possess to prevent the undermining of the RTI law by a hostile bureaucracy.

In Bangladesh and Nepal, RTI laws remain to be fully utilised by the people despite encouraging examples of RTI disclosure. This presents a dilemma for Sri Lanka if the political environment becomes more turbulent with increased political,

social and economic instability. What chances would a fragile and newly emergent RTI regime have against such a discouraging background? These are undoubtedly matters of concern.

In the next essay in this publication, retired public servant Susil Sirivardana offers an eminently practical warning in regard to the institutionalized ‘culture of secrecy’ that public servants primarily tasked with working the RTI Act, cling to. Departing from the particularities of the law itself and its administrative working, he examines the reasons for the deterioration of Sri Lanka’s public service.

Illustrating this with personal anecdotes, he points out that these experiences speak to the ‘hostility of the public service’ when called upon to apply ‘the vital attribute of transparency to the workings of the government.’ As he reminds, ‘this is an important fact to recognise as the public service culture constitutes the context in which RTI operates and in regard to which beneficial change must surely take place.’

‘Generic and causative faultlines’ leading to a persistent culture of secrecy are listed in order to clarify and ideally avoid pitfalls in the working of the RTI regime. Two main reasons that he points to for the aforesaid are over-politicisation and bureaucratisation of the public service. An underlying unhappy truth is that that Sri Lanka’s nation-building process has been ‘both deficient and incomplete...leading to the ’building (of) ethnic constituencies while Gandhian and Nehruvian India was crafting the Indian Nation.’ A further element in this systemic deterioration has been the gradual replacing of coherent and well thought out national policies with ‘a set of half-baked, flawed and ad hoc policies and programmes.’ Inevitably what resulted was ‘disorder, economic losses, plunder and pillage by politicians and their henchmen while the norms of democratic governance were hypocritically paid lip service to with a surfeit of rhetoric.’

Sirivardana sees potential in RTI to radically transform these dysfunctional ‘ecosystems of society’ (as he terms it) in that, RTI can be employed as ‘a strategic weapon of societal regeneration, prioritization of knowledge and empowerment of individuals and communities.’ He notes that since its enactment, the public response to the RTI Act has been ‘nothing less than exceptional’ and the public has already recognised the right to know as a means to empower their ‘diminished and marginalised selves.’

Continuing the practical focus by critically examining the environment in which RTI operates in Sri Lanka, editor-in-chief of *The Sunday Times*, Sinha Ratnatunga reminds the country’s media fraternity that RTI is meant for journalists and not for ‘churnalists’ (i.e. those who merely ‘churn out’ propaganda or ‘puff pieces’ from politicians). He points out that many do not realise the long and protracted struggle to bring RTI to the country’s statute books with finally, the political leadership being ‘...virtually forced’ to enact the RTI Act.

Ironically however, though the media played a major role in coercing the political establishment to approve the RTI Act, the media itself has been less than vigorous in actually using the provisions of the Act, apart from a few good investigative journalists. In fact, as he succinctly terms it ‘the media has fallen short...no Media House seems to have a separate RTI Desk to focus on obtaining stories based on information gained through the RTI Act.’

Even so, he writes that ‘there is no need to despair.’ In India, (notably the RTI success story in the region), journalists were initially lethargic and cynical about using the RTI Act. He urges a pro-active attitude on the part of Media Houses and Media Associations to energize young journalists to use RTI and engage in quality journalism as distinguished from sensationalized ‘fake

news.’ His concluding reflection is that a parliamentarian had been one of the many to use RTI to get information faster than which he could get in the traditional way by asking a question in Parliament. This is proof that, in many respects, RTI is waking up the bureaucracy.

Meanwhile in the first of the *Legal Reflections on the RTI Act* that we carry, former member of the Sri Lanka Law Commission during the time that the Law Commission initially put forward a draft RTI Act for Sri Lanka and current visiting appellate court judge, Republic of Fiji, Jayantha de Almeida Guneratne embarks on a comprehensive analytical examination of two decisions of the RTI Commission.

These decisions reflect common principles in emerging RTI jurisprudence which, as he notes, is reiterated in many other appeal rulings handed down. He comments that the Commission is uniquely placed in that, while it needs to observe legal norms and safeguards, it is also afforded great flexibility in privileging the right to know of citizens over and above legal technicalities.

Two instances that he singles out as illustrating this point is the public interest override (Section 5(4)) and the discretion afforded to the appeal body to go beyond a strict application of the time limits when appeals are lodged in circumstances where the RTI Commission finds that it is satisfied that the appellant was ‘prevented by a reason beyond his or her control from filing the application in time’ (Section 32(2)). That same discretion is given at the first level of appeal (to the designated officer) where ‘reasonable cause’ is given by an appellant for the delay (Section 31(5)).

He measures the Commission’s performance against these provisions, looking at its response in regard to exemptions pleaded by Public Authorities to deny information. Some of these heavily

quoted exemptions include contempt of court/maintenance of the authority and impartiality of the judiciary, fiduciary relationship of lawyer and client as well as professional privilege (respectively Sections 5(1) (j), (g) and (f) of the RTI Act).

The evolving of the concept of ‘institutional decisions’ of Public Authorities to enable information to be released under RTI where the expending of public funds is involved is critically remarked on. He draws interesting distinctions between the imperatives of ‘transparency’ and ‘accountability’ in the context of RTI while acknowledging commonalities in both.

In the second of such *Legal Reflections*, senior attorney Harsha Fernando dwells on the complex intertwining of RTI in the corporate and banking sector. He looks at the extent to which such entities can invoke RTI in seeking information as well as the contexts in which they are categorised as Public Authorities subject to RTI. He points out that where corporate bodies are concerned, the RTI Act takes a functional approach in defining such bodies as Public Authorities (Section 43) for the purposes of the Act. A similar discussion takes place in regard to banking institutions under license and regulators.

He discusses the meaning of terms such as ‘possession, custody and control’ which are threshold considerations as to whether the RTI Act can be utilised by information seekers (Section 3) and broadly examines the ambit of particular exemptions to the giving of information such as privacy and commercial confidence/trade secrets (respectively Sections 5 (1) (a) and (d) as well as the application of the ‘larger public interest’ to these exemptions.

Meanwhile, focusing on the use of RTI in marginalised and war affected communities, legal researchers Ashwini Natesan and Aadil Nathani examine particular decisions of the Commission against the background of the global use of RTI in similar contexts.

Particularly where the Sri Lankan experience is concerned and arising as a concern from the appeals examined, the authors caution, (as do other contributors to this Volume in a common theme that emerges), that PAs must not exhibit a pattern of refusing even ‘routine disclosures’ for flimsy reasons leaving the appellants to approach the RTI Commission in each and every case. As they stress, ‘for the RTI regime to bear fruit, it is critical that governmental agencies proactively disclose information and in applicable instances disclose immediately on receipt of request, save exceptional circumstances.’

Greater protection must to be given to RTI users living in a militarized environment. A further factor surfacing in the appeals that are examined is the language barrier. Though the RTI Act allows an applicant to file an information request asking for information in the ‘language of preference’ (Section 24(5(b))), the Act does not compel a PA to actually give the information in that preferred language. Instead, the duty is to give the information in the language in which the same is maintained, in official records. In many instances therefore, Tamil citizens receive information from PAs in the Sinhala language which presents a serious problem. It is the duty of the Government, the RTI Commission and the implementing agency of RTI (the Ministry of Mass Media) to address this issue with the urgency that it calls for. Further, citing the Commission’s observation that, ‘the Commission is duty bound to act cautiously when mandating the release of information that risks the protection of public officers who have acted as whistleblowers,’ the authors recommend that Sri Lanka should enact a law protecting whistleblowers in line with other developed jurisdictions.

Where the comparative analysis is concerned, India, Mexico and South Africa illustrate that ‘public authorities are cautious of disclosure and lean strongly in favour of secrecy and

non-disclosure despite a legal obligation to disclose.’ There has been notably successful examples of information challenges to state accountability by journalists, activists and rights oriented academics. However, a pervasive problem relates to the lack of access to/lack of use of the law by affected persons and the absence of an effective enforcement mechanism,’ which is a common point reflected upon later by academic Richard Calland specifically in relation to South Africa.

As Natesan and Nathani observe, persistent practices of state impunity, hostility of officials, delays and obstructions coupled with lack of awareness of RTI in the government sector pose formidable problems to marginalised communities who attempt to use the law. Public officials use familiar ‘delay and deny’ tactics to deprive RTI of force.

Approaching RTI from a very different angle, namely from the viewpoint of proactive (voluntary) disclosure as opposed to challenges filed to agencies to compel disclosure (reactive disclosure), communications policy maker Wijayananda Jayaweera contends that this is a weak point with Sri Lanka’s law. He notes that even in countries with strong pro-active disclosure provisions (i.e. India), the adherence of state agencies to voluntarily disclosing information has not been positive.

He makes a persuasive case as to why it is in the interests of Public Authorities themselves to observe maximum proactive disclosure standards, listing out several reasons in this regard, foremost among which is the reduction of individual information requests which take up time and energy of public officials. Proposing a model publication scheme, he underscores the fact that the provision of information is an inherent factor of the governance process;

Government information is increasingly becoming a form of infrastructure, no less important to contemporary life

as education and health systems, roads, electrical grid, or water systems. Increasing the proactive publication of information and making the government information highway a real public utility is an important obligation of any democratic government which care for citizens' ability to make well-informed decisions.

Our last two essays deal with comparative perspectives. Senior legal analyst Toby Mendel examines Sri Lanka's RTI Act, elaborating on the global ranking scheme of the Centre for Law and Democracy. He points to several aspects of the legal regime referred to as 'innovative' including the granting of prosecutorial powers (of those who commit offences under the RTI Act) to the RTI Commission which is also given the authority to determine fees for the release of information.

In respect of areas of the RTI Regime which require improvement, he reflects on contradictions in the constitutional text (Article 14A) which enshrines the right to information, remarking that the way that the right has been framed 'could be understood both as creating a right to access "any information" or only information which is "required for the exercise or protection of a citizen's right", which would be significantly more limited protection.

Further he reiterates that the enactment of future laws containing provision establishing bodies specifically not made subject to the RTI Act, will gravely undermine the country's RTI regime. Among other concerns that he highlights are the limitations of providing information only to 'citizens' and the fact that the RTI Commission, (at least explicitly), lacks the power to conduct inspections of public authorities. His caution is apt;

'The early signs suggest that Sri Lanka is also doing well in terms of implementing the RTI Act, albeit with some strength and weaknesses. This is very important because, while something of a relative honeymoon

atmosphere can be expected in the early days of implementing an RTI law, that is bound to change over time. The more progress Sri Lanka can make in terms of institutionalising good practices on RTI during the honeymoon period, the better placed it will be to weather the backsliding which will almost inevitably come.'

Departing from a Sri Lanka centric focus, South African academic Richard Calland presents the South African RTI experience as an interesting point of contrast and comparison. Describing the RTI process as 'a rollercoaster ride of peaks and troughs' notwithstanding, he makes the point early on that 'South Africa's RTI has been stress-tested and has emerged intact, a vital cog in the wheel of the country's new democratic order.'

Analysing the scope, implementation and enforcement of South Africa's Promotion of Access to Information Act 2000 (PAIA), he acknowledges the value of the 'strong, if in some respects arguably unnecessarily convoluted piece of legislation' but raises the 'lack of an inexpensive, speedy and specialist enforcement body' regarding which concern, he deliberates upon at length.

Where enforcement of PAIA is concerned, he points authoritatively to the fact that 'significant victories' have been won but that notwithstanding these emblematic cases, South Africa's apartheid legacies of secrecy have not been significantly reversed. Indeed, the process of accessing public records is so burdensome that, as he notes, this 'invariably requires the intervention or support of an intermediary organisation.' Routinely ignoring information requests is part of the information denial culture which persists.

He observes that the establishment of an Information Regulator under the Protection of Personal Information Act 2013 with power to also hear appeals on information requests could be a 'game- changing' development for South Africa. In concluding,

he returns to the theme of his introductory comments; that despite major achievements, 'South Africa's RTI is undermined by a resistant culture of incompetence and at times secrecy in the public service and has been battered by adverse political headwinds.'

Similarly to South Africa, RTI is emerging as a 'contested political space' in Sri Lanka. Despite this caveat, it is no doubt the expectation of Sri Lankan citizens that the RTI Act which has been enthusiastically used by them during the past two years, will successfully undergo its own 'stress test' to emerge as a fundamental component of a new democratic order in the country.

Kishali Pinto-Jayawardena
RTI Commissioner & Senior Attorney-At-Law

GENERAL THOUGHTS ON THE RIGHT TO INFORMATION

REFLECTIONS ON TWO YEARS OF RTI IN SRI LANKA

Prashanthi Mahindaratne

1. Introduction

As the Right to Information (RTI) regime of the country approaches its second year mark, this publication is timely because it is necessary to recognize the existing and potential challenges to the system at the earliest and address them strategically if RTI is to take root and grow within the system in a constructive manner, particularly when RTI appears to be in retreat in more mature jurisdictions of the region. For instance, the Hindustan Times reports that in India, after 13 years of RTI, the number of requests for information from citizens to the over 1950 public authorities of the Central Government has dropped by a rate of 6% from 2015-2016 to 2016-2017 due to stone walling of information by information officers and slow disposal of appeals.³ This downward trend is reported to be due to loss of faith in the system consequent to increasing difficulty in obtaining information, and the politicization of appointments to the commissions, both at state and central government levels.⁴

In the above context the first two years of implementation of Sri Lanka's Right to Information Act No. 12 of 2016 ('Act') appears to be unexpectedly satisfactory. In the absence of an empirical study of the performance of the overall RTI scheme of the country, a limited assessment can be made based on the performance of the Right to Information Commission ('RTIC') during the past two years, both in terms of the volume of disposal of appeals and the qualitative nature of the decisions rendered.

3 'How RTI Act is dying a slow death in India' *Hindustan Times* (3 May 2018) <<https://www.hindustantimes.com/india-news/how-rti-is-dying-a-slow-death-in-india/storyTpdC63K7s42vxgV1bxwTI.html>>.

4 *ibid.*

As at the end of July 2018, the RTIC is reported to have rendered 610 decisions (both interim and final) out of a total of 839 fully fledged appeals filed with the Commission during the past two years,⁵ which would amount to the release of information in full or in part in approximately 73% of the appeals heard by the Commission within the first two years. This would be a high figure, in comparison to performance levels of other administrative tribunals, and in particular, vis-à-vis the case disposal pace of the courts. Of the said total disposals, 383 decisions are fully considered final orders⁶ on various aspects of the Act highlighting the need for openness in decision making by public authorities, as reflected in the decisions published on the RTIC website.⁷

These figures for the 1st year of the Commission's life in particular, are albeit limited material and human resources due to the government's failure to provide a separate budget allocation for its recurrent expenditure, and the Commission having to work with a poorly sum of three million rupees allocated from the President's Office during its initial period of functioning.⁸

As reported on the RTIC's website and the media, the subject matter of the appeals ranged from inter alia, problems in service delivery in government institutions, irregularities in governance processes, accountability of state institutions, requests for reports of commissions of inquiry and draft laws, to major corruption scandals in frontline state institutions, including alleged irregularities committed in the process of bond issuance by the Central Bank.

5 Statistics given to the writer during the month of August 2018 by the RTIC when this paper was being written. As at 31st December, 2018, the Commission recorded 1030 appeals before it, out of which 654 appeals had been concluded. In the remainder of pending appeals, interim orders had been issued by the Commission in the majority of cases, releasing information in stages. (See Preface in draft to forthcoming volume of Selected Orders of the RTI Commission, 2017-2018 kindly provided to the writer by the Commission in January 2019).

6 *ibid.*

7 <<http://www.rticommission.lk/web/index.php?lang=en>>.

8 'RTI Commission cash-starved' *Sunday Times* (12 February 2017) <<http://www.sundaytimes.lk/170212/news/rti-commission-cash-starved-228323.html>>.

This indicates a developing awareness amongst citizens of the value of RTI and an evolving practice of exercising that right. Obviously, the number of appeals does not assist towards an assessment of the total number of requests made under the Act during the past two years. The figure is bound to be high, as citizens are reported to have invoked the Act to obtain varied types of information, including requests by families of disappeared seeking information on the status of police investigations into disappearances. Hence it appears that more and more citizens are using the RTI law to address numerous issues, from corruption in the state sector to tracing the whereabouts of the disappeared.

It is worthy of mention that our RTI law has led to the revelation of information of great relevance to the ordinary citizen, particularly relating to blatant mishandling of public funds. For example, the country learnt that Rs.10.8 billion of EPF monies has been invested in 7 private equity investments up to the year 2014 and of that sum, Rs.9.3 billion has not generated any returns to date.⁹ Information relating to bilateral agreements between the government and middle-eastern states pertaining to migrant workers, was disclosed pursuant to a decision of the RTIC, which observed that ‘there is considerable public interest (attached to the information) given public concern in regard to protecting the rights of Sri Lankan citizens who work in those countries.’¹⁰

Further, information relating to grave human rights violations by law enforcement authorities,¹¹ and approvals given by local

9 ‘EPF gets zero returns from majority of private equity investments’ *Daily Mirror* (6 February 2018) <<http://www.dailymirror.lk/article/EPF-gets-zero-returns-from-majority-of-private-equity-investments-145232.html>>.

10 *Feizal Samath v. Sri Lankan Bureau of Foreign Employment* RTIC Appeal (In-Person)/201/2017 available at <http://www.rticommission.lk/web/images/pdf/31032018/feizal--samath-revised-appeal.pdf>.

11 ‘Shocking Discovery under RTI Act on Death of Two Jaffna Students’ *Colombo Telegraph* (5 August 2018) <<https://www.colombotelegraph.com/index.php/shocking-discovery-under-rti-act-on-death-of-two-jaffna-students/>>.

authorities to irregular constructions,¹² reached the public domain pursuant to the invocation of the RTI law. It is also important to record that information relating not only of misdeeds by public authorities, but also information that indicates constructive and successful execution of responsibilities by public authorities surfaced pursuant to the RTI law. For example, pursuant to an appeal to the RTIC, information of GoSL's successful rehabilitation and integration into society of 12,186 former LTTE cadres, including 594 child soldiers, reached the public domain.¹³ In directing the public authority concerned to disclose the requested information, RTIC observed, 'In fact, the release of the information appears to be in the interest of, (rather than to the detriment of), the functions of the PA (Public Authority) and the Government, where the public interest is concerned.'¹⁴

It is important to observe that principles emanating from decisions of the RTIC, if adhered to by the State, will no doubt vastly contribute towards good governance. For example, the RTIC has articulated the need to present draft laws before the public 'in advance, and before the Bill is gazetted, in order to obtain public feedback on its contents which is a beneficial process leading to public consensus around the framing of legislation,'¹⁵ and notes that this in fact, is a global practice, and is followed in many countries in the region.¹⁶

12 Statement of the Right to Information Commission, Sri Lanka available at <http://www.rticommission.lk/web/images/mediareleases/media-statement-Eng-6th-Feb.pdf>.

13 'Sri Lankan government rehabilitates over 12,000 LTTEs' *The New Indian Express* (22 January 2019) <<http://www.newindianexpress.com/world/2018/jul/24/sri-lankan-government-rehabilitates-over-12000-lttes-1847949.html>>.

14 *Tharindu Jayawardena v. Bureau of the Commissioner-General of Rehabilitation* RTIC Appeal/119/2017 available at <http://www.rticommission.lk/web/images/pdf/comm-order-tharindu-jayawardena-v-rehab-comm.pdf>.

15 *Dr. Mario Gomez v. Ministry of Social Empowerment, Welfare and Kandy Heritage* RTIC Appeal (In person)/51 /2018 available at <http://www.rticommission.lk/web/images/pdf/10062018/mario-gomez-v-ministry-social-empowerment.pdf>.

16 *ibid.*

RTIC decisions have also led to clarity in respect of the provisions of the Act. For instance, in dealing with the difficult issue of right to privacy versus the overriding larger public interest element, the Commission determined that ‘the exemption under which information may not be released if an unwarranted invasion of privacy is attracted under Section 5(1) (a) is applicable only to individuals. Consequently, the PA (Public Authority) cannot plead that the privacy of a community is affected as a ground to refuse the release of the information.’¹⁷

As at the time of writing this paper (i.e. end July 2018), an appeal was yet to be lodged in the Court of Appeal by either a Public Authority or a citizen against an order of the Commission,¹⁸ which would suggest a 100% compliance rate of the RTIC’s orders as at that date. This is certainly a fact worthy of report, particularly in the context of compliance rates in more mature RTI jurisdictions, for example, India.¹⁹

Based on my own experience in working with the Commission, I believe that one of the principal reasons for this phenomenal compliance rate could be that the RTIC is perceived as being fair and judicious in its approach to decision making. In exercising its appellate jurisdiction, the Commission is regularly observed going the extra mile to fully hear both parties and being labouriously deliberate to ensure not only that the decisions are in conformity with the spirit and the objectives of the Act, but that the Commission also duly balances the critical factors, namely the public interest premised on the principle of maximum disclosure

17 *Tharindu Jayawardena v. Bureau of the Commissioner-General of Rehabilitation* RTIC Appeal/119/2017 available at <http://www.rticommission.lk/web/images/pdf/comm-order-tharindu-jayawardena-v-rehab-comm.pdf>.

18 As reported by the Right to Information Commission on direct inquiry by the writer at the time the article was written. On 16.08.2018, the People’s Bank filed an appeal to the Court of Appeal against a decision of the Commission (*Ceylon Bank Employees’ Union v. People’s Bank* RTIC Order of 17.07.2018) in terms of Section 34 of the Act.

19 ‘How RTI Act is dying a slow death in India’ *Hindustan Times* (3 May 2018) *ibid*.

vis-à-vis the need for protection of specific interests, such as national security, privacy, law & order etc. Therefore, there appears to be a certain measure of ease with which both the public authorities, and citizens accept the Commission as a fair arbiter on RTI.

Therefore, I believe it is a fair comment that a larger part of the credit for what is believed to be a very positive period of infancy in Sri Lanka's RTI regime is attributable to the work of the Commission. This is however not to diminish the credit due to the numerous public authorities who have readily complied with the law and disclosed information forthwith without resistance. Reportedly, the larger majority of public authorities who received requests in the past two years, readily disclosed the information,²⁰ and thereby contributed towards instilling the concept of the citizen's right to information into the national psyche. This in itself may be seen as a phenomenon given that the public sector of Sri Lanka, overnight was required to make a mindset and attitudinal change from a closed-up comfort zone of official secrecy to a wide-open realm of transparency and openness. In that context, the positive response of those public authorities who readily complied with the law is indeed heartening and is a clear reflection of the potential role public authorities could play in the institutionalization of RTI in the country.

However, it is vital to recognize that a fully sustainable RTI regime can be established, only where all stakeholders cooperate in the due implementation of the law. All public authorities, citizens, and civil society organizations must cooperate, and begin to recognize the right to information as a constitutional right of the citizen en par with all other fundamental rights guaranteed under Chapter III of the Constitution. Denial of access to information in possession, custody or control of a public authority must be considered only in respect of those categories of information

20 'RTI implemented successfully – more awareness required: TISL' *Daily FT* (24 August 2018) <<http://www.ft.lk/news/RTI-implemented-successfully-more-awareness-required-TISL/56-648841>>.

enumerated under Section 5 of the Act, and that too where there is no overriding larger public interest in disclosure. The importance of the role of the judiciary, and in particular the Attorney General as the chief legal advisor to the state sector, in sensitizing the public sector of its fundamental legal obligation of disclosure cannot be overstated.

Yet, it is pertinent to note that still there appears to be lack of full comprehension and appreciation in the public sector of the fundamental norm of RTI— namely that the rule is to disclose, while exclusion from disclosure is the exception.²¹ Due to this lack of understanding, many information officers appear to comply with the law in the breach. There have been many instances, which reflect a tendency on the part of information officers to interpret or rather misinterpret the nature of the requested information, in order to inveigle the information into the parameters of Section 5 exemptions, to justify refusal of disclosure, or evade disclosure by seeking unwarranted extensions,²² whereas even in respect of those categories of information that fall within the ambit of Section 5, the law stipulates that ‘a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from the disclosure.’²³ This is the very essence of the law, which some in the public sector appear yet to fully comprehend or appreciate.

Public authorities must recognize that the RTI law is not a mere piece of legislation that addresses the needs of only those outside the public service sphere, but that it also serves the private interests of public servants. For example, in the event of suspected discriminatory or unfair treatment in promotions, transfers, dismissals in the public sector, an aggrieved public officer can

21 See media statement by the RTIC dated 6th February, 2018 <http://www.rticommission.lk/web/index.php?option=com_content&view=article&id=316:media-statement-06-02-2018&catid=10:media-releases&lang=en&Itemid=378>.

22 *ibid*.

23 Section 5(4) of the Act

obtain information regarding the criteria used in such decision making under the RTI law, which would otherwise not have been available in the ordinary course of events. Therefore, it is in the interest of all citizens, be they public officers or private entities that the law is duly upheld and implemented, and the notion of the right to information becomes a corner stone of public administration.

2. Solutions – Policy, Strategy, Training, Public discourse

I believe the fault lies in the absence of a supporting government policy and well thought out strategy on the implementation of the RTI law. Enactment of a law alone does not suffice, if it is not supported by government policy and a duly considered strategy. Whilst the Ministry of Mass Media conducts training sessions for information officers, there should be more regular training and workshops, particularly at this stage of infancy of the system because much of a mature system is instilled at the early stages of its evolution. Training must not only be confined to information officers, but also be extended to designated officers, who are invariably heads of the institutions. There must be periodic training even for senior level public officers regardless of whether they are information officers or designated officers. In most public authorities, information officers are junior level officers, who do not have sufficient authority or the capacity to override superiors. as a result, many information officers are known to simply refer requests to sectional heads dealing with the subject matter and defer to their decisions. Therefore, it is of vital importance that training and education on the RTI law must be at institutional levels.

Further public authorities must adopt internal institutional policies on RTI in accordance with the law and issue circulars and directives, so that information officers are not only edified on their obligations from external sources, but from within the institution itself.

There must also be a robust public discourse in the media on RTI and the law. Regrettably media reporting on RTI is inadequate to make an impression amongst stakeholders. Whilst there exists, random press reports on high profile requests or decisions of the Commission, a concerted and intense involvement of the media in creating awareness of the value of RTI amongst all stakeholders is conspicuously absent. “The Bond Commission”²⁴ hearing is an example of the impact of intense and consistent media reportage, which resulted in even school students talking about the “bond scam”. This experience must demonstrate to the media the power they wield in their ability to create awareness and influence the public mindset. Thus, it is a matter for regret that the media has not fully discharged their responsibility in the RTI sphere to create adequate awareness amongst all stakeholders of the value of RTI, particularly given that the media is a key stakeholder, which stands to benefit from a progressive RTI regime. Therefore, there must be a collective media campaign to promote RTI in the country based on a well thought out strategy.

It is vital that as a nation, we must be fully sensitized to the legal transformation that the country has undergone under the Act from a status of “official secrecy” to a status of full transparency in the activities of public functionaries. This cannot be done by the RTIC and the Ministry of Mass Media alone and all stakeholders must be involved in the process. The public sector must begin to recognize the citizen’s right to information as provided under the Act, as a justiciable right guaranteed under the Constitution, and not as a newly introduced administrative headache to be dispensed with through tactical moves. In this context, the Supreme Court’s acknowledgement that the application of the Right to Information Act No. 12 of 2016, ‘*enjoys quasi-constitutional protection*’ by

24 The Commission of Inquiry Appointed to Investigate and Inquire into and Report on the Issuance of Treasury Bonds during the period 1 February 2015 to 31 March 2016 including the management, administration and conduct of affairs of the CBSL in respect to bond issuance during this period and whether there had been any malpractice, irregularity or non-compliance with or disregard of the proper procedures applicable.

virtue of its genesis in Article 14A²⁵ (emphasis added), is of great jurisprudential value in advancing this position.

In the end, the litmus test of a vibrant and mature RTI regime would be the extent of compliance of public authorities in respect of their proactive disclosure obligations, which would mitigate the need for individual requests by citizens. The RTIC has already issued guidelines for proactive disclosure under Sections 8 and 9 of the Act²⁶ and it remains to be seen how far and how soon the public authorities would comply.

3. Civil Society & RTI

It is not only the public sector that is responsible for the establishment of a progressive RTI regime, but the citizen, and in particular civil society plays a key role in the advancement of RTI in the country. In a discussion on RTI, the focus is generally on the obligations of the public authorities. But what of the citizen? It is essential that citizens exercise their right to information in a responsible manner, i.e. the law must be used with a sense of responsibility, with a genuine intent to further the objectives of the law and not as a weapon against politicians or public authorities, or to address a personal vendetta against a public authority, or just simply to attract publicity to one's organization or on such private or personal agenda. The purpose and the objective of the law as articulated in the Preamble to the Act is to foster a culture of transparency by allowing the public access to information to combat corruption and promote accountability and good governance in the state sector. As such, the law must be utilized in furtherance of that objective and not to address irrelevant private or personal agenda.

25 *Judgement of the Supreme Court on the constitutionality of the "Office for Reparations" Bill* – petition numbers S.C.S.D. 19/2018 & S.C.S.D. 20/2018, p 7.

26 <http://www.rticommission.lk/web/index.php?option=com_content&view=article&id=21&Itemid=152&lang=en>.

The RTIC itself has stated that it is in receipt of appeals that had appeared to have originated from vexatious applications.²⁷ While that is inevitable, it is hoped that vexatious applicants would not flood the Commission with appeals causing strains in the administrative work load.

In addition, due caution must be observed even in the filing of appeals that are meritorious on the face of it as strategically in its early years, the law must be allowed to develop organically, claiming for itself public legitimacy and support rather than the Commission and the courts being thrust into the centre of high political controversies that have the potential to deal a body-blow to the emerging RTI culture. There should not be insensible use of a sensible law.

Frivolous or vexatious requests are counterproductive to the advancement of the RTI Law. To state the obvious, the very legislators who passed the law, also have the capacity to bring regressive amendments thereto, or even repeal the law. An example is the statement made by the White House under the Trump regime announcing that it would repeal regulations subjecting itself to the US Freedom of Information Act.²⁸ If our legislators start seeing the RTI law as being used as a weapon against state authorities, or if too many frivolous or vexatious applications are made, we might surely lose the forest for the timber. In this context it was disturbing to learn that the Minister of Mass Media had been tasked by the Cabinet to submit a comprehensive report suggesting appropriate amendments to the Act, where necessary, in view of what has been stated to be difficulties encountered by public officers in the implementation of the law.

27 See media statement of RTIC dated 6th February, 2018
<<http://www.rticommission.lk/web/images/mediareleases/media-statement-Eng-6th-Feb.pdf>>.

28 'Explaining the White House FOIA Rule Repeal' *USA Today* (17 March 2015) <<https://www.usatoday.com/story/news/nation-now/2015/03/17/white-house-office-of-administration-freedom-of-information-act-foia/24906463/>>.

While the basis of this request is not known, it is possible that the die may already have been cast, although it is somewhat comforting to note the government's categorical assurance that there is no attempt to amend the Act.²⁹ The writer hopes that saner counsel will prevail at both ends of the spectrum and there will not be any setback to this extremely valuable law, which is essential for the achievement of a corruption free society. Therefore, it is of paramount importance for citizens to use the law with a sense of responsibility and not misuse it, if we are to preserve the law as it is. It is unfortunate that our RTI Act does not provide for some recourse, perhaps a penalty against those who make vexatious applications.

Another potential impediment to the RTI law is that it could be undermined by subsequent legislation. For example, the recently passed National Audit Act No. 19 of 2018 incorporates an over - broad exclusion from the RTI Act in Section 9(1) (b), which excludes disclosure of any information without prior consent given in writing of the relevant person or institution providing such information until the report or statement prepared by the Auditor General relating to such information has been presented in Parliament. Whilst the need for confidentiality of information relating to an ongoing audit inquiry or investigation can be appreciated, because premature disclosure of information could impede an investigation if it gets into wrong hands, such circumstances could have been addressed by means of an amendment to Section 5(1)(h)(i) of the RTI Act, whereby information relating to ongoing financial or civil investigations could also have been exempt from disclosure under the Act (currently only information relating to criminal investigations or prosecutions is exempt), instead of the National Audit Act incorporating such overly broad exclusions, which can easily be manipulated.

29 Government Denies Moves to Amend RTI Act' *RTI Sri Lanka* (27 June 2017) <<https://www.rti.gov.lk/media/news/144-government-denies-moves-to-amend-rti-act>>.

4. RTI vs. Privacy

A complex issue that poses a further challenge to the RTI law is the absence of a privacy law in Sri Lanka or a citizen's constitutional right to privacy. The situation is further compounded by the absence of a data protection law in the country. Hopefully a future privacy law and a data protection law will address these issues, so that the Parliament does not have to deal with the issues of confidentiality piecemeal in statutes that will be passed in the future vis-à-vis the RTI Act.

It is also important to recognize that RTI should not be seen as a cure for all ills. A vibrant democracy must have other means and other tools to promote transparency in public functionaries, not just a good RTI law. For example, the Declaration of Assets and Liabilities Law, No 1 of 1975, which is archaic ought to be reformed to inter alia include provisions requiring declarations of the President, Ministers, Parliamentarians, elected officers, Ministry Secretaries and perhaps the very senior bureaucrats heading institutions to be published proactively. Yet such a requirement ought to be limited to those specific categories of persons at the highest echelons of the state sector, because it would be unreasonable to require the publication of declarations of assets and liabilities of all public officers.

While of course, noting the epidemic proportions of corruption in the public sector of the country, it is also fair to acknowledge that there are thousands of uncorrupt law abiding public officers, who are themselves ordinary citizens. And to place their private lives under public scrutiny by virtue of the law may not be fair by them, given that there are sufficient legal tools to scrutinize their conduct in the event corruption is suspected.

I would conclude by noting that a vibrant democracy must have the capacity to finely balance public interest of disclosure of information, with the right to privacy of the individual. Having said

that, I would emphasize that the two rights – right to information on the one, and the right to privacy on the other, are not equal. Primacy must be given to the overriding larger public interest of disclosure of information. Hence right to information must be the principle, whilst the right to privacy would be the exception.

RIGHT TO INFORMATION AS A VITAL PREMISE OF THE RULE OF LAW

Deepika Udagama

1. Introduction

The Right to Information (RTI) is about giving citizens the right to pierce the often shrouded veil of governance. There is therefore, particular importance accorded to this right in the context of the Rule of Law. RTI allows the public to learn more about the rationale behind government decisions. RTI is also about citizens using that information to challenge the different levels of government and seeking to prevent abuse of public power and misuse of public resources. Public power must be used in the public benefit and a right to information regime gives the public the right to monitor the use of public power and resources. Beyond that, a right to information regime has an intrinsic dimension in that it also enables citizens to ‘just know’ about public decisions irrespective of whether they achieve a particular outcome or not. That knowledge is an empowering aspect of participation in civic life.

As all powers of the Republic are vested in the people, RTI is essential for their empowerment. The public have a right to know about national, regional and local budgets; development strategies and national action plans; agreements with multilateral institutions; plans for infrastructure development; the expenditure of Government Ministers, departments and other institutions; procurement decisions, including procurement for defence and national security; how public resources are being used for responding to public crises; and about other decisions that impact on public life.

Thus, an RTI law transforms the nature of governance at a conceptual level. The release of information is no longer dependent on government discretion or largesse. Instead members of the public have a right to demand information. Many developed

legal regimes in fact, require government to proactively disclose information periodically in that regard. As a general rule, public decisions should be accessible to the public and only in rare exceptions, should information be withheld.

2. Some Observations on the RTI Act in Practice

Sri Lanka's journey to enact an RTI law was prolonged and difficult. On 4th of August 2016, the Parliament of Sri Lanka enacted the Right to Information Act No. 12 of 2016 ("RTI Act") giving meaning to the citizen's fundamental Right to Information. The RTI Act provides for a process to exercise the constitutional right of access to information enshrined in Article 14A of the 19th Amendment to the Constitution (2015). With the implementation of the RTI Act on 3rd February, 2017, the Right to Information Commission published its Rules on Fees and Appeal Procedures and advised the Government of Sri Lanka in regard to gazetting Regulations on Proactive Disclosure by Public Authorities as well as Regulations on Re-Use of Information obtained under the RTI Act.³⁰

These gazetted Rules and Regulations resulted in the addition of a full ten points to Sri Lanka's already existing 121 points out of a total 150 points on the RTI rating maintained by the global rating agency, the Canadian based Centre for Law and Democracy,³¹ ranking Sri Lanka's RTI legal framework among the best in the world.

The stated purpose of the RTI Act is to foster a culture of transparency and accountability in Public Authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance (*viz*; the preamble

30 <http://www.rticommission.lk/web/images/pdf/regulations-rti2004-66_E_feb.pdf>.

31 'The RTI Rating' <<https://www.rti-rating.org/>>.

to the Act). Since the RTI Act came into force, the RTI Commission has recorded a positive response by Public Authorities in respect of releasing information following the hearing of appeals.³² The majority of such appeals have been made by ordinary citizens. According to the Commission, it is the general public that enjoys the fruits of the enactment of RTI as much as, if not more than, the media.

In a recent open interview, RTI Commissioner Kishali Pinto-Jayawardena opined that Sri Lanka has achieved much since the Act was operationalised.³³ She pointed out that during the first six months following the operation of the RTI regime, information requests made by the general public to Public Authorities and the Right to Information Commission were both diverse and large in number. She also added that when assessing the numbers of the requests or the nature and quality of requests, it is clear that if the right to information did not have public impact, such a demand could not have emerged or been sustained.

Most requests during that period were not made from the country's capital city or other major cities but from afar, such as Matara, Hambantota, Jaffna, Anuradhapura and Polonnaruwa;

*'People from rural areas are well aware of this law. They are well informed on the Act and its Regulations. Moreover, they express their views eloquently before the Commission.'*³⁴

The RTI Act does not provide leeway to access each and every type of information. Section 5 of the Act lays down a list of exceptions to the disclosure of information. But as previously

32 Sri Lanka's Right to Information Act is a Weapon of the People - Op-Ed Interview with Commissioner, Right to Information Commission of Sri Lanka, Attorney-at-Law Kishali Pinto Jayawardena' *RTI Sri Lanka* (5 September 2017) <<https://www.rti.gov.lk/media/news/152-sri-lanka-s-right-to-information-act-is-a-weapon-of-the-people-op-ed-interview-with-commissioner-right-to-information-commission-of-sri-lanka-attorney-at-law-kishali-pinto-jayawardena>>.

33 *ibid.*

34 *ibid.*

observed, if the public interest in disclosing the information outweighs the harm done by such disclosure, such information could still be disclosed to the public under and in terms of Section 5(4) of the Act.

The manner in which Sri Lanka's RTI regime is evolving particularly in relation to the working of these exceptions in Section 5 (1) of the RTI Act where information may be denied but which denial may be defeated by the public interest override, is of specific interest. For example even though powers, privileges and practices of Parliament are included among the exemptions on which information may be withheld in Section 5(1)(k), the Commission has taken the unequivocal position that this does not mean that the privilege exception can be blindly cited. Keeping the objective of Section 5(4) in mind, the public interest has been determined as uppermost in deciding whether or not to release the information.³⁵

That principle was illustrated in an appeal that came before the Commission with regard to a Provincial Council which pleaded privilege to refuse giving information to a journalist who had asked for information on appointments made to the Provincial Council. Although there was no request for personal information, the particular Provincial Council had refused the request citing its privileges as reasons for refusal. Upon an appeal being made to the Commission, it was directed that the related information must be disclosed as it was evident that the disclosure of information that benefits public interest had been refused under the pretext of privilege. The salaries and wages for such appointments are made using public funds. Hence, the Commission decided that the general public has a right to know such details.³⁶

In another instance, there was an attempt by a Provincial Council to guard the information with regard to the overseas trips of ministers on the ground of privilege. Here too, the Commission decided that in these instances where public money is used,

³⁵ *ibid.*

³⁶ *ibid.*

access to information cannot be refused using ‘privilege.’ The Commission declared that the Provincial Council should explain how the disclosure of requested information could be denied under the specified exemptions in Section 5(1) of the Act as differentiated from a vague and general citation of privilege. The public interest factor in the use of public funds by the relevant Public Authority was also emphasized.³⁷

The public interest factor surfaces in the Commission’s decisions with Section 5(4) of the RTI Act being used to good effect. In February (2018), the RTI Commission issued an Order to the Sri Lanka Bureau of Foreign Employment to release the Memoranda of Understanding and/or Bilateral agreements pertaining to migrant workers between the Governments of Sri Lanka and Saudi Arabia, Qatar and Kuwait in view of the public interest in protecting the rights of Sri Lankan citizens who work in those countries as migrant workers.³⁸ The appellant, a journalist, had argued that the public should be able to access these documents to scrutinize and critique the manner in which the Sri Lanka state lives up to its obligations to protect migrant workers who are often abused by their employees.

From these examples, it is clear that the use of the RTI Act has been diverse. In general, citizens have used the RTI Act as an effective tool. On the one hand, citizens (including public officers) use the Act on a personal level, to rectify injustices done to them. On the other hand, many RTI users have employed the Act for the common good and the public welfare³⁹ That is an encouraging sign.

³⁷ *ibid.*

³⁸ *Feizal Samath v. Sri Lanka Bureau of Foreign Employment* (RTIC/201/2017) <<http://www.rticommission.lk/web/images/pdf/31032018/feizal--samath-revised-appeal.pdf>>.

³⁹ ‘Sri Lanka’s Right to Information Act is a Weapon of the People - Op-Ed Interview with Commissioner, Right to Information Commission of Sri Lanka, Attorney-at-Law Kishali Pinto Jayawardena’ *RTI Sri Lanka* (5 September 2017) <<https://www.rti.gov.lk/media/news/152-sri-lanka-s-right-to-information-act-is-a-weapon-of-the-people-op-ed-interview-with-commissioner-right-to-information-commission-of-sri-lanka-attorney-at-law-kishali-pinto-jayawardena>>.

3. Use of RTI laws in the region

South Asia has several RTI laws with the efficacy of such laws varying from country to country. While India's RTI law is noted for its vibrant use by citizens as will be analysed later on in this reflection, it has faced many challenges in recent years.⁴⁰ In August 2014, The Asia Foundation conducted research into the status of citizens' access to information by carrying out a series of street corner interviews, focus group discussions and test filings of RTI applications in three countries, namely Bangladesh, Nepal and Pakistan.⁴¹

The findings of that research indicated a general lack of public awareness of the RTI law and its relevance to citizens' everyday lives. In a total of 263 street corner interviews conducted, the research showed that 52 percent of respondents felt that they needed access to information for the main reason that greater responsibility and accountability in the workings of Government had to be manifested. The second most important reason for seeking information was to address personal grievances (45 percent). Exposing corruption was also another reason highlighted by respondents to seek information from the Government.⁴²

India's RTI Act of 2005 (its preamble states that the statute's aim is 'to provide an effective framework for effectuating the Right to Information recognized under Article 19 of the Constitution of India') has changed the relationship between citizens and state authority. It has undeniably reduced the impact of colonial era laws such as the Official Secrets Act (1923) which denied information on

40 'Secularism at risk as RTI Act weakens, says Aruna Roy' *The Hindu* (12 May 2018)

<<https://www.thehindu.com/news/cities/Hyderabad/secularism-at-risk-as-rti-act-weakens-says-aruna-roy/article23867597.ece>>.

41 'Citizens' Access to Information in South Asia: Regional Synthesis Report' (The Asia Foundation, August 2014)

<<https://asiafoundation.org/resources/pdfs/CitizensAccessToInformationInSouthAsia.pdf>>.

42 *ibid.*

archaic grounds. India's rural communities led the charge for state level RTI laws, asking government officials how they had spent public funds allocated for communities. It has been thirteen years since the national RTI Act was passed into law and its significance and effect is quite evident.

One significant struggle was in respect of the payment of a statutory minimum wage for people working in the public sector led by Mazdoor Kisan Shakthi Sangathan (MKSS). As a result of this effort, activists discovered serious irregularities in official records, including the names of deceased persons being cited to claim payments, replication of one person's name in several labour lists and those who had not worked as manual labourers claiming payment for work.⁴³ Another early example related to a major telecommunication fraud scandal in 2011 involving the Telecommunications Ministry undercharging mobile phone companies for frequency allocation licences, allegedly for bribes, which resulted in heavy costs to the state coffers.⁴⁴

Indian activists have used the public interest argument to insist that state policy must conform to good governance and constitutional principles in many key cases.⁴⁵ One such instance related to the squandering of money by the Indian Red Cross Society just two months after the RTI Act came into force. Investigations by activists revealed the manner in which public officials in the Indian Red Cross Society had squandered moneys allocated for the Kargil war relief fund as well as the rehabilitation of people affected by natural disasters.⁴⁶

The use of RTI exposed how public officers had used those

43 'How the UK can learn from India's Right to Information Act' *Freedom of Information Centre of Armenia* (28 May 2013) <<http://www.foi.am/en/articles/item/1237/>>

44 'If not for RTI, 2G action taken would be a secret' *FacenFacts* (30 May 2011) <<http://www.facenfacts.com/NewsDetails/10204/if-not-for-rti-2g-action-taken-would-be-a-secret.htm>>.

45 Betwa Sharma, '5 Scams The RTI Act Helped Bust In Its First 10 Years' *Huffpost* (15 July 2016) <https://www.huffingtonpost.in/2015/10/12/5-most-critical-scams-exp_n_8263302.html>.

46 *ibid*.

funds to purchase costly household items, vehicles and even pay household bills.

Delays and pressure being exerted by interested parties are inevitable. In a later interview, Hitender Jain who was instrumental in these exposures recalled the various obstacles that he had to face in persisting with his RTI applications. Rather than the information being provided in one month (which is what the law requires), it took almost 19 months for information to start trickling in. Analysing the mass of data that was provided also took considerable skill.⁴⁷

There are many more such success stories. One notable instance was when a lawyer filed RTI requests asking for information with regard to the allocations of coal to companies, generally effected through public auctions and in a competitive process. From the information released, it was revealed that this process had been discarded for selling coal to big companies (Jindal group, Essar Group, Laxmi Mittal) on monetary inducements resulting in the loss of revenue to the State. Popularly referred to as the 'Coalgate scandal',⁴⁸ the RTI exposure led to investigations by India's Central Bureau of Investigation and the arrest of several key political players.

India's success story with RTI despite recent challenges has been notable. In the rest of South Asia, positive experiences of the use of RTI are less spectacular. Despite Bangladesh's RTI Act of 2009 not being used as widely as should be the case, civil society organizations, academia, individuals, experts and international development partners have welcomed the RTI Act seeing it as an opportunity to strengthen democracy and establish a transparent and participatory system of governance. Significantly, people from marginalized and disadvantaged groups have utilised the RTI Act to good effect, empowering themselves and their communities.

47 *ibid.*

48 Manaal Bhombal, 'How RTI Exposed Some of India's Greatest Scams' *WTD News* (26 September 2018) <<http://wtdnews.com/how-rti-exposed-india-as-greatest-scams/>>.

In Nepal, the right to information is primarily governed by the Interim Constitution 2007, Right to Information Act 2007, Right to Information Regulation 2009, and the Classification Guidelines issued by the Classification Committee formed pursuant to Article 27 of the Right to Information Act. Apart from these instruments, a number of other statutes regulate the right to information.

The Interim Constitution of 2007 (Article 27) has ensured the Right to Information as a fundamental right. It provides citizen the right to demand or obtain information on any matter of concern to himself / herself or to the public. Sections 3 and 30 of the Right to Information Act, 2007 empower Nepalese citizens to exercise the right to obtain information of public importance and individual concern, respectively. This Act also contains a separate provision for the classification and protection of the information in Sections 27 and 28. Activists have used this law effectively.

An interesting instance of RTI activism in this context concerned the status of Nepal's ratification of the statute of the International Criminal Court (ICC) when a Hon-Governmental Organisation working on RTI (Freedom Forum) applied for a copy of the report filed by the task force appointed to study the ratification. State agencies resisted, arguing that the report concerned 'issues related to the views Nepal would adopt in terms of bilateral, regional, and multilateral relations, and [also because] a meeting of the Information Classification Committee chaired by the Chief Secretary had decided that such information need not be given.'⁴⁹ Dahal's NGO, the Freedom Forum appealed to the National Information Commission (NIC) against the decision resulting in the NIC ordering to release the information.

In another instance, RTI was successfully employed to exercise the people's right to transparency in constitution-making. Nepal held elections for its first Constituent Assembly (CA) on April 10, 2008. Its 601 members were required by statute to promulgate

49 'Case Studies in Use of the RTI law in Nepal' *Freedominfo.org* (7 January 2015) <<http://www.freedominfo.org/2015/01/case-studies-use-rti-law-nepal/>>.

a new Constitution in two years. When it failed to do so, the CA's term was extended several times, until it was finally dissolved in May 2012 following a Supreme Court ruling.⁵⁰ An information request by the Freedom Forum to the relevant state agencies asking for details of CA meetings (dates, times, attendance, the number of bills approved by the CA and the Legislature-Parliament, with titles, dates and times, the details of salaries, expenses, and perks of all members etc.) resulted in much of the information being released. Due to poor record keeping by the Secretariat, information relating to the expenditure details was not released with the information requestor being assured that the details would be provided at a later date.⁵¹

4. Conclusion

Sri Lanka's RTI law has enabled RTI to play a life changing role in the lives of people whilst promoting democratic governance and acting as a tool to combat corruption. The print and electronic media, people's representatives, politicians and the common citizens have to play a key role in order to ensure that the Act is protected and is properly implemented.

In the tug and pull of information disclosure in all RTI regimes, there are 'hard cases', for example in regard to national security, the prosecution of crimes, personal privacy or diplomacy where a great deal of finesse needs to be observed in balancing the relevant interests. The public interest may be advanced by confidentiality and secrecy in exceptional and tightly drawn instances. But even then, there are situations in which the public interest will be enhanced by disclosure of the information as clearly evidenced in the fact that Sri Lanka's Act contains a public interest override in Section 5(4) applicable to all the exemptions under which information can be released as listed out in Section 5(1).

50 *ibid.*

51 *ibid.*

The national security exception is probably the most contested exception in RTI laws in the region. Our courts have historically shown great deference to state agencies when the ‘national security card’ has been played. But access to information can prevent government abuse and reduce corruption even in regard to, for example, military procurements which have long been the subject of intense public security in Sri Lanka. It is satisfying that Sri Lanka’s RTI Act does not contain a list of national security and intelligence bodies that are exempted from the reach of the Act as is the case in other countries in the region. Instead of entities being privileged, each case must be assessed on its merits in ensuring that an appropriate balance is struck between a legitimate state interest and the public’s right to know.

The RTI Act provides a good tool to achieve that balance and as the decisions of the RTI Commission themselves exemplify in declining to allow Public Authorities to vaguely plead national security as a ground to deny information,⁵² encouraging standards have been set for the future.

52 *Tharindu Jayawardena v. Bureau of the Commissioner-General of Rehabilitation* RTIC Appeal/119/2017 available at <http://www.rticommission.lk/web/images/pdf/comm-order-tharindu-jayawardena-v-rehab-comm.pdf>.

THE CULTURE OF SECRECY IN SRI LANKA'S PUBLIC SERVICE

Susil Sirivardana

1. Introduction

The culture of secrecy in Sri Lanka's Public Service was a suppressed topic until the Right to Information (RTI) Act was enacted by the Sri Lanka Parliament on the 4th of August, 2016. For the first time in our history, RTI emerged as a key issue of comment and discussion in the public discourse. The earlier negative culture of secrecy had drawn its roots from a long prevalent proclivity on the part of public officers to deny information as a given, despite a minority challenging this persistent practice over the years. Its vehemence and longevity was simply due to it becoming an *institutionalized culture*. Hence secrecy, particularly in the public service came to be perceived and accepted by society as inevitable.

But to the benefit of the country, civil society groups including the media which fought for an RTI Act for several decades, finally succeeded in their campaigns. The cry for RTI had earlier been tactically stalled by the powers that be. But in early August 2016 its time had come, and the hitherto vehemently denied assent to an RTI law was passed in Parliament, ironically, by consensus.

2. Personal Experiences in the Public Service

To reinforce the points set out in the opening paragraphs of this short essay, I would like to recount three personal experiences. They relate to what I have undergone from the inception of my career in the Sri Lanka Administrative Service in 1965 to its close in 2018. While they do not directly relate to the withholding of information, they illustrate the hostility of the public service to the vital attribute of transparency in the workings of the government.

This is important to recognise as the public service culture constitutes the environment within which RTI operates and in regard to which beneficial change must surely take place.

My first assignment involved a continuous interface with communities of selected youth invited to adopt settlement agriculture which attempted to match their aspiration for a high monthly income. Almost all the districts were covered and a great deal of time was spent in the field. Frequent and rigorous inspections involved extensive field checks together with the youth and the project staff, followed, by long face-to-face meetings, where contentious matters were covered in depth. A common complaint was that public servants were to blame for many ills and inefficiencies affecting the government process. The point here was not the mutual opposition between the youth and public servants but rather, the attitudes involved where it was often the case that many public servants always tried to disown responsibility- often totally - giving rise to tensions that required mediation which was a task that I undertook myself. Credibility was crucial. Trust and the social contract were involved.

The second experience was highly personal and also insidious. I was the Head of Department of a strategic project of the government. I firmly believed in two practices in development administration. Committed leadership and motivated creative minds were key, not the size of the agency. I was particular about whom I selected for each task. I always worked with a core staff, who were prepared to go the extra mile. Decision-making regarding policy came only after thorough discussion and was by consensus. Trust was crucial. As a result, until the right officer for a post was found, a position remained vacant. When it came to manning at the head office level, I believed that the best 'go-getting' staff officers should be in the districts, and not at the center, because that was where the drama was. The corollary was that the center could improvise.

One day I was shocked and angry beyond measure when I got a letter from my Ministry Secretary saying that the Minister

had approved that so and so, hand-picked by me and working in a staff post in the next room, should be immediately appointed to fill the unfilled vacancy as my Additional officer. Before I received this letter, I had already given thought to the matter and had concluded that the officer did not meet the stringent standards needed for that post. I could conceive of many eventualities when he would find it difficult to perform some of the demands of that high level. This move was made in utter secrecy, behind my back, both by the Minister and by the officer concerned. The cabal well knew that I would have good reasons to oppose the suggestion if made in the normal course. So, it had to resort to a disgraceful expedient – utter secrecy.

I vehemently protested to the Minister and the Secretary, but the matter could not be resolved. This was a move carefully hatched, when the President whose pet project it was, had just been assassinated. The resulting political vacuum enabled a manipulative bureaucracy to massage the Minister's acquiescence. In fact, the Minister said as much to me. So much for the culture of decency and trust at the highest level of bureaucracy!

My final experience was very recent. I had answered the call of a Minister to serve as a Senior Advisor after over twenty years of retirement. As a token of appreciation, I accepted. I was also interested in reassessing the state of the Public Service after some decades of apparent decline. Ironically, I came to work in my old institution where I had served over a decade and had ended as its Chairperson. A dispute arose between me and the senior management over a change of my personal office room. I had shifted rooms once and no sooner had I occupied the new room, when I was asked to shift again.

I found that the alternative being offered this time round, was unsuitable given my position. I pointed out these reasons and held my ground. The matter stalled for nearly five months, with behind the scenes machinations going on. The surprising and shocking fact was that throughout the protracted dispute, the senior management

never thought it fit to discuss the dispute with me, maintaining stealthy silence and secrecy. It was a matter that could have easily been resolved if the parties came together and discussed, because all of us were well known to each other and the others concerned had served under me before. Finally, when I was compelled to shift, I unilaterally retired.

There is a sequel to this experience. I found on returning to public service after a two-decade break (2015), that the institutional and bureaucratic culture had undergone a sea change. Dialogue and consultation on contested matters were zero. The new culture was *that of fiercely operating from within one's "box"* with no discussion whatsoever. Secrecy enjoyed a privileged position and was a part and parcel of the new unprofessionalism. Even more unacceptable was the fact that people in positions of higher responsibility who should have intervened to arrest this aberrant culture, chose to look away. Hence the degree of the sea changes in the public service. These times were rhetoricised as the culture of *yahapalanaya* or good governance! The above examples are symptomatic of the whole public administration system in general, irrespective of level.

3. Generic Faultlines in Sri Lankan society

It is worth investigating some of the main generic and causative faultlines that have created and facilitated this persisting culture of secrecy. Identifying such elements will help the path of development of the RTI process. It will enable the people - the owners of the RTI process – and the RTI authorities to clarify for themselves their own supportive and complementary roles in this vital people-centric process.

Fettering and diminishing the role of the citizen by over-politicisation and bureaucratisation (statisation) is the first of these faultlines. Blatantly repudiating the constitutional will which clearly speaks of the sovereign people or citizenry and perpetuating a conjoined structure of power and wealth ensuring abject

subservience to it in no uncertain terms is part of that negative process. In the familiar civil society –state – Market/Private sector triangle, the role and status of civil society is tragically nominal. The hegemony of the State, and its imminently immediate votaries, the politicians and the bureaucrats, have sustainably institutionalised this reductivism.

The second fault line is related to the systemic and all-important macro process of nation building. Our nation building has been both deficient and incomplete. During our stage of development of fighting for national liberation and independence, the foundation that we laid had more to do with an ethnic process than a liberation process. We were building ethnic constituencies while Gandhian and Nehruvian India was crafting the Indian Nation. This manifested itself in the evolution of a deeply polarised polity where ethnic nationalisms of the main ethnic groups were contending for political power as the strategic goal of national independence.

So it was no surprise that we ended up as a divided nation which became part and parcel of our polity. Its direct result was the decades long ethnic war, which took an inestimable toll on society as a whole. This faultline's ascendancy to the mainstream meant that we willingly segregated ourselves as in the case of our school system. The whole of society began to look at the other, in Us – Them terms. One's ethnic other muted into one's potential enemy. This misperception of the role of the Other is only another synonym for conflict and flawed nation building. After the ending of the war in the North and East, we vaguely realized our folly, but the virus of an ethno-centric mode of thinking and feeling remains widely prevalent in the thews and sinews of society. The roots of this faultline extends to the two youth insurgencies as well as the more recent ethnically-derived attacks against religious and ethnic minorities in Beruwela (2014) and Kandy (2018).

The third systemic faultline points to another related matter.

That is what may be called, sociologically speaking, the broad perception of a systemic divide between a Robust Meritocratic Society and an Over-politicised Mediocratic Society. It is our finding that our history from, say the 1920s to the present, factually divides itself into the above mentioned two phases. The distinction is best understood in terms of core characteristics. In the first, extending from the 1920s to the early 1950s, our society was structured and managed on Meritocratic and Democratic principles. Its dominant feature was that society was systemically welded together in political, social and economic terms to approximate democratic and meritocratic standards.

Hence the resulting conscious social and political engineering was propelled by qualitative standards and values. There was space for dissent at the highest levels (*Bracegirdle*⁵³ and the Jaffna Youth Congress⁵⁴ experiences are examples). Public Administration was conducted according to impersonal norms of good governance in keeping with that stage of development. With universal franchise and the State Council,⁵⁵ concrete and practical lessons in a democratic and open polity were learnt and practiced.

The plethora of democratizing and people-oriented basic needs legislation – regarding Land and Settlement Policy, Local Government, Public Works, Transport, Agriculture and Food Security - of the State Council, gave a huge fillip to the depressed and marginalized people of the colonial society of the time. Above all, and even with all the limitations of a colonial polity where the agency of the local people had been denied, the level of governance

53 *In re Mark Antony Lyster Bracegirdle* (1937) 39 NLR 193 where the court inquired into the merits of a Governor's Order compelling Bracegirdle, a planter, who had expressed 'certain controversial views' on political and racial aspects of life in colonial Ceylon. It was firmly asserted that the declaration of martial law was no impediment to judicial review.

54 Ranked among the first of youth leagues in the country, this was a secular movement committed to national unity and the eradication of inequalities imposed by caste

55 The State Council of Ceylon was the unicameral legislature for Ceylon, established in 1931 by the Donoughmore Constitution which gave universal adult franchise to the people of the colony for the first time.

was perceived to be of a credible quality.

In contrast, the polity and society after Sinhala Only, the ethnic riots of the 1950s and the juggernaut of over-politicisation brought on by the 1972 Republican Constitution (decolonization and national dignity), a set of half-baked, flawed and ad hoc policies and programmes were implemented with results that resulted in inevitable disorder, economic losses, plunder and pillage by politicians and their henchmen while the norms of democratic governance were hypocritically paid lip service to, with a surfeit of rhetoric.

In the process, the country found itself teetering on unmanageability on one side while meritocratic values and standards of public and official conduct were seriously compromised on the other. True, there was rearguard action all the time by hardcore democratic stalwarts but they were few and far between. The systemic upshot of this self-subverting process was the enthronement of Mediocrity. It was this mediocrity that must take a great deal of the responsibility for the culture of secrecy which overran the Public Service.

Again, it was this mediocratic order which has reined in the Sri Lankan state and society for the last 50-60 years resulting in significant change of individuals and communities. These changes occurred in the personal and psychological realm of 'the self', meaning the human being in a holistic (in an affective as well as an intellectual) sense. The macro result we see may be stated as the erasure of the sensitive human being led by a functioning value frame and committed to excellence and high standards.

In contrast to the present age, we could identify such meritocratic role models who were exemplars to society in earlier times, where a Robust Society prevailed in Sri Lanka. Just to take one simple example; the quality of school principals of the central

schools as well as the older private schools. Every single one of them were role models who produced women and men of sterling human merit. But later as Sri Lanka changed, instead of sensitive human beings, the products of mediocrity and opportunism were the willing and pliable standard bearers of the new culture of secrecy, hypocrisy, greed, opportunism and deceit. The moral fibre that Sri Lanka possessed at one time was lost for current generations.

After this brief exploration of ecosystemic faultlines as we call them, what is to be done? How does the RTI process relate to the act of *regeneration and restoration of the open, value-led and responsible* Sri Lanka that we desire and dream of?

4. Transforming Ecosystems of Society

We have used the term ‘ecosystems’ to relate mainly to the culture of individual and social life in relation to thought, action, values and behaviour. ‘Transforming ecosystems’ is not a facile strategy. But that is the enormity of our task and we have no option but to face it.

In our view, RTI is tailor made to address this process as a futuristic vision and mission. RTI is ideally suited to be a strategic weapon of societal regeneration, prioritization of knowledge and empowerment of individuals and communities. As we commemorate the significant achievements of this short two year childhood, the public response to RTI has been nothing less than exceptional.

RTI has already won the public trust in being a tool that the people can use on behalf of their diminished and marginalised selves. The RTI Act has proved to be an effective countervailing force – the missing lead actor – in the empowerment arena, too often dominated by the shrill cacophony of political voices. Material conditions are right for this emergence. The rise of people’s

voices in 2015 leading to political change and the role played by Venerable Sobhitha Thero's Movement was an early indication that Sri Lankan citizens have become tired of the old culture of secrecy and disempowerment.

RTI can justifiably be a much needed moral and operational medium to re-empower and create material space for civil society to intensify its flickering discourse on democratic space and make it the dominant partner in governance that it should be. RTI has its historic role cut out for it. We wish it well on its challenging journey.

MEDIA AND RTI

A LAW FOR JOURNALISTS – NOT 'CHURNALISTS'

Sinha Ratnatunga

1. Introductory Thoughts

Nothing is probably more annoying to young journalists than to hear their elders start talking about how in “their day”, they were so good at ferreting out stories from officialdom and the scoops they had.

For these youngsters, these are tales from the ‘*kopi kaaley*’ or the coffee era, a time predating the tea era of a century and a half ago. And yet, these seniors can at least reminisce, with yarns of how their colleagues, scribes of yesteryear, would have to use all the tricks of the trade to extricate otherwise ‘Top Secret’ and classified information from official records, and from officials, however highly or lowly they were placed, all sworn to secrecy by law and by the DNA of public servants.

Some stories are legendary of how a certain reporter would carry with him a bundle of files when going to a senior government official’s desk (already piled high with official files) and place his files on top of a stack. When leaving, the reporter would casually pick up his files and along with them remove a couple of extra files from the official’s desk, only to return them the next day saying he had ‘accidentally’ taken some with him. That was his method of accessing government information.

Each had his *modus operandi*. There was the instance when a highly confidential letter sent by a Finance Minister to his President was leaked by a ministry clerk to a reporter. Neither the clerk nor the reporter knew its import as it was in a language they were unfamiliar with. They only knew it was classified as it contained the rubber stamp CONFIDENTIAL, a word both understood. That

they knew was the seal to mean it was important – and secret. They met at a bar in Colombo Fort where a photostat copy of the letter was handed over. The reporter brought it to his Editor who immediately realised its significance.

When the story broke, the Minister had naturally suspected the President of leaking the story.

True enough, those were stories from another era. Today's reporters have the Right to Information Act ("RTI Act"). It was meant to make life easier for journalists to access secret information the Government or any 'Public Authority' wanted to hide. After a year of the law coming into force, alas, very few journalists have taken advantage of a legal instrument that allows them to get into hitherto forbidden, unexplored territory.

Many young scribes little realise, let alone appreciate, the fight that was waged to get the RTI Act passed into law in Sri Lanka. It was not a matter of course, as some may think. It did not just happen.

2. The Campaign for an RTI Act

Two decades ago, when the media rallied to challenge a then Government campaign of serial indictments against editors and publishers on charges of criminal defamation, a Freedom of Information Law was proposed by a United Front of publishers, editors, working journalists and freedom of expression activists. The official demand came via the Colombo Declaration on Media Freedom and Social Responsibility of 1998.

Sri Lanka, which could have been the first country in South Asia to enact such a progressive law that had taken the rest of the democratic world by storm, ended up among the last. In 2004, such a law was drafted by a media-friendly Government with the active participation of the journalistic community. The law was approved by the then Cabinet, but just as it was presented

to Parliament for passage into law, the House was prematurely dissolved and the entire process aborted.

The draft law never saw the light of day, and interested parties never wanted it to see the light of day – for good reason. Much of the corrupt deals unfolding by way of Presidential Commissions of Inquiry and before Courts of Law today might well have been exposed at the time. A little more than a decade of public agitation before the political leadership was virtually forced to bring forth the Right to Information Act – the successor to the scuttled Freedom of Information Bill. In the interim, Freedom of Information had developed into a Right of the Citizenry and so became the Right to Information Act. A well-meaning bid to give it Constitutional status in the 19th Amendment however was botched. But that is another story. If it was the media that gave the leadership to the campaign for the RTI Act in Sri Lanka, it was a complete contrast in India, where a ‘bottom-up’ or grassroots movement that began in the rural villages of Rajasthan wound its way through other states to the Central capital in New Delhi and eventually to its Parliament.

Peasant workers mobilized by volunteer groups went on hunger strikes for this law. There were street protests and public meetings. In what is all too familiar in Sri Lanka, Indian politicians tried to backtrack on election manifestos promising such laws, and instead, tried to bring in an administrative order rather than a law. The Indian activists, though, would have none of it. Aruna Roy, considered the Mother of India’s RTI’ says in her book; ‘*The RTI Story – Power to the People*’⁵⁶ that the RTI narrative is a celebration of ordinary people and their immense contribution to strengthening the pillars of democratic justice in modern India.

In Sri Lanka, probably because the campaign for the law was Colombo-centric rather than something that grew from the grassroots, its value may be less felt and less widespread. Civil society groups have tried to take the law to the villages but those

56 Aruna Roy & MKSS Collective, *The RTI Story: Power to the People* (Roli Books 2018).

who seem to have been quick to grab the newfound opportunity of the right to obtain official information have been lawyers appearing for corporate clients. Equally, lawyers have been retained by public authorities to keep prying eyes from the information they want to safeguard. Typically, these lawyers have managed to butter their bread on both sides thanks to this law.

3. The Media's Use of RTI

The media has fallen short. The RTI Act may be in its nascent stage, but so too is the media's enthusiasm. A recent publication of the Sri Lanka Press Institute to mark the first year of the RTI Act in Sri Lanka seems to have laboured to find sufficient articles from the Media that were the result of information obtained by making applications under the RTI Act. Only a select group of journalists seem to be ahead of the others in using the law to benefit their readers – the citizens of Sri Lanka, on matters of public interest. Still, the stories were interesting reads and ought to encourage their peers to follow in their footsteps.

The booklet '*RTI- Making the News*' features a few investigative stories where the RTI had been utilised in a report published in the *Sunday Times*, Namini Wijedasa highlighted how the Road Development Authority had begun work on the Ruwanpura Expressway without the necessary Environmental Impact Assessment and an economic feasibility study being finalised. Another report, by Chandeepta Wettasinghe published in the *Daily Mirror* 'EPF gets zero returns from majority of private equity investments' also utilised the RTI to get the information that might otherwise not have been available to the public.

Some other journalists who have used the RTI Act in the first year are Prasanth Abeywickrama (*Lakbima*), Ajantha Bandara Ratnayake (*Wayamba TODAY, a web journalist from Kurunegala*), Rahul Samanth Hettiarachchi (*Lanka News Web*), Chandani Kirinde and Sandun Jayawardene (*the Sunday Times*), Sarath Manula Wickrama (*Sri Lanka Press Institute*), Udayanthi

Munasinghe (*Maubima*), Bigun Menaka Gamage, Harindu Uduwaragedera and Tharindu Jayawardene (*Lankadeepa*), Ashika Brahmana Thej Werapitiya (*Irida*) and some staff reporters from the Uthayan. They could be considered pioneer journalists who used the RTI Act to run stories in the first year of its enactment. The numbers should double and more in the years ahead.

Yet up to now, no Media House seems to have a separate RTI Desk to focus on obtaining stories based on information gained through the RTI Act. At a time when investigative journalism is taking a back seat to what is commonly now known as ‘*churnalism*’, and the need for journalists to churn out stories by the hour for websites and feed the 24/7/365 news cycle taking precedence over working on complex in-depth stories, how much a dedicated RTI Desk will be a priority, is another issue.

But there is no need to despair. Even in India, in the early years of the RTI, there was lethargy and cynicism among media persons about actively pursuing stories through information obtained through their RTI Law. Many felt, like in Sri Lanka that traditional methods were good enough for them to obtain official information. One of the pioneers who took advantage of the law to write detailed investigative stories, Shyamlal Yadav says in his book; ‘*Journalism through RTI – Information Investigation Impact*’⁵⁷, the Indian media also took some time to empower themselves with this new instrument available to them.

‘I soon realized that one can use the RTI Act without even knowing or reading it, and that is the beauty of this historic legislation,’ he said. In one story he had worked on, Yadav filed 700 RTI applications and collected data over four years. It was a nationwide search of private persons who had been issued arms licences. That is the kind of perseverance and staying power required by serious journalists going after serious stories. ‘But,’ he says, ‘the fact is that in comparison to the media in many other

57 Yadav S, *Journalism through RTI—Information Investigation Impact* (Sage 2017)

countries, the Indian media has not done enough to explore the potential of the RTI Act.’ He goes on to suggest that the RTI Act must be taught to every Indian citizen.

4. Energizing the RTI process in Sri Lanka

On that note it is heartening to know the Cabinet of Ministers in September of 2018 approved the proposal presented by Media Minister Mangala Samaraweera to implement a “Right to Information for Village” mobile service, and to organize school competitions all over the country on this topic in a move to create more awareness.

However, it should not be a ‘wait and see’ policy, but one where Media Houses and Media Unions, from The Editors’ Guild to the Working Journalists Association and the Free Media Movement, the Sri Lanka Press Institute and civil society groups work together to energize the up and coming crop of journalists. They must be informed of the benefits that accrue to them in their professional life from the RTI law and in the process educate themselves on the procedures in accessing official information for the benefit of the public at large. It is then that the media in general will make an even more meaningful contribution to quality journalism that still remains not only attractive in this world of ‘fake news’ thrown up mostly by spurious web portals, but also be more relevant to good governance and the national interest.

The fact that even a Member of Parliament recently filed an RTI application to obtain official information was proof that what he could not obtain by way of a traditional question in the Legislature, he was able to obtain faster through the RTI Act.

In the wider scheme of things, those holding public office might be that much more cautious before they spend public funds and indulge in corrupt activities with the knowledge at the back of their minds, that whatever they do, might one day be subject to public scrutiny – by law.

LEGAL REFLECTIONS ON THE RTI ACT

CRITICAL EVALUATION OF TWO SELECTED ORDERS OF THE RIGHT TO INFORMATION COMMISSION OF SRI LANKA

Jayantha de Almeida Guneratne

1. Introduction

It is as recent as in 2015 that the ‘Right to Information’ was recognised as a fundamental right within the framework of Article 14A of the Constitution, by way of an amendment thereto.⁵⁸ Prior to that, the Supreme Court, in the exercise of its fundamental rights jurisdiction conferred under the framework of Article 14 read in conjunction with Article 12⁵⁹ acknowledged such a ‘right to information’ impliedly but in limited contexts, going thus far but no further in recognising a general right to information.⁶⁰

As distinguished from other fundamental rights enshrined in the Constitution,⁶¹ ‘the right to access information,’ is ‘as provided for by law.’⁶² Thus, the need to have enacted a law viz; the Right to Information Act No 12 of 2016 (the Act). There were also other reasons as to why a separate Act was necessary.

First, alleged violations of fundamental rights are restricted to applications against ‘executive or administrative action’⁶³ whereas the reach of the RTI Act goes far beyond that. Secondly, the Supreme Court which exercise fundamental rights jurisdiction, *prima facie*, is vested with power to grant ‘such relief’ or ‘make

58 19th Amendment to the Constitution of Sri Lanka.

59 The Right to Equality

60 See Crawley, Page & Pinto-Jayawardena (eds), *Embattled Media; Democracy, Governance and Reform in Sri Lanka* (Sage 2015) in particular, chapter 9 therein.

61 The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Chapter IV – rights *per se* as provided by the Constitution itself [Constitution of Sri Lanka].

62 Constitution of Sri Lanka, Article 14A.

63 Constitution of Sri Lanka, Article 17.

directions as it may deem just and equitable.’⁶⁴ The jurisprudence developed by the Supreme Court in the last four decades following the (1978) 2nd Republican Constitution reveals that it has assumed the power under the said ‘just and equitable’ relief provisions to order ‘compensation’ against the violators and reverse any ‘executive or administrative decision’ coming within the phrase ‘make directions.’⁶⁵ In contrast, the Right to Information Commission established by the Act is conferred with power to initiate criminal proceedings against Public Authorities who, the Commission would find, have violated a citizen’s right to access information. Thus, violations lead to potential criminal consequences as opposed to compensatory payments (having limited deterrent effect) which are normally the case in instances of fundamental rights violations.

Moreover, there is an important distinction that we must take note of. For decades, Public Authorities as envisaged by the Act (Information Officers (IO) and Designated Officers (DO)), have been nurtured in a culture of denial and caught in a maze of bureaucracy. Superimposed on that bureaucratic culture, the Supreme Court itself has adapted a ‘hands off policy’ in recent years, upholding the executive fiat in the context of ‘national interest’ and/or ‘security interest’. Departing from this conservatism, the RTI Act has boldly enforced a “public interest override”, (Section 5(4)) even in regard to matters of national security, thereby effecting a significant shift in regard to matters pertaining to the release of information of vital importance to the country and to citizens.

Further, the direction in regard to observing time limits in making a request for information from the IO and appealing to the DO and therein to the Commission shows another point of contrast with the Supreme Court’s jurisdiction under Chapter IV of the Constitution where time limits have been held to be imperative subject only to the ‘doctrine of impossibility of performance.’⁶⁶ Where the RTI Act is concerned, the discretion reposed in the

64 Constitution of Sri Lanka, Article 126 (4).

65 *ibid.*

66 *Gamaethige v. Siriwardena and Others* (1988) 1 SLR 384

Designated Officer (DO) and the Commission at the first and second levels of appeal regarding information requests or appeals that are submitted past the stipulated dates (Section 31 (5) and Section 32 (2)) is implicit in the generosity afforded to citizens' rights as implicit in the spirit and letter of the RTI Act. The basic principle is that appeals should not be dismissed on mere technicalities such as the non-observance of time limits.

Such was the background scenario when the RTI Act became operational.⁶⁷ Thus the challenge that lay for the Commission was to develop a body of jurisprudence striking a *via media*, between principles enunciated by judicial precedent and the express provisions of the Act, the Regulations made by the designated minister under it and the Commission's own legislatively authorized Rules thereunder, given the inveterate principle that, tribunals are the masters of their procedure.

How would the Commission give effect to the liberal letter and spirit of the Act sans over-emphasis laid on technicalities which lawyers are so fond of arguing about? Given the expansive jurisdiction conferred upon the Commission under the Act, how would the Commission approach its role under the Act? Would it follow judicial precedents laid down by the Supreme Court and the Court of Appeal or would it evolve an imaginative new approach or a *via media* for itself? No doubt, the Commission would be guided by judicial precedent, given particularly the fact that the Act contemplates adversarial proceedings and legal representation is permitted. Consequently, lawyers, being nurtured in legal principles including canons of constitutional and statutory interpretation would cite judicial precedent, short of urging perhaps the doctrine of *stare decisis*. As we will see, these expectations have been borne out in the early years of the Commission's functioning.

With the aforesaid introductory remarks I shall now proceed to analyse and critically evaluate some selected orders/decisions handed down by the Commission in the first year of its role as an

67 On 3rd February 2017.

appellate body. It is of interest that the Commission has devised guidance from comparative jurisdictions in these efforts.

2. **Reflections on *Ceylon Bank Employees Union v. People's Bank***⁶⁸

2.1. **Spectrum of Information Sought**

The Respondent PA had disregarded its legal consultant's opinion on a disciplinary matter involving some of its employees and retained private lawyers leading to several cases being filed in Court. The Attorney-General had not been consulted in terms of retaining state law officers for these cases. What were the criteria used in selecting the said private lawyers? Who were they by name? What fees were paid to them? Were they excessive or exorbitant? Had the Auditor General's approval and/or provisional approval been obtained to make such payment of fees? Had the Governor and/or Director of Banking Supervision of the Central Bank been informed of the existence and progress of the aforementioned court cases?

2.1.1. **The Stance Taken by the Public Authority**

The Information Officer (IO) denied the said information on the basis that the same fell within one or more of the excepted/exempted categories decreed in Section 5 of the RTI Act. The first appeal provided in the RTI Act to the Designated Officer (DO) being not responded to, the Appellant appealed to the Commission.

2.1.2. **Examination of Relevant Issues**

The broad issues the Commission was faced with in addressing viz the denial to disclose information may be taken seriatim as follows, some of which were inter-linked.

A. **Release of a certified copy and/or extracts and/or such other documentary material of the decision taken by the**

68 RTIC Appeal No 58/2018 before the Full Commission; Dates of hearing: 30.01.2018, 27.03.2018 & 22.05.2018; Final Order delivered on 17.07.2018.

People's Bank to disregard and override the legal opinion given by the Legal Consultant of the bank to desist from initiating or continuing disciplinary action against three employee-members of the Appellant Union

In upholding the refusal of the PA to give that information, the Commission reasoned that the requested information is directly in issue in the pending litigation referred to by the Public Authority. It 'forms in fact, the very basis on which that litigation appears to have been initiated in the first instance.'⁶⁹ Denial to give the information was consequently upheld under Section 5(1)(j) of the RTI Act, (that release of the same would be prejudicial to the maintenance of the authority and impartiality of the judiciary).

Reflections on the Commission's decision

The upholding of the decision of the Public Authority indicates that the Commission has been careful not to trespass beyond the remit of its statutory authority, in terms of intervention into a contested matter between parties ongoing in a court of law.

B. The decision taken to retain private lawyers without retaining officers of the Attorney General's Department and the expending of public funds on the same – *the Sub Judice* objection

The PA had further contended that to release information regarding the decision to retain private Counsel would amount to dictating to the PA as to who should have been retained. Rejecting that contention the Commission held that, the said contention is flawed in its very basic premise. It was observed that while the PA has discretion to retain whomsoever it wished, the transparency of that decision was in issue as the matter in dispute related to the expenditure of public funds, thus bringing in the concept of "public interest" in regard to which transparency and accountability of the best standards must be reflected.⁷⁰

69 *ibid* 9.

70 RTIC Order delivered on 17.07.2018, p 9-10.

The Commission held, the information requested relates to the expending of public funds which consequently vested the Commission with jurisdiction to order disclosure of the cumulative funds spent on the retention of private counsel by the Public Authority in the public interest reflecting transparency, accountability and good governance.⁷¹

Reflections on the Commission's decision

Was the refusal to disclose the information in question justified on the ground that it would be in Contempt of Court or prejudicial to the maintenance of the authority and impartiality of the judiciary? Was it justified in the context of the sub judice concept? That contention advanced on behalf of the Respondent was based on “the exceptional category” envisaged in Section 5(1) (j) of the RTI Act, it being common ground that there were pending cases in Court. In rejecting that contention the Commission reasoned thus:

‘the real risk of prejudice to the authority and impartiality of the judiciary is not established...’⁷²

Several aspects in the Commission's said decision may be commented on at this juncture. It is the Respondent PA which had pleaded the sub judice defence as being an exempted ground to deny disclosure. If so, as reasoned by the Commission, the burden was on the PA to establish the same. Mere citation of pending cases was not sufficient to discharge that burden to thwart the intention underlying the Act.

What is envisaged by the rule of *sub judice*? That is “a rule limiting comment and disclosure relating to judicial proceedings.”⁷³ The pending judicial proceedings were legal action instituted by the Respondent against some of its employees. Any comment relating thereto would be a matter for the Courts to shut out as being

71 RTI Act No. 12 of 2016, preamble [RTI Act].

72 RTIC Order delivered on 17.07.2018, p 10.

73 Jonathan Law (ed), *Oxford Dictionary of Laws* (8th edition, 2015) p 601.

irrelevant. But how could information pertaining to the retaining of private Counsel involving expending of public funds and the sums so expended be encompassed within the *sub-judice* rule affecting (prejudicing) the authority and impartiality of the judiciary?

Consequently, the two jurisdictional authorities viz the Commission's decision to order the said disclosure and the judiciary to proceed and determine the 'actions' before it stood separated. If so, how could the PA have contended that such doctrine would amount to "Contempt of Court?"⁷⁴ The Commission derived guidance from an Indian Precedent, interpreting Section 8(1) (l) of the RTI Act of the Indian Act couched in similar term to Section 5(1) (j) of "the Act," namely *In Sh. PD Bansal v. Food Corporation of India*⁷⁵ where the relevant provision for consideration was Section 8(1)(b) of the RTI Act which exempts from disclosure, information that has been expressly forbidden to be published by any court of Law or Tribunal or the disclosure of which may constitute contempt of court.⁷⁶

In the Commission's decision, Section 4 of the RTI Act is cited to support its decision which reads as follows:

'The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.'

The involving of the said "notwithstanding..." provisions to bolster its reasoning may have been done through an abundance of

74 The Essence of that concept being 'action bringing the Court to ridicule'.

75 Case No. CIC/LS/A/2009/000937. Here the CIC ordered the disclosure of the 'total legal expenses' incurred by the Respondent Public Authority, reasoning that 'the cost on a particular case is incurred from the Public exchequer hence, the Respondents are hereby directed to inform the Appellant about the total cost incurred on the concerned case, after proper calculation.' 76 RTIC Order delivered on 17.07.2018, p 10.

76 RTIC Order delivered on 17.07.2018, p 10.

caution, leaving no room for doubt although the jurisdiction vested in the Commission is premised on the “Public Interest override” and is justifiable from that standpoint alone.

C. Was the refusal to disclose the requested information justified on the basis of Fiduciary Relationship and/or Professional Communications?

The Public Authority sought to justify this on the basis of Section 5(1) (g) of the RTI Act as involving the fiduciary relationship of lawyer and client and consequently as being a matter coming within professional privilege and being offensive to privacy as well?

While acknowledging the contours of what constitutes a fiduciary relationship, the Commission reasoned that “the cases in issue may be regarded as an institutional decision” taken by a Public Authority. Accordingly the Commission held that, this contention was not entitled to succeed.⁷⁷ The same applied in the Commission’s thinking in regard to the contention based on “professional communication” (Section 5(1) (f)).

Reflections on the Commission’s decision

The relationship of “lawyer and client” flowing as it were from an antecedent contractual relationship could not be applied as a general rule in the context of “an institutional decision taken by a public authority.” That aspect is discussed in more detail later on in this essay and is discernable when the Commission made reference to “the cases in issue” being cases involving the expending of public funds. Thus the public interest demanded disclosure of the funds so expended, the very purpose for which the RTI Act had been passed.

Even from another perspective, for instance a private party calling for tenders from another private party, is given to anyone of its choice, such a transaction would remain in the private domain. But, could similar reasoning apply to a governmental authority

which awards a tender? The answer must necessarily be in the negative for a public authority would be dealing in public funds and not private funds. The same would apply to the contention based on “professional communication” the fee quoted by the lawyers for the “cases in question agreed to by the “public authority” and the circumstances that might have ended with the final negotiation thereon.

The Public Authority’s said contention was not entitled to succeed in the light of the Commission’s extensive study, examined and analysed on past precedents including some of its own in a short span of one and a half years along with the relevant Supreme Court Rules and Section 126 of the Evidence Ordinance.

- D. What about disclosure of the names of the lawyers retained by the Public Authority? Were they liable to be disclosed?**
- a. Re the names of the lawyers retained on the basis of a matter relating to ‘privacy’.
 - b. Re the selection criteria used in selecting the said lawyers.

Reflections on the Commission’s decision

In regard to (a) above, the information request being implicitly the disclosure of the names of the said retained lawyers, the Commission’s refusal to direct disclosure of the same stands justified as a matter falling within the contours of the concept of fiduciary and/or contractual relationship.

Consequently in my view, the information requestor (the trade union) had missed a cue in that regard. The amount paid as fees needed to be disclosed in the public interest. The names of the lawyers to whom fees had been paid was based on a different footing in as much as disclosure of the same would have made inroads to ‘privacy’, linked as it were to concepts of contractual/ fiduciary relationship. The information requestor therefore erred in

asking for the names of the said lawyers and the Commission was well justified in refusing that request.

In considering the request to disclose the criteria employed by the Peoples Bank in selecting the lawyers, the Commission ordered disclosure subject to the redaction of the names of the lawyers on the basis that ‘the Act seeks to promote a culture of transparency and disclosure. The exemption of fiduciary relationship is inapplicable as this request pertains to criteria adopted by the PA in selecting an attorney for the cases. This is a matter of internal consideration / contemplation and relates to an institutional decision.’⁷⁸

There may be competing opinions on this point. While one view would incline towards the thinking that disclosure of selection criteria in respect of attorneys whom they retain by public authorities would be infringing into the internal affairs of that authority, the other view may support that decision of the Commission on the basis that this is somewhat similar to the criteria used by public authorities in procurement processes which have been laid down to ensure that decisions are not taken arbitrarily. In both cases, the expenditure of public funds is in issue.

In this particular instance relating to alleged gross financial mismanagement by the Public Authority in issue, the Commission may have been persuaded by the circumstances of the case to ensure that there is transparency in ‘institutional decisions’ that are taken. The concept of ‘institutional decision’ that has been developed in this regard is worthy of note in the development of RTI norms and practices.

E. Re the information requested as to whether the Auditor General and the Governor and/or the Director of the Banking Supervision of the Central Bank, had been informed of the existence and progress of the said cases in issue. In reference to the above, the Commission ordered disclosure.

78 RTIC Order, p 22.

2.1.3. Some General Thoughts on the Decision

A. Scope of the Commission's Jurisdiction - The Criteria of Transparency as opposed to Accountability

Although the criteria of transparency and accountability are employed under the RTI Act as if both concepts flow into one another and in the conjunctive which stands to reason if the notion of accountability is construed as general public accountability, there is another view that may be taken. Transparency arises as to the quantum of funds expended retaining private lawyers by way of fees justified disclosure. Accountability in so doing in instituting legal action in disregarding the PA's legal consultant's advice is another matter albeit that falls outside the Commission's jurisdiction.

In my view, to argue otherwise surely would have been counter to its decision based on "privacy" addressed earlier in this analysis. What purpose could have been served by apprising the Auditor- General and the Governor and/or the Director of the Banking Supervision of the Central Bank as to the names of private lawyers retained other than the quantum of the fees paid? Could the Auditor General or the Governor and/or the Director of the Banking Supervision of the Central Bank in law have had any say in that matter? I think not. Had it been otherwise then the matter would surely have attracted, the contention based on the principle of sub- judice and the contention based on "affecting the authority and impartiality of the Courts" which the Commission had earlier rejected.

Thus, the concepts of transparency and accountability are inter- linked but also have distinct meanings in the exercise of the Right to Information. In exercising its powers therefore, the Commission has to be mindful of its jurisdictional limitations in that while, the expending of public funds would inevitably lead to disclosure of information in the public interest, venturing beyond those boundaries would no doubt have run the risk of

the Commission being put on inquiry for acting in excess of its jurisdiction; i.e., for asking a wrong question and proceeding to answer it.⁷⁹

B. The Overriding Criterion of ‘Public Interest’

Construed in proper perspective, where public funds had been expended, transparency demanded disclosure of the sums so expended in the public interest. Refusal to disclose such information based on defenses such as being offensive to the concept of “fiduciary duty” “the authority and impartiality of the Courts”, the “*Sub-judice*” rule and “(legal) professional privilege” all stood subordinate to that overriding criterion of “the public interest.” Three adjunct principles enunciated by the Commission flowed from that overriding criterion of “the public interest” – two substantive principles, the other procedural in nature.

C. The Substantive Principles – The general concept of fiduciary relationship as qualified by the “concept of an institutional decision”

As articulated in the foregoing analysis – in private litigation, the concept of a fiduciary relationship between lawyer and client would generally apply. So would the case in regard to “professional privilege” but the expending of public funds by a public Authority stood on a different footing to the extent as to the sums so expended by way of legal fees paid to private lawyers, being the requested information which the Commission ordered reversing the PA’s decision. The Commission was called upon to lay down as a principle as to the scope and limits of the concept of “fiduciary relationship” even in the context of an institutional decision dealing with public funds.

⁷⁹ An established principle in the seminal decision of the English House of Lords in the *Anisminic Case* (in the Context of Public Law) [1983] 2 AC 237, which was revisited and adopted and applied by the Supreme Court of Sri Lanka in *Moosajees Limited v. Arthur* (2004) 2 SLR 1.

As observed previously, the question of moneys expended by way of fees was a matter that fell within the public interest domain. The names of the private lawyers retained by the PA that belonged to the realm of privacy. If the said private lawyer had consented to their names being revealed would have been different. In the absence of that happening, the PA refused to disclose the names of the said private lawyers.

In condoning the PA's decision not to disclose the names of the private lawyers, the Commission thus struck a *via media* between the obligations on the part of the PA to disclose the moneys expended in retaining private lawyers in the public interest and the names of the said private lawyers to whom such fees had been paid which as falling within privacy in the context of the "concept of fiduciary relationship."

D. The Procedural Principles – the Burden of Proof

The PA had taken umbrage in denying the information requested on the basis that it was offensive to the "authority and impartiality of the judiciary" and the sub-judice rule. If so, the burden was on the PA to establish the same (as noted by the Commission) which as the record reveals the PA failed to establish. Consequently the "public interest override" was left intact.

E. Particularly Interesting Aspects in the Decision

A question arises in regard to the role of the Auditor-General and the Governor and/or the Director of the Banking Supervision of the Central Bank *vis-à-vis* the PA's obligation to the said functionaries as perceived by the Commission (for the reasons stated earlier in this analysis), although it did not affect the Commission's final decision to order disclosure as to the quantum of public funds expended in retaining private lawyers.

The twin demands of transparency and accountability envisaged under the Act were met therein where the Commission

rejected the several grounds urged by the PA in denying and/or refusing to disclose the information in question which had been sought for the reason stated by the Commission.

Consequently, the exercise which the Commission associated itself with in regard to the issues involving the Auditor-General and Governor and/or the Director of the Banking Supervision of the Central Bank may be opined as being redundant. Of special note are the legal tools that the Commission employed in coming to this decision. The Commission derived (a) inspiration from precedents from other jurisdictions which had interpreted and responded to the concept of the Right to Access Information, (b) examining as it did some of its own previous Orders handed down in that light along with (c) the Commission's reference made to some Sri Lankan judicial precedents as well.⁸⁰

3. Reflections on *Air Line Pilots Guild of Sri Lanka v. Sri Lankan Airlines*⁸¹

3.1. Background Facts in Brief

The Appellant had requested for a wide range of information. At the commencement of the proceedings, the Respondent had raised a preliminary objection to the jurisdiction of the Commission to entertain the appeal. That matter having been entertained by the Commission on a preliminary issue, parties were permitted, to make their submissions (both oral and written) on the jurisdictional objection so raised.

80 Reflected in the Commission's Order in issue, in regard to which space constraints do not permit an extended consideration.

81 RTIC Appeal (In-Person) /99/2017 heard as part of a formal meeting of the Commission on 13.11.2017, 08.01.2018, 06.02.2018, 23.03.2018, 24.04.2018 and 09.05.2018.

3.2.The Crux of the Jurisdictional Objection

3.2.1. The Basis on which the Objection was raised

Sri Lankan Airlines (the Respondent), taking exception to the jurisdiction of the Commission to hear and determine the appeal had submitted that, initially, there was a (public) company by the name of Air Lanka Limited incorporated as such in 1979 under the Companies Ordinance. With the enactment of the Companies Act No. 17 of 1982, Air Lanka Limited had changed its name to Sri Lankan Airlines Limited in 1999 and had re-registered as such as a (public) company. On the passing of the present Companies Act No. 7 of 2007, it had re-registered (conceded by the Respondent as it being an existing (public) company).

However, while acknowledging the said changes in the legislative regime, the Respondent had argued that, having regard to Section 43 of the RTI Act (the Act) which defines a “public authority” as a “company incorporated under the Companies Act of 2007,” though it was re-registered under the 2007 Act, it is not a Company incorporated under the said Companies Act which therefore took it outside the RTI Act and the jurisdiction of the Commission to hear and determine the appeal before it.

As against the Respondent’s contention the Appellant had argued in effect that, ‘a repeal of a Statute under which a “a company” is incorporated does not constitute a “fresh incorporation” but a continuation of an existing incorporation.’

3.2.2. Reflections on the Decision of the Commission

Having noted the provision contained in Part XVII of the Companies Act of 2007 titled “Application of the Act to existing Companies,” particularly Section 485(6), in applying those provisions to the instant case the Commission reasoned that “... the certificate of incorporation of (the Respondent) as a limited

company under Section 485(6) of the Companies Act... describes it as any ‘existing company’ which is registered... as if incorporated under the Act.”

The Commission also took cognizance of Section 529 of the Companies Act which defines a Company to mean a Company incorporated under it and its interactions with Section 43(e) of the RTI Act that defines ‘a public authority.’

3.2.3. Some Pertinent Aspects of the Commission’s Decision

The principal consideration that had loomed large in the Commission’s mind was, if the Respondent’s contention was to be upheld, it would have resulted in the consequence of several companies re-registered under the Companies Act of 2007 being left outside the purview of the reach of the RTI Act.

Could that have been the legislative intent of the Companies Act of 2007 read with the RTI Act? What rationale could be found to draw a distinction between an “existing company” as at 2007 and they being re-registered and as if incorporated under the said 2007 Act? Would not the drawing of such a distinction have rendered the RTI Act redundant in its reach? Consequently, was not the Respondent’s contention then reduced to an exercise in drawing a distinction without a difference?

Having regard to the provisions of Section 485-487 of the Companies Act of 2007 relating to re-registration being incorporated under it, in the event of those procedurally mandated provisions being complied with, could the Respondent (the National Airlines Carrier) have legal persona and been regarded as a juristic entity? Such were the question the Commission addressed cumulatively on its order having regard to and in the light of well-established and time-tested Canons of Statutory Interpretation.

Canons of Statutory Interpretation from which the Commission derived guidance in reaching its reasoning and decisions

Those Canons of Interpretation are found at pages 5-6 of the Commission's Order – viz;

- (i) That, statutes must receive a sensible construction such as to give effect to the legislative intention so as to avoid an unjust and absurd conclusion;
- (ii) That, every effort must be made to engage in such construction as shall suppress the mischief and advance the remedy;
- (iii) That, a statute must be so construed as to make it effective and operative on the principle; "*ut res magis valeat quam pereat*" that is to say, if there be a choice of two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, the broader must be adopted in order to not reduce the legislation to futility.

In conclusion I say that, the Commission's order in overruling the preliminary objections to its jurisdiction bears scrutiny in the aspects which were advanced before it save as to say perhaps that reliance on the preamble in the Act (viz; 'foster a culture of transparency and accountability in public authorities') to buttress its finding may not have been required in as much as this would have been more relevant for deciding a substantive issue on merits as opposed to jurisdictional objection raised as a threshold issue.

3.3. Analysing the Decision on Merits⁸²

A wide range of information had been sought by the Appellant which had been denied by the Public Authority. I will consider some aspects of the Order in dealing with each category of requested information.

82 Order of the Commission delivered on 12.06.2018.

Nature of information request (I) - remunerations, emolument and allowances paid to the officers in question

The Public Authority had denied the information request taking refuge under the exemption specified in Section 5 of the RTI Act, based on the concepts of ‘fiduciary relationship’ and ‘privacy’. The said pleas were sought to be justified on the basis of Indian precedents dealing with ‘personal employment contract.’⁸³

The Commission noted however that Regulation 20 (1) (ii) (2),⁸⁴ read together with the preamble of the RTI Act clearly identifies the promotion of a culture of transparency and accountability involving the objective of public participation in good governance. The Commission had no hesitation in reversing the Designated Officer’s decision to deny the information sought. The salaries, emolument etc. paid to the named officers, involved the public purse and tax payers’ money. That invested the public with the right to receive the said information. In the light of that overriding public interest, the defenses based on ‘privacy’ and ‘a fiduciary relationship’ were ruled as not entitled to succeed.

To begin with, the Commission’s Order amounted to a reminder to public authorities to take the initiative in making pro-active disclosures of organizational information where the public purse is involved. It was clear that if that is not done, then the information will be ordered to be disclosed in the exercise of its powers when determining an appeal filed before it (reactive disclosure).

What purpose is to be served by such disclosure? No doubt, the public would not have a substantive right to challenge salaries etc. paid to officers of a Public Authority. That would be a matter of governmental (fiscal) policy and decisions. However, it would be the public’s right to receive that information in order to assess in the public’s only mind as to the quality of the service it is getting from

83 ibid 7-8.

84 ibid 6.

Public Authorities, (in this instance, the national airline carrier). Or in other words, the public will be enabled to assess if the moneys expended on salaries etc. paid to officers are commensurate with the quality of the services extended to the public. That to my mind, is the purpose served in ordering disclosure, although, the Commission did not say that in so many words in its order.

A particular factor must be remarked on. The value of the preamble to an Act as an aid to Statutory Interpretation is of historical origin. This has been an inveterate legislative practice and a preamble was looked upon as a legitimate aid in construing the enacting parts of a Statute.⁸⁵ However, that practice had declined with time, in regard to which the (then) House of Lords had expressed regret.⁸⁶

The RTI Act of Sri Lanka ranks as a Commonwealth Statute and the approach of the Commission in using the preamble to the Act in interpreting its own approach to the provisions of the Act is therefore welcomed. This has revived the importance of a preamble in the statutory scheme which is to the great advantage of RTI seekers in Sri Lanka.

The Commission derived assistance from several Indian judicial precedents in arriving at its Order,

- (i) In relation to (not following the Respondent's argument based on) the concept of "personal employment contract" (as being misconceived) and,
- (ii) Adopting the Indian judicial thinking on the payment of salaries to public officers as for a matter that falls within the public domain.⁸⁷

85 *Sussex Peerage Claim* (1844) 11 CI & f 85.

86 Per Lord Alverstone in *L.C.C v. B.B.Co. Ltd* (1911) 1 L.B. 455.

87 RTIC Order delivered on 12.06. 2018, p 6-9.

Nature of information request (II) - “Agreement related to the purchase of Airbus”

As the Record of Proceedings before the Commission would reflect, the information sought related to;

- A. Memorandum of Understanding (SL Airline & PIA)
- B. Wet Lease Agreement (SL Airline & PIA)
- C. Wet lease extension Agreement (SL Airline & PIA)

The facts on which the information so sought had been denied by the Public Authority concerned *inter alia* as follows;

- (i) That, disclosure in regard to the said agreements would prejudice Sri Lanka’s relations/agreements/obligations with another State.⁸⁸
- (ii) That, such information impacting on commercial confidence, and trade secrets protected under the Intellectual Property Act No. 36 of 2003 would harm the competitive position of a third party unless the Public Authority is satisfied that larger public interest warrant the disclosure of such information.⁸⁹
- (iii) That, the Wet Lease Agreement (referred to above) had provided for a confidentiality clause.⁹⁰

The Appellant sought the information in question on the basis that the Respondent’s transaction with PIA had been mired in public controversy with allegation of irregular practices on both sides and corruption resulting in extensive losses to both. At the outset, the Commission identified the activities of the Respondent in respect of which information had been sought as falling into two main categories, viz;

⁸⁸ RTI Act, Section 5(1)(b)(ii).

⁸⁹ RTI Act, Section 5(1)(d).

⁹⁰ Clause 24.3 (vide: referred to at Commission’s Order, p 10).

1. An MOU upon which no financial or legal commitments had arisen and agreements that had lapsed with the effluxion of time lapsed agreements.
2. Ongoing contracts with the PIA

3.4. Principles and Propositions enunciated in regard to “Lapsed Agreements”

Deriving inspiration from precedents in *Transnet Ltd. and Another v. SA Metal Machinery Co (PTY) Ltd* (Case No 147/05, 29 November 2005, Supreme Court of South Africa)⁹¹ and *Public & Private Development Centre v. Power Holding Company of Nigeria & The Honorable Attorney- General of the Federation* (FHC/ABJ/CS/582/2012, Federal High Court of Nigeria)⁹² while noting certain differences in the Sri Lankan RTI Act and the Legislation of those jurisdictions, the Commission laid down the following principles and/or propositions.

1. A Public Authority was obligated to conduct its operation in a transparent and accountable manner.⁹³
2. A confidentiality clause could not protect disclosure of bidders-information after the contract had been awarded.⁹⁴
3. A transaction in question must still be at the negotiation stage in order to deny information that pertained to it.⁹⁵
4. The disclosure of the information must reasonably be expected to interfere with the contractual or other negotiations of a third party.⁹⁶

91 *Transnet Ltd. and Another v. SA Metal Machinery Co (PTY) Ltd* (Case No. 147/05), 29 November 2005.

92 *Public & Private Development Centre v. Power Holding Company of Nigeria & The Honorable Attorney- General of the Federation* (FHC/ABJ/CS/582/2012)

93 *Transnet Ltd. and Another v. SA Metal Machinery Co (PTY) Ltd* (Case No. 147/05) 29 November 2005.

94 *ibid.*

95 *Public & Private Development Centre v. Power Holding Company of Nigeria & The Honorable Attorney- General of the Federation* (FHC/ABJ/CS/582/2012).

96 *ibid*

5. While comparable provision relating to contractual negotiations as present in the Nigerian information regime is not contained in the Act of Sri Lanka, denial of information based on harm to “commercial confidence” and “competitive interests”⁹⁷ such harm which in any event had to be shown as being “not simply possible, but probable”⁹⁸ was not entitled to succeed as the agreements in question were no longer in force, the burden to establish the same being on the Public Authority on the contention of the “public interest override” legislatively decreed (Vide: Section 5 (1) (d) read with Section 5(4) of the RTI Act), which as the factual matrix in the case revealed, the Respondent had not discharged as causing “serious prejudice” in disclosing the said information.

3.4. Distinction drawn between “lapsed” and “ongoing” contracts

It was thought fit to order disclosure of information in regard to “lapsed contracts” as opposed to “on going contracts.” This was on the basis that disclosure of information may have an adverse impact on ongoing negotiations in regard to those contracts. However, it is my view that this must not be taken as a general principle but may be assessed on a case by case basis, taking into consideration, ‘the public interest override.’ Thus in a suitable case, even information relating to ‘ongoing contracts’ could be disclosed having regard to the information requester’s right to information in the interest of transparency, accountability and good governance in regard to the conduct of Public Authorities.

97 Based on RTI Act, Section 5 (1) (d) as pleaded by the Respondent.

98 *Transnet Ltd. and Another v. SA Metal Machinery Co (PTY) Ltd* (Case No. 147/05) 29 November 2005.

4. Conclusions; Emerging RTI Jurisprudence

I thought it fit to select the afore analysed two Orders of the Commission given the comprehensive nature of the issues and the extensive manner in which the Commission had grappled and dealt with the same, in as much as, in most of the other appeals that surfaced before it, those very same issues had been traversed.

I have summed-up some primary principles and propositions that the Commission had derived guidance from in making its determination, along with reflections on its own statutory and interpretative reach. It must be acknowledged that, the decisions so far considered and reflected on, have established a body of jurisprudence in the working of the Commission during a relatively short period of functioning (one and a half years), touching on several legal concepts as discussed above, viz the rights of an information requester, the Public Authority's obligation vis a vis such requests for information, the procedural aspect and the discharge of the burden of proof in proceedings before it (in adapting an interpretative function in the exercise of any tribunal's excise of jurisdiction albeit an appellate body), the scope of content of the *sub-judice* rule/concept, considerations relating to the authority and impartiality of the judiciary.

Further, in reaching its decisions, the Commission may also examine the historical development of the concept of State Privilege,⁹⁹ referencing 'the written law' contained in Sections 123 and 124 of the Evidence Ordinance (though severally amended), which Section still remain on the statute book).¹⁰⁰ Here, the Supreme Court at the time upheld the executive in pleading State Privilege to withhold information. No judicial initiative was taken to counter the same. These are judicial attitudes that need to change with the advancement of modern society.

99 See de Almeida Guneratne, J. *Public Interest Privilege – A Comparative Study* (Master's Thesis- University of Colombo, 1984).

100 Legislative Enactments of Sri Lanka (LESL) Vol 1, 1980 (Revised Cap 21).

Where the RTI Act is concerned, the Commission has proved itself not to be a ‘paper tiger’ but as possessing the authority and the determination to enforce the Act as an appellate body with power to initiate punitive proceedings. It has shown a serious will towards demonstrating the legislative commitment with which the Act was brought into the statute book. Further, it has played an educative role in striking a balance between ‘a requester friendly’ as well as a ‘public authority receptive’ body, thus in effect bringing about a shift in the bureaucratic culture in the country, the overriding criterion being the “public interest.”

On the basis of what has been articulated in this analysis, I have no doubt in my mind that the Commission has laid down a body of emerging and standard-setting jurisprudence in the context of the RTI Act, which may be described as being of paramount importance to the development of the RTI culture in Sri Lanka, in fulfillment of its statutory role.

RTI IN THE REALM OF THE CORPORATE AND BANKING SECTORS

*Harsha Fernando**

1. The Right to Information in Context

The Right to Information (RTI) essentially grants to the citizen the right of access to information. The intention of the legislature is clear in the preamble to the Right to Information Act No. 12 of 2016 (“RTI Act”) where the right is granted to promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance. This categorizes the “right to information” within the sphere of governance.

The Right of access to information (Article 14A) is a fundamental right by virtue of it being included in the Fundamental Rights Chapter III of the Constitution. Article 19 of the Universal Declaration of Human Rights, which forms the basis for the Fundamental Rights Chapter of the Constitution, also recognizes the right to freedom of expression and opinion to include the right to “... seek, receive, and impart...” information.

Some Fundamental Rights under Chapter III are unrestricted or absolute (e.g. rights under Articles 10 and 11) whilst others can be restricted to the extent provided for in Article 15. The 19th amendment, that introduced Article 14A, did not amend Article 15 to include Article 14A. limitations are contained in Article 14A . itself. Two of the obvious limitations in Article 14A are; (1) right of access to information is granted only to citizens; and (2) only to the

* The views expressed are personal to the author and do not reflect the views of any institution or person the author advises or represents and includes material from some of the Explanatory Notes previously prepared by the author on behalf of the RTI Commission.

extent as “provided for by law”. The primary “law” in this instance is the RTI Act and other laws that specifically restrict disclosure of information could be interpreted as falling into this category.

The right to access information granted by the RTI regime imposes a corresponding legal obligation on public authorities to give access to information that is in their possession, custody or control. Refusal is the exception. This is a fundamental change to Sri Lanka’s approach to access to information held by public authorities. Prior to the RTI Act, several laws and the Establishment Code¹⁰¹ discouraged disclosure of most of the information held by public authorities.¹⁰² The RTI Act offers legal protection to those officials who disclose information as mandated under the Act.¹⁰³

2. Anti - Corruption, Accountability and Good Governance

Anti - corruption, accountability and good governance are interlinked although they are distinguishable as stand alone concepts. Corruption is the abuse of power for private gain. Bribery and corruption are offences in Sri Lanka,¹⁰⁴ which attract criminal sanctions. If not addressed, there are serious and far-reaching economic, social, and political consequences to the country and its people. Accountability is the obligation of an organization or an individual to account for its or his/her activities, accept responsibility for them and to disclose the manner in which the decisions were arrived at (transparency).

Accountability will ensure that the actions and conduct of the decision makers and the public authorities are relevant to the public good, outcomes are sustainable, and have been carried out in an efficient and an effective manner. Governance is a pattern by which

101 E.g. compare with Chapter XLVII – Paragraph 6 of the Establishments Code.

102 Section 19 of the Penal Code obligates “Public Servants” to “give information of offences.”

103 RTI Act, Section 30-40

104 Bribery Act No. 8 of 1973, s 70.

power is exercised by officials. Good governance results when power is exercised in a legitimate manner with the participation and consensus of the stakeholders, based on a long-term strategic vision for sustainable human development, with accountability and fairness, within the legal framework for the ultimate benefit and improvement of those governed.

Availability of information is critical for the above. The RTI regime provides and regulates access to information. The nature of the “right” granted by the RTI Act merits brief consideration.

3. “Information”; Definitions and Terms

In the knowledge economy,¹⁰⁵ “information” has a much bigger utility value. In that context too the RTI regime has significant potential.¹⁰⁶ The interpretation section of the RTI Act¹⁰⁷ provides an inclusive (not an exhaustive) definition to “information” and includes the following;

‘any material which is recorded in any form including records, documents, memos, emails, opinions, advices, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, video tape, machine readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof.’¹⁰⁸

This definition is important for the citizen to assert his rights and exercise his sovereignty to the extent as provided for in the

105 In the “Knowledge Economy”, knowledge is the main driver of value and is understood to mean interpreted data; as against information which is raw data.

106 For example Section 7(3) requires all information, as existing at the date of the Act, to be preserved for 10 years and all information created after the Act for 12 years.

107 RTI Act, Section 43.

108 *ibid.*

preamble referred to above. The RTI Act, when read together with Article 14A of the Constitution, is premised on the principle that all information held by Public Authorities is owned by citizens, who are sovereign. The Indian Supreme Court has held that;

*'the Legislature's intent is to make available to the general public such information which had been obtained by the public authorities from the private body. Had it been the case where only information related to public authorities was to be provided, the Legislature would not have included the word "private body". The people of this country have a right to know every public act, everything that is done in a public way, by their functionaries. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.'*¹⁰⁹

The above is applicable to Sri Lanka's RTI regime, which has drawn on the wisdom from several regional and international RTI regimes.

4. Finance and Banking Corporate Entities

Corporate and banking sectors are vital for the economy of the country and the well-being of citizens. Corporate and banking entities too have a legitimate right (and a duty) to fully participate in public life, combat corruption and promote accountability and good governance. In relation to finance and banking entities, two questions arise; (1) do these entities have the right of access to information under the RTI Act; and (2) are these entities under an obligation to provide information under the RTI Act.

109 *Reserve Bank of India and Ors v. Jayantilal N. Misty and Ors* A.I.R 1982 SC149
 <<http://judis.nic.in/supremecourt/imgs1.aspx?filename=43192>> (accessed 30 September 2017).

4.1. Corporate entities and Right of Access to Information

In considering the link of corporate and banking entities to the RTI regime, the first and foremost consideration is whether corporate entities have the right of access to information in terms of Section 3(1) of the Act as the section grants the right to every citizen. “Citizen” is defined in Section 43 of the RTI Act to include both incorporated (e.g. a company) and unincorporated (e.g. a society) bodies. It is requisite when it comes to incorporated or unincorporated bodies that 75% of the members of such bodies to be “citizens” to exercise the right granted under Article 14A. A public authority has the right to satisfy itself that the 75% membership requirement is complied with by an incorporated or by an unincorporated body prior to granting the right of access to information.

Assessment of the number of members who are citizens depends on the type of entity (body) that is requesting access. For a body incorporated as a company under the Companies Act No. 07 of 2007, the number of members can be ascertained by looking at its shareholder lists.¹¹⁰ The determinant is the number of members and not the percentage of shareholdings.¹¹¹ Similarly the members of an unincorporated body can be ascertained by looking at its members’ list. However, the right under Section 3 is restricted to “Citizens”. This means foreign nationals and entities do not have the right of access to information. Although a non-citizen does not have the “right” to access information, there is no prohibition in the RTI Act for a non-citizen to receive information if a public authority is inclined to provide information.

110 Through the Company Secretary or the Office of the Registrar of Companies.

111 A company in which one non-citizen holds 80% of the shares and the balance 20% shares are held by three “citizens”, then that company would qualify as a “citizen” because 75% of its members are citizens although they hold only 20% of the shares.

4.2. Corporate entities and the Duty to provide Information

The Companies Act No. 7 of 2007 already incorporates provisions that require information disclosure¹¹² in the form of annual returns, audit reports, financial statements etc. Therefore, in any event, the private sector is already subjected to an information disclosure regime. Banking entities have the added requirements as imposed under the Banking Act of 1988 and the Directives issued by the sector regulator, the Central Bank of Sri Lanka (CBSL).

4.3. A Corporate entity is a “Public Authority”

The right of access as granted by the RTI regime is limited to information held by public authorities. If banking and corporate entities fall within the definition of a “public authority,” then they too are bound to provide access to information. If 25% or more share ownership or controlling interest in a company by the state or public authority can be established then such company would become a “public authority” for purposes of the RTI Act.

The current trend is that public functions and services, traditionally carried out by public entities, are being transferred increasingly to the private sector through privatization, outsourcing, and public/private projects. Although private sector entities carry out different types of “public functions” they typically share three features: the transfer of public functions, with the associated delivery risk to private entities; the use of market-style competition to select the supplier; and a shift in the measurement of performance from a concern with process to the achievements of outputs. Internal markets have been introduced into the provision of such fundamental public services as health and education, organized around a separation between “purchasers” and “providers” and ned by sophisticated commercial contracts.¹¹³

112 Companies Act No. 7 of 2007: Part VII – Management and Administration [Companies Act].

113 Murray Hunt, ‘Constitutionalism and Contractualisation of Government’ in Taggart M (ed), *The Province of Administrative Law* (Hart 1997).

Generally, in view of the changing nature of government's role, "public function" would be given a broader interpretation, thus bringing many corporate entities engaging in such within the realm of the RTI Act.¹¹⁴ As the below analysis will demonstrate, the RTI Act does not make a definite demarcation between private and public authorities as traditionally understood. In the Indian case of *Sarbajit Roy v. Delhi Electricity Regulatory Commission*,¹¹⁵ the Central Information Commission of India reaffirmed that privatized public utility companies continue to be within the RTI Act (Indian), notwithstanding their privatization.

The RTI Act takes more a functional approach¹¹⁶ to defining public authority than a legalistic one. The concept of "public authority" in the RTI Act stems based on, ownership or control or public nature of the entity. A "Public Authority" is defined in Section 43 of the Act (Interpretation Section) and includes 12 types of institutions. Any institution falling under any of the 12 categories would constitute a "Public Authority." Institutions established under the Constitution (such as the Independent Commissions) too are "public authorities."¹¹⁷

This definition encompasses corporate and banking entities in which the government has shareholdings or where the entity is carrying out a statutory or public function under a contract, a partnership, an agreement or license from the government or any of its agencies or from a local body.¹¹⁸ Of the 12 types of institutions defined in Section 43 of the RTI Act under the heading "public authorities," corporate entities incorporated under the Companies

114 See *YL v. Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95, [86].

115 Application No: CIC/WB/A/2006/00011 (India's RTI Act, Section 19).

116 The function approach was considered in *R v. Panel on Takeovers and Mergers, ex parte Datafin Plc* (1987) Q.B. 815 that approaches the issue based on the "true nature" of the functions being exercised by the relevant functionary.

117 In the Indian case of *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi and Anr* (2012)13 SCC 61 it was held that a body or an institution which is established or constituted by or under the Constitution would be a public authority, referring to the Public Service Commission. (available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45279).

118 RTI Act, Section 43.

Act No. 7 of 2007 fall into several categories. They are; (1) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five *per centum* or more of the shares or otherwise has a controlling interest; (2) a private entity or organization, which is carrying out a statutory or public function or service, 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 or service; (3) private universities and professional institutions which are established, recognized or licensed under any written law or funded, wholly or partly, by the State or a public corporation or any statutory body; and (4) private educational institutions including institutions offering vocational or technical education which are established, recognized or licensed under any written law or funded, wholly or partly, by the State or a public corporation or any statutory body.

4.4. “Controlling Interest”

Of the above, the definition of a company incorporated under the Companies Act No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five *per centum* or more of the shares or otherwise has a controlling interest as a “public authority” is wide in scope. Controlling interest is meant to refer to situations where a party has enough voting shares to control the affairs of the Company.¹¹⁹ The general rule is that if the party possesses 50% plus 1 share, that party has a “controlling interest.” However, the law recognizes control even in instances where there is no direct ownership of 50% + 1 voting shares. The Companies Act allows issuance of different types of shares¹²⁰ and refers to “relevant rights.”¹²¹

119 See RTI Commission ruling on disclosing details of emoluments of senior management of Sri Lankan Air lines. available at: <http://www.sundaytimes.lk/180617/news/rti-commission-orders-srilankan-to-disclose-vip-salaries-298673.html> (accessed 14 October 2018).

120 Companies Act, Section 49(2).

121 Companies Act, Section 198.

The test of “controlling interest” becomes relevant as the Companies Act also accords special treatment to Secretary to the Treasury by enabling him to hold a special type of share referred to as a “Golden Share,” if described in the Articles of the Company. The concept of a Golden Share is that it gives the holder the right of a decisive vote (veto of sorts), against all other shares at a shareholders’ meeting. In terms of Section 139(2) of the Companies Act, the Secretary to the Treasury enjoys special voting privileges if he holds a Golden Share in a Company.¹²² Whether this alone constitutes sufficient control on the affairs of the Company will depend on the circumstances of each case. Articles of the Company, shareholder structure, number of Directors appointed by virtue of shareholdings of the State (Government of Sri Lanka) and voting patterns are key factors that should be considered in ascertaining “controlling interest.”

One of the issues that may arise is whether listed companies whose shares have been bought by the Government through the use of Employees Provident Fund (EPF) could be considered a “public authority” if the government obtained sufficient number of shareholdings and/or exercises control. As the objective of the RTI Act seem to be to shed light on the governmental activities by making available information with regard to its functions, the RTI Act would apply the moment the government surpasses the statutory threshold of 25% or exercises control. The EPF, being a statutory superannuation fund and statutorily vested with the Central Bank of Sri Lanka (CBSL), another statutory body, attracts the RTI Act.

4.5. Corporate entities contracting with Government

Similarly, sub paragraph (g) includes private entities or organizations which carry out a statutory or “public function” or service, under a contract, a partnership including Public Private

¹²² Notwithstanding anything in the Companies Act, the Secretary to the Treasury, as the golden shareholder, is entitled to appoint not more than three other persons as his proxies to attend and vote at General Meetings of the Company.

Partnership (PPP), 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 or service. This is meant to include situations where public services are contracted to be provided by private entities.

For instance, Section 4 of the Municipal Councils Ordinance No. 29 of 1947 mandates the Municipal Council to regulate, control and administer matters relating to the public health, public utility services and public thoroughfares, and generally with the protection and promotion of the comfort, convenience and welfare of the people and the amenities of the Municipality. Increasingly private entities are contracted to provide these services (e.g. street cleaning and garbage collection).

For instance the National Thoroughfares Act No. 40 of 2008 allows the Road Development Authority to contract a private entity for the design, construction, operation, maintenance, development or overall management of a user fee national highway. Consequent to contracting, these private entities could be considered as covered under the RTI Act obligating them to provide access to relevant information. All project implemented by a public authority by way of a Joint Venture or a PPP would similarly attract provisions of the RTI Act.

4.6. Banking Institutions under License

This raises the question of as to whether private banks (i.e. without 25% share ownership or controlling interest by the State) are public authorities as they operate under license granted in terms of the Banking Act¹²³ by the CBSL. Banks carry a number of confidential and sensitive information of customers and are prohibited from disclosing them through use of secrecy provisions found in several places in the laws and regulations applicable to commercial and specialized banks.¹²⁴

123 Banking Act No. 30 of 1988 as amended.

124 See Part IVA of the Banking Act where the identity of the owner of the numbered account is treated as absolutely inviolable.

There are two arguments that could be advanced to remove commercial banks from the obligation to provide access to information; (1) banking *per se* is not a statutory or a public function although carried out under license. The business of banking evolved as a private enterprise that over time was subjected to regulation by the state in view of its significant implications to the economy; and (2) the critical information held by Banks would be covered under the exception to the right of access as articulated in Section 5 of the RTI Act. A request for information of Bank details of an individual was considered and rejected by the Central Information Commission (“CIC”) of India¹²⁵ on the basis that the bank is under a duty to maintain the secrecy of accounts of its customers, who are also third parties. The CIC further held that the applicant had not established any *bona fide* public interest in having access to the information sought nor did he have any association or business relationship with the company.

The residual issue is whether State Banks,¹²⁶ incorporated and set up under Parliamentary Acts could be considered as “public authorities.” These banks would attract RTI Act’s definition of a public authority as they are, categorized by the State as Government Owned Business Undertakings (GOBUs).¹²⁷ In addition Boards of Directors of these banks are appointed based on ministerial discretion.¹²⁸ This means that the Government not only owns, but also controls these banks bringing them within the definition of a “Public Authority” under Section 43 of the RTI Act. Still a request for access to information of a public functionary (e.g. a Minister) who maintains a personal account with the bank may be refused by a State Bank under Section 5(1) (a) of the RTI Act provided the

125 *A.P. Singh v. Punjab National Bank* Appeal No. 12/IC(A)/2006, dated 14.3.2006 available at: http://www.excisesurat1.nic.in/Trade%20Notice/RTI/Rajan_Madhav_v._SBI.pdf (accessed 24 October 2017).

126 E.g. Bank of Ceylon, People’s Bank, National Savings Bank, Lankaputhra Development Bank.

127 Annual Report of the Ministry of Finance (2017) lists Bank of Ceylon, People’s Bank and the National Savings Bank under the Department of Public Enterprises.

128 See Bank of Ceylon Ordinance (Chapter 302), Section 6(1).

release of such would not serve a “larger public interest.” However, the public has a right of access to information (e.g. Bank’s risk exposure, credit policies etc.) other than those of individual customer’s traditionally covered under secrecy provisions.

5. Higher Educational Institutions

The question whether provision of education should be the exclusive responsibility of the State has been answered in the negative. The basis of the recent judgement of the Court of Appeal (affirmed in the Supreme Court) on the SAITM issue is premised on the policy principle that the right to education does not mean right to free education.¹²⁹

The definition of Public Authority under Section 43 of the RTI Act also includes higher educational institutions, but makes a distinction between higher educational institutions (including private universities and professional institutions which are established, recognized or licensed under any written law or funded, wholly or partly, by the State or a public authority) and private educational institutions (including institutions offering vocational or technical education which are established, recognized or licensed under any written law or funded, wholly or partly, by the State or a public authority). As this is an inclusive definition, privately owned educational institutions are can be considered as covered by it.

However, the RTI Act will apply only if the institution is “established, recognized or licensed under any written law.” A doubt arises as to whether “any written law” would include the Companies Act. As the entities incorporated under the Companies Act are provided for in a separate sub-section (e), it could be argued that “any written law” in this sub-section mean those laws that are specifically applicable to the education/higher education sector, such as the Universities Act. There are a number of professional

129 *Malshani Suriyarachchi v. Sri Lanka Medical Council & Others* SC Case No. SC/SPL/LA/ 41 /2017.

institutions that are established either by statute¹³⁰ or under the authority of a statute. These would be covered under the RTI Act.

6. Regulators; Depositories of Information

There is another category of institutions that are placed between public and private spheres. They are market regulatory bodies in the form of independent institutions or Directors General. The better-known regulators would be the CBSL, Securities and Exchange Commission (SEC), Telecommunications Regulatory Commission (TRC), Insurance Board of Sri Lanka (IBSL), Registrar of Companies, and Private Health Services Regulatory Council. These institutions undoubtedly are “public authorities” within the meaning of the RTI Act and they, by virtue of their legislative mandate, hold enormous amount of information of entities regulated by them. Especially in the context of these institutions, it is necessary to consider if the information of regulatees held by the regulator would fall within the RTI Act. The answer is in the affirmative, except for information covered under Section 5 of the RTI Act.

7. “Possession, Custody or Control”

The right to information under Section 3 is granted only to information that is in the “possession, custody or control” of a Public Authority. Although possession, custody and control are attributes of ownership, the Authority need not own the information. Possession means the control a person intentionally exercises toward a thing with the intention to possess it. Control means to have power over a thing; and custody means having protective care of guardianship.

If the information is already in the public domain then such information cannot be considered as being in the “possession, custody or control” of the relevant public authority. The public authority must hold the information to the exclusion of others.

130. E.g. Institute of Chartered Accountants established by Act No. 23 of 1959.

The High Court of Delhi stated that;

‘the expression “held by” or “under the control of any public authority” in relation to “information” means that information which is held by the public authority under its control to the exclusion of others. It cannot mean that information which the public authority has already “let go,” i.e. shared generally with the citizens, and also that information, in respect of which there is statutory mechanism which obliges the public authority to share the same with the citizenry by following the prescribed procedure, and upon fulfillment of the prescribed conditions. This is so, because in respect of such information, which the public authority is statutorily obliged to disseminate, it cannot be said that the public authority “holds” or “controls” the same. There is no exclusive right in such holding or control. In fact, the control vests in the seeker of the information who has only to operate the statutorily prescribed mechanism to access the information. It is not this kind of information, which appears to fall within the meaning of the expression “right to information” as the information in relation to which the “right to information” is specifically conferred by the RTI Act is that information which “is held by or under the control of any public authority.”’¹³¹

8. Exemption to the Right of Access: Section 5

Part II of the RTI Act is the exception to the general rule contained in Part I; i.e. the grounds on which information may be denied. Under Section 5, the public authority is mandated to refuse the information request¹³² if the information falls under any of the items in sub paragraphs (a) – (n) of Sub-section 5(1). This means that the RTI Act has very consciously ensured the protection

¹³¹ *Registrar of Companies & Ors. v. Dharmendra Kumar Garg & Anr.* (W.P.(C) 11271/2009) available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=45279 (accessed 30 September 2017).

¹³² Section 5(1) uses the words “...shall be refused...” (emphasis added).

of information as defined in Section 5(1). Sections 5(2) – 5(4) of the RTI Act contain further qualifications. Under Section 5(2) information that is more than 10 years must be disclosed other than information falling under sub-sections (a), (b), (d), (e), (f), (g), (h), or (j) of Section 5(1). Section 5(4) requires the release of information if the public interest in disclosing it outweighs the benefits of non disclosure.

Section 5 provides a number of important provisos to provision of access to information that is of relevance to corporate and banking sectors. Broadly, access to information can be refused on the grounds of (1)unwarranted invasion of privacy; (2) undermine the defense of the state or prejudicial to international relations; (3) cause serious prejudice to the economy of the country by disclosing prematurely policies relating to specified areas such as exchange control and taxation; (4) information that impacts commercial confidence, trade secrets or intellectual property the disclosure of which would harm competitive position of third parties; (5) leading to disclosure of medical information of individuals; (6) communications with a professional or under a fiduciary relationship; (7) prejudicial to prevention and detection of crime; and (8) confidential information of third parties supplied to the public authority.

For purposes of this Article two exceptions are considered in detail; privacy and trade secrets.

8.1. Privacy

The right to private life is a well-recognized concept in international law. This has been interpreted broadly on the premise that it is an essential pre-requisite for personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. Section 5(1)(a) of the RTI Act requires rejection of information requests that relate to personal information the disclosure of which has no relationship to any public activity or interest or which would cause

unwarranted invasion of privacy of the individual unless the larger public interest justifies disclosure or the person concerned has consented, in writing to such disclosure.

As can be seen, this Section contains subjective language, granting discretion to the decision maker to base his decision on the circumstances of each request. Article 14A (2) recognizes the right to privacy as overriding that of the right to information. In fact the wording of the Article is, "...other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of ... privacy..." This recognizes the internationally accepted principle that right to privacy is also an essential and crucial element in a democracy. "Privacy" is a foundation for ensuring human dignity and enables the individual to develop ideas and form relationships.¹³³ The recent judgment of the Indian Supreme Court dealt extensively with right to privacy stating that the right "to be let alone" represented a manifestation of "an inviolate personality," a core of freedom and liberty for which the human being had to be free from intrusion.¹³⁴

Sri Lanka, similar to several other countries, does not have specific legislation to protect right to privacy, although it is recognized in principle.¹³⁵ The courts have recognized the right to privacy as far back as in 1910.¹³⁶ There is no exact legal definition as to what constitutes "privacy." Broadly speaking, privacy is the right to be left alone, or freedom from interference or intrusion.

133 John Stuart Mill in his treatise "On Liberty" (1859) defined privacy by stating; ...The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign...

134 *Justice K. S. Puttaswamy (Rtd) and Anr v. Union of India and others*; available at: [http://supremecourtindia.nic.in/pdf/LU/ALL%20WP\(C\)%20No.494%20of%202012%20Right%20to%20Privacy.pdf](http://supremecourtindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf) (accessed 24 October 2017).

135 *Fernando v. Sri Lanka Broadcasting Corporation and Others*; 1996 1 SLR 157 at page 176 / *Ratnayake & Another v. Mediwaka & Others* (2005) 1 SLR 323 at p. 335.

136 *Chinnapa et al v. Kanakar et al*; 13 NLR 157 where the erection of an Ola fence was recognized as a tool to secure privacy.

Information privacy is the right to have some control over how your personal information is collected and used. It could be considered as such information that another need not know.

The wording of Section 5(1) (a) itself sets several tests that could be applied in refusing the request for information.

Firstly, is it “personal information?” Although there is no universally accepted definition, “personal information” could be regarded as information or an opinion about an identified individual, or an individual who is reasonably identifiable.¹³⁷ This means information that is personal to the individual and his social relations including family and employment. They would include sensitive information such as political opinion, sexual orientation, personal relationships, family details etc. It would also include information such as health information, information relating to spending patterns, credit information, bank records, employee records etc. It is not possible to list exhaustively all information that would constitute “personal information” and would depend on the circumstances of each case. A general rule that can be applied is whether the information is about an identified individual or is capable of identifying an individual then that would constitute personal information.¹³⁸ The wisdom of the recent General Data Protection Regulation of the EU¹³⁹ should be considered in further enhancing data protection in Sri Lanka.

An issue arises with regard to information contained in declarations made under the Declaration of Assets and Liabilities Law No.1 of 1975, as amended. Although Section 5(3) empowers “any person” to call for and refer to any declaration and grants the right to obtain that declaration on payment of a prescribed fee, that is subject to the overriding provisions on secrecy in Section 8. In terms of Section 8, any person obtaining a declaration by

137 Privacy Act No. 119 of 1988 of Australia; Part II Division 1 – General Definitions.

138 *ibid.*

139 Regulation (EU) 2016/679 of the European Parliament and of the Council; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>.

virtue of Section 5 of the Declaration of Assets and Liabilities Law must treat such as confidential and also take an oath of secrecy. Such person is further bound not to disclose the information in the declaration except in relation to proceedings instituted under the laws relating to bribery, excise, exchange control and inland-revenue. Contravention of this secrecy obligation attracts criminal punishment.¹⁴⁰ In this context it may well be contended that the Declaration of Assets and Liabilities Law itself seeks to treat information in a declaration as “personal information.” After all, declaration of assets includes information of the declarants, their spouses, and their children.

Secondly, does the disclosure of that information have a relationship to any public activity or interest? This limb questions link to the any public activity or interest. The phrase “public activity or interest” is wide in scope. Public activity, as the words itself suggest, can be considered as any activity that has a connection to the public.¹⁴¹

“Public interest” can be considered as a common concern among citizens. The issue impacts or is relevant to the public in general or to a class or group of persons. It could relate to the affairs of public bodies. It should not mean mere curiosity but should relate to the body politic and public weal.¹⁴² A threshold has to be crossed for the utility value of the information to be “relating to public activity or interest” i.e. information requests for mere curiosity or for private reasons should not find favour under the RTI Act.

In this context reference has to be made to Article 14A of the Constitution which states that “...every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of

140 Declaration of Assets and Liabilities Law, Section 8(4).

141 E.g. existence of a criminal record of a trustee of a charitable organization; educational qualifications of the tuition teacher who offers her services to the public at large etc.

142 Adopted from The Free Dictionary; available at: <https://legal-dictionary.thefreedictionary.com/Public+Interest>: (accessed 24 October 2017).

a citizen's rights..." It appears that from a plain reading of this Article the right is only in respect of information that is required for the exercise or protection of a citizen's rights. This means applications based on mere curiosity are not protected. Citizens' rights can be direct, indirect as well as derivative rights.¹⁴³ This breath and scope of rights automatically enhances the application of the rights under Article 14A too. Right to information is itself a right and therefore the phrase "...information that is required for the exercise or protection of a citizen's rights..." in Article 14A should be given a broad, instead of a narrow interpretation.

Public interest as defined in a number of cases of the Supreme Court can be used as guidance keeping in mind the inherent parameters that the definition stems from; i.e. the Courts entertained public interest litigation in order to prevent a government agency from violating the law as it is contrary to public interest, when the person affected or a class of persons affected are unable to approach the Court for any relief by reason of poverty, helplessness or disability or being placed in a socially or economically disadvantaged position.¹⁴⁴

Thirdly, does the disclosure cause unwarranted invasion of privacy of the individual unless the larger public interest justifies the disclosure of such information. This limb brings the additional safeguard of "invasion of privacy." This means any personal information that causes "unwanted invasion of privacy of the individual" should not be disclosed unless the larger public interest justifies disclosure. Privacy, as a concept, has attracted much debate. Constitution guarantees no fundamental right to privacy. There is no universally agreed definition as to what constitutes "privacy." However, as the RTI Act provides safeguards against "unwanted invasions of privacy," the concept is now part of the legal regime. Whether the disclosure of a particular piece of information would constitute invasion of privacy is a decision that has to be taken

143 Rights that are necessary to fulfill other rights.

144 *Wanasingha & Others v. University of Colombo and Others* (2006) 3 SLR 322. Rights that are necessary to fulfill other rights.

based on the facts and circumstances of each information request.

A 2017 judgment of the Supreme Court of India¹⁴⁵ exhaustively deals with privacy and concludes recognizing the right to privacy. The judgment, among other matters, refers to four basic states of privacy¹⁴⁶ (i) solitude – the most complete state of privacy involving the individual in an “inner dialogue with the mind and conscience” (ii) state of intimacy - which refers not merely to intimate relations between spouses or partners but also between family, friends and colleagues (iii) anonymity - where an individual seeks freedom from identification despite being in a public space and (iv) state of reservation - which is expressed as the need to hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express. The common basis of these four situations is that there are matters that should strictly belong to the individual as against those that belong to the people in general. Individual must have the ability to decide what he should keep private. This of course would not include information that relate to the individuals transactions with Public Authorities relating to matter of public nature such as tenders, contracts, etc.

8.2. Commercial Confidence and Trade Secrets

Section 5(1)(d) exempts information, including commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003, the disclosure of which would harm the competitive position of a third party, unless the public authority is satisfied that larger public interest warrants the disclosure of such information.

Commercial confidence means the information can be shared for the purposes for which it was given, but cannot be shared with third parties. In the absence of detailed guidance on commercial confidence in the RTI Act, information officers are left to decide

145 *Justice K. S. Puttaswamy (Rtd) and Anr v. Union of India and others*; available at: [http://supremecourtindia.nic.in/pdf/LU/ALL%20WP\(C\)%20No.494%20of%202012%20Right%20to%20Privacy.pdf](http://supremecourtindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf) (accessed 24 October 2017)

146 As articulated by Prof. Alan Furman Westin (1929 – 2013)

based on circumstances of each case. However, as Section 5(1)(d) contains a clause that larger public interest warrants disclosure of even commercial confidence information, the Public Authority has to balance commercial confidence with public interest.

The Office of the Information Commission of Queensland provides a five-criteria model to decide which information would fall within “commercial confidence.”¹⁴⁷ Accordingly, under Queensland RTI regime, confidential information will be exempt from release if it passes five criteria; if it fails even one, it will not be exempt from release. The five criteria are:

1. The information must be secret—if it is already widely known or readily available, then it is not secret.
2. The information must have a 'quality of confidence'—it can't be trivial or useless, it must not be in the public domain, common knowledge, or something which the applicant already knows, and it cannot be evidence of a crime.
3. When the information was given to the agency, the person who provided it must have meant for it to be kept confidential; when the agency received it, they must also have meant for it to be kept confidential. Both of them must have believed it was going to be confidential; if only one of them meant it to be confidential the information will fail this criterion.
4. Giving the information to the applicant would be an unauthorized use of the information—if the applicant wasn't authorized to receive the information by the person who gave it to the agency, the information will pass this criterion.
5. Giving the information to the applicant would cause harm to the person who gave it to the agency, for example financial loss, embarrassment, or a loss of privacy.

147 'What is confidentiality? An introduction for applicants and third parties' (Office of the Information Commissioner, Queensland) available at: <https://www.oic.qld.gov.au/guidelines/for-community-members/information-sheets-access-and-amendment/what-is-confidentiality> (accessed 15 October 2018).

Government contracts and Commercial Confidence

Even if the information cannot pass all criteria, it could still raise public interest factors against release. If those outweigh the public interest factors favoring release, the information will be contrary to the public interest to disclose. The Information Commission of Queensland while recognizing the insertion of confidentiality clauses when the government contracts with private entities, go on to state that the RTI law overrides them. Similar sentiments have been expressed in relation to email disclaimers, but in the same light it recognizes the importance of respecting confidentiality of information to promote competition and commercial viability, which is in itself in the interest of the public.

Public interest element in government contracts, especially for outsourced services is inexorably linked to transparency, anti-corruption, accountability and good governance; the foundations of the RTI regime. The National Audit Office of UK¹⁴⁸ opines that “...transparency is needed to ensure that no one within the contractor can hide problems and that it is in the contractors’ commercial interest to focus on their client’s (the government’s) needs. This requires more than just the key performance indicators reported to the client. For instance, it also requires public reporting and openness to public scrutiny; whistleblowing policies that encourage staff to report problems up the supply chain; and user feedback,” thus making a stronger case in favor of “larger public interest” than “commercial confidence.”

Intellectual Property Considerations

A trade secret is different from confidential information as someone involved in trade or industry must be able to use the information to their advantage. When the Freedom of Information (Scotland) Bill was considered by the House of Parliament, the

¹⁴⁸ ‘The Role of Major Contractors in the Delivery of Public Services’ UK: National Audit Office (November 2013) Available at:

[https://www.nao.org.uk/wp-content/uploads/2013/11/10296-001-BOOK- ES.pdf](https://www.nao.org.uk/wp-content/uploads/2013/11/10296-001-BOOK-ES.pdf) (accessed 15 October 2018).

presenting Minister said, “...*trade secret can be regarded as an asset - perhaps the most valuable asset - of the business. The recipes for Drambuie and IrnBru are examples of trade secrets that people would readily recognize as being of a different quality from commercial interests. Sometimes trade secrets attract legal protection, such as a patent or copyright, but often the only protection is in maintaining their secrecy...*”¹⁴⁹

In Sri Lanka Part VIII of the Intellectual Property Act No. 36 of 2003 deals with unfair competition and undisclosed information. This part recognizes the concept of “unfair competition” and makes disclosure, acquisition, or use of undisclosed information without consent an offence. Section 160(c) defines “undisclosed information” based on three elements; (1) the information is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question; (2) the information has actual or potential commercial value because it is secret; and (3) it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.

The Public Authority, faced with an information request, has to carefully consider the provisions of Intellectual Property Act and any contractual obligations, including Non Disclosure Agreements (NDAs) when disclosing information of third parties (private entities). The Procurement Guidelines, for instance, requires integrity of information and procedure to be maintained.

9. “Larger Public Interest”; Proviso to the Proviso

Overriding public interest would restore the right of access to information. As the RTI Act declares in Section 4 that its provisions

¹⁴⁹ As quoted in UK Information Commission decision note on the request to Royal Mail Group to disclose all its current agreements to deliver unaddressed mails; Available at: https://ico.org.uk/media/action-weve-taken/decision-notices/2011/600180/fs_50313967.pdf (accessed 15 October 2018).

“...have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail...,” it seems that the intention of the legislature, subject to Section 5, favours disclosure considering the “larger public interests.” As there is no statutory definition of “larger public interests,” such will depend once again on the circumstances of each case. The phrase “larger public interests” encompasses a higher threshold when compared to mere “public interest.” The onus of justifying “larger public interest” would fall on both the requester of the information as well as the Information Officer.

Section 5(1) (a) requires the Information Officer to come to a finding, based on the request, if the information falls under the exception. Since it is mandatory¹⁵⁰ to refuse information requests that fall under Section 5(1)(a) exception, justification for its release has to be clear, primarily directed towards the individual whose personal information has been released, who otherwise would have had a right to privacy in relation to that information.

10. The RTI regime and the Corporate Sector

The RTI regime was introduced to ensure citizens’ participation in the overall functioning of the government to ensure good governance. The RTI regime, clearly and cogently establishes the right to seek information from public authorities and provides, through public authorities, access to information of the private sector. With globalization, privatization, deregulation and use of nontraditional financing models for public infrastructure and services, private entities will continue to expand its scope into performing public functions. Transparency is a key to ensuring corruption free governance.

¹⁵⁰ Section 5(1).

Therefore, the RTI regime *vis-à-vis* the private sector has to be viewed and operationalized as progressive steps towards ensuring citizen's participation in public life through combating corruption and promoting accountability and good governance, irrespective of whether public services provision and governance are by public or private entities.

**RTI BY MARGINALIZED AND CONFLICT-
AFFECTED COMMUNITIES**

THE ACID TEST OF USING THE RIGHT TO KNOW TO COMPEL STATE ACCOUNTABILITY¹⁵¹

Ashwini Natesan and Aadil Nathani

1. Introduction

Article 19 of the International Covenant on Civil and Political Rights, 1966 (ratified by Sri Lanka in 1980) declares—

‘everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinion without interference and to seek, and receive and impart information and ideas through any media and regardless of frontiers.’ (emphasis added)

The right to access information is enshrined as a fundamental right in the Constitution of Sri Lanka under Article 14A.¹⁵² The Right to Information Act No. 12 of 2016 (“RTI Act”) is unquestionably a law of enormous significance in the country’s history. The RTI Act has been lauded for its stringent provisions encouraging maximum disclosure and has been ranked among the best in South Asia.¹⁵³ The legislation aims at fostering a culture of transparency and accountability by encouraging proactive disclosure of information amongst public authorities and ensuring that disclosure of information is the norm rather than an exception.

151 The authors wish to place on record their sincere thanks to RTI Commissioner Kishali Pinto-Jayawardena for her support and valuable input in writing this article. Aadil Nathani is also grateful to Dr. Sujith Xavier (Windsor Law, Canada) for encouraging and enabling him to work with the RTI Commission, Sri Lanka. The information readily provided by Dr. Raja Muzaffar Bhat of the Jammu and Kashmir (J&K) RTI Movement, India in regard to his organisation’s RTI work in India’s conflict affected areas is much appreciated.

152 Introduced through the constitutional amendment in 2015.

153 ‘Global Right to Information Rating: By Country’ <<https://www.rti-rating.org/country-data/>> (accessed 1 February 2019).

The advantages of the right to know and the availability of open government data are widely recognised¹⁵⁴ and hardly needs elaboration. Since Sri Lanka is emerging from a period of turmoil and long-lasting civil war, examining the effectiveness of the right to information (“RTI”) regime in marginalised / disadvantaged and conflict-affected communities assumes great importance. In the two years since the RTI Act has come into force, substantial progress has been made in using RTI as an effective tool of enforcing transparency. The first part of this paper focuses on certain select orders of the RTI Commission (“Commission”) dealing with important issues arising from information requests in the Northern and Eastern areas of Sri Lanka, the second part looks at the comparative position in other jurisdictions and finally, the concluding analysis reflects on key themes in regard to the discussions.

2. Some Orders of the Commission on appeals from the North & East

The eight Orders discussed below deal with particular issues of national security, corruption, parliamentary privilege etc. This selection of cases by the writers is meant to illustrate the invocation of RTI resulting in guidances issued by the Commission for future RTI users and for Public Authorities (“PA”) in the handling of RTI requests.

But quite apart from the specific cases analysed here, numerous RTI appeals have been filed to the Commission asking for information in relation to contentious issues of land

154 The Supreme Court of India in *M. Nagaraj v. Union of India* (2006) 8 SCC 212 deduced that the right to access information based on the concept of an open Government is the direct result from the right to know which is implicit in the right to free speech and expression. It was observed by the Supreme Court of India in *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592 that people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy

rights, and communal divisions particularly in the East.¹⁵⁵ These instances underscore increasing tensions between communities in a province that has Sinhala, Tamil and Muslim populations living in close proximity to each other. The context of these appeals may therefore be instructive for community activists working in the East in order to focus attention on community building around contested issues of land boundaries in former war affected areas where there have been multiple displacements of people.

Further, though the RTI Act has been used at ground level by displaced persons and community activists on their behalf to clarify land ownership in regard to disputed lands, obtain identification documentation and so on,¹⁵⁶ appeals in this regard have not been filed to the Commission as of record, presumably due to public officers in the relevant government offices responding satisfactorily to these requests,¹⁵⁷ though the absence of appeals may also be due to reluctance of information requestors to invoke the appeal process.

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- 155 See *K Parthiban v. Divisional Secretariat – Vavuniya RTIC Appeal* (In- Person) /286/2018 <<http://www.rticommission.lk/web/images/pdf/rticappeal-286-2018/rtic-286-2018-en-14102018.pdf>> (accessed 1 February 2019) or *A.S.M. Sadaaqath v. Divisional Secretariat, Sainthamaruthu*, RTIC Appeal (In-person)/71/2017 <<http://www.rticommission.lk/web/images/pdf/120502018/sadaaqath.pdf>> (accessed 1 February 2019) as examples.
- 156 Manori Wijesekera, 'Sri Lankans Use New RTI Law to Access Land Information Following War in North' *Global Press Journal* (5 March 2017) <https://globalpressjournal.com/asia/sri_lanka/sri-lankans-use-new-rti-law-access-land-information-following-war-north/> (accessed 1 February 2019); Shiran Illanperuma, 'Sri Lankan Youth are Using RTI to Help War-Affected Families' *Roar Media* (23 February 2017) <<https://roar.media/english/life/reports/sri-lankan-youth-are-using-rti-to-help-war-affected-families/>> (accessed 1 February 2019); 'RTI in Sri Lanka - The Dawn of a Fish Bowl Regime' *The Social Architects* <<http://www.thesocialarchitects.org/>> (accessed 1 February 2019).
- 157 Anecdotal conversations with officers of the Divisional Secretariats in the North and East, December 2018.

Though efforts were made to compel state agencies to give information in regard to persons who had ‘disappeared’ during Sri Lanka’s conflict years, these have not been persisted with due to fear that family members of the ‘disappeared’ experience in questioning the military, intelligence, police and other law enforcement agencies. In fact, as one appeal decision in this paper demonstrates in respect of a journalist who had been filing RTI applications alleging the filing of military intelligence reports against him, (*G. Dileep Amuthan v. Ministry of Defence (RTIC 70/2018)*), these fears are all pervasive. Meanwhile, an interesting development took place in 2018 when a Mannar based women’s group in Eastern Sri Lanka petitioned the Office of the Prime Minister under the RTI Act to obtain ‘copies of proposals and/ or draft legislation and/ or concept notes and/ or documentation relevant to the commitments made by the Government of Sri Lanka in the United Nations Human Rights Council Resolution 30/1 (UN HRC 30/1) to the following;

- a. Establish an office on missing persons
- b. Establish a truth – seeking mechanism
- c. Establish a judicial mechanism with a special counsel
- d. Establish any other mechanism for the purpose of delivering truth, justice, reparations, or guarantees of non –recurrence

Also asked were the road map in relation to the above and copies of reviews and/ or correspondence and /or documentation prepared by nation and/or international consultants and / or experts with respect to the above mentioned, proposals and/ or draft legislation and/ or concept notes and/ or documentation.¹⁵⁸ Though the information was initially refused by state agencies upon citation of several technical grounds, the appeal hearing before the Commission resulted in the release of the Reparations Bill by the

158 *Shreen Saroor v. Prime Minister’s Office –RTIC Appeal/01/2018*
 <<http://www.rticcommission.lk/web/images/pdf/rticappeal-001-2018/rtic-01-2018-en-08092018.pdf>> (accessed 1 February 2019).

Office of the Attorney General upon a direction made in that regard. It was emphasized by the Commission as follows;

This information request pertains to matters relevant to Sri Lanka's transitional justice process and therefore concern information that is vital to the public interest. In particular, where the drafting of laws are concerned, this Commission reiterates its observations in Gomez v. Ministry of Social Empowerment, Welfare and Kandyan Heritage (RTIC Appeal /51 /2018, RTIC Minutes, 27.02.2018) that 'in many countries in the region as well as globally, draft laws are required to be presented before the public in advance and before the Bill is gazetted, in order to obtain public feedback on its contents which is a beneficial process leading to public consensus around the framing of legislation.'

*'This observation was made in the context of the fact that the definition of information in Section 43 of the Act expressly includes 'draft legislation' within its ambit.'*¹⁵⁹

With these above preliminary reflections in mind, we will proceed to examine a selection of RTI appeals filed by citizens in the North and East having a bearing on general principles of information disclosure and the importance of transparency in government and accountability of the State.

2.1 ***G. Dileep Amuthan v. Secretariat, Northern Provincial Council***¹⁶⁰

The Appellant requested the names and addresses of the two management assistants and the office assistants assigned to each of the 33 Provincial Councillors of the Northern Province (excluding the Ministers) which was denied by the PA citing Section 5 (1) (k) of the RTI Act.¹⁶¹

¹⁵⁹ RTIC Minute of 15.05.2018.

¹⁶⁰ RTIC Appeal/17/2017

<http://www.rticommission.lk/web/images/recent_orders_in_appeal/dileep-amuthan-rti-assembly.pdf> (accessed 1 February 2019).

¹⁶¹ The said Section states: *'the disclosure of such information would infringe the privileges of Parliament or of a Provincial Council as provided by Law.'*

Analysis of G. Dileep Amuthan v. Secretariat, Northern Provincial Council:

Prima facie, although, the case may seem straight forward, certain issues are of public interest. Firstly, the PA relied on the exemption of Section 5 (1) (k) of the RTI Act but did not justify the same. The Commission drew the attention of the PA to Section 32 (4) of the RTI Act which places the burden of proof on the PA and determined that PAs simply cannot refuse information under Section 5 of the RTI Act without sufficiently substantiating the same. Secondly, the case established that information pertaining to appointments / vacancies should be subject to disclosure, notwithstanding whether such posts were permanent or not. Lastly, the Commission's observation, viz; "*these posts were paid out of public funds and a citizen had the right to ask for this information*" would go a long way in encouraging other citizens to seek information, highlighting that use of public funds could always be subject to scrutiny.

2.1. G. Dileep Amuthan v. Governor's Secretariat, Northern Province¹⁶²

The information request related to overseas travel details of 33 Provincial Councillors and 5 Ministers of the Northern Provincial Council, where permission had been sought and obtained from the Governor. The differentiating factor in this case was that the Appellant requested information in relation to both official and private trips of the Councillors, for which permission was given by the Governor. The PA, represented by the Information Officer ("IO"), had reservations in disclosing such travel details on grounds that they were private information. The Appellant, however, submitted that approaching the Governor for permission, was sufficient reason to prove that high ranking officials, such as,

¹⁶² G. Dileep Amuthan v. Governor's Secretariat, Northern Province RTIC Appeal/35/2017<<http://www.rticommission.lk/web/images/pdf/dileep-amuthan-governors-secy.pdf>> (accessed 1 February 2019).

the Councillor / Minister of the Council, were not ordinary people but those responsible to the general public whom they represent. The Commission ordered disclosure of the number of overseas visits undertaken by the officials.

This case is one of the many examples where the Commission inclined in favour of disclosure of information when public interest and public funds were involved; clearly stating that these considerations are of paramount importance.¹⁶³

2.2. G. Dileep Amuthan v. Ministry of Agriculture, Northern Provincial Council¹⁶⁴

This above appeal dealt with a rather short point of disclosure of information in relation to the funds for “protection of casuarina trees of the Vadamaradchi East Manatkaadu region.” The IO responded by claiming that the PA was not involved in the project. On an appeal to the Designated Officer, (DO) extension of time was sought on grounds that The Chief Minister’s Ministry had taken over the concerned Ministry. The Appellant approached the Commission on grounds that the Ministry was now functioning on its own. On the order of the Commission the PA provided the requested information.

163 *Verite Research (Pvt) Ltd v. Central Bank of Sri Lanka*, RTIC Appeal (In person)/25/2018
<http://www.rticommission.lk/web/images/pdf/rticappeal-026-2018/verite-research-v-central-bank-sri-lanka-si-21072018.pdf>> (accessed 1 February 2019); *Shreen Saroor v. Prime Minister’s Office*, RTIC Appeal (In person)/01/2018
<http://www.rticommission.lk/web/images/pdf/18052018/shreen-saroor-appeal.pdf>> (accessed 1 February 2019); *Dushyanthi Suriapperuma v. Sri Lanka Medical Council*, RTIC/36/2017)
<http://www.rticommission.lk/web/images/pdf/16062018/suriyapperuma-v-slmc.pdf>> (accessed 1 February 2019).

164 *RTIC Appeal/140/2017*<<http://www.rticommission.lk/web/images/pdf/dileep-amuthan-v-min-of-agri.pdf>> (accessed 1 February 2019).

***2.3.G. Dileep Amuthan v. Northern Provincial Council*¹⁶⁵**

In this appeal, the appellant requested an inquiry report regarding the Valvettithurai Urban Council. The said Council was dissolved. The appellant was given a one-page summary of the report by the PA. On appeal to the DO, the appellant learned that the PA was claiming that releasing the full report would affect the privilege of members of Provincial Council under Section 5(1)(k) of the RTI Act.¹⁶⁶ The Commission ruled that Section 5(1) (k) cannot be used as an “omnibus clause” to be applied to block each and every instance of information being asked from individual members of the provincial Council. It was opined nonetheless that, as there were about 10 officers and witnesses involved as third parties to the corruption inquiry, third-party exemptions under Section 5(1) (i)¹⁶⁷ read with Section 29 of the Act should be considered. The PA was directed to ascertain as to whether those third parties were agreeable to their testimony being made public, in line with the mandated procedures in Section 29.

Subsequent to the direction of the Commission, the report on the inquiry was released by the PA. However, a portion of the report relating to the testimony given in confidence by an official of the Urban Council, whose complaint had led to the inquiry in the first place was withheld by the PA. This was on the basis that she was a whistleblower, who feared the repercussions of this information being made public and had refused to allow disclosure of her testimony. The crux of the appeal concerned the crucial issue

165 RTIC Appeal (In- Person)/21/2017<<http://www.rticommission.lk/web/images/pdf/rticappeal-021-2017/rtic-021-2017-en-06122018-2.pdf>>(accessed 1 February 2019).

166 Section 5(1)(k) reads: ‘*Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused where the disclosure of such information would infringe the privileges of Parliament or of a Provincial Council as provided by Law.*’

167 Section 5(1)(i) reads: ‘*Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused where subject to the provisions of Section 29(2)(c), the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure.*’

of the necessity to maintain balance between competing rights / interests of information disclosure and protection provided to whistleblowers.

In the specific factual context of this appeal, taking into account the role of the whistleblower as a person striving for accountability and transparency, and the possibility of concerned persons taking revenge against the whistleblower, the Commission ruled that the testimony need not be disclosed, citing privacy concerns in Section 5(1)(a) of the RTI Act.¹⁶⁸ It was held that there was no larger public interest in releasing that testimony, as the release of the remainder of the report on corruption occurring within the Urban Council satisfied the aims of information disclosure to compel transparency and good governance.

An Analysis of G. Dileep Amuthan v. Northern Provincial Council

The key issues in this appeal centered around corruption in governmental bodies and protection of whistleblowers. Firstly, the DO attempted to withhold certain information under the exemption of “parliamentary privilege.” This issue was dealt by the Commission rather elaborately in its Order emphasizing that privileges and exemptions under the RTI Act are not to be pleaded routinely and generally. Secondly, the issue of protecting whistleblower interests emerged as a key interest. The Commission in its decision, protected the identity of, and the information provided by, the whistleblower, stating that whistleblower protection shared the same values and goals as RTI:

168 Section 5(1)(a) reads: ‘Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused where the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure.’

‘Striving for accountability and transparency is an evident common ground between acts of whistleblowers and the RTI regime. Given the absence of a separate law that protects such whistleblowers, the Commission is duty bound to act cautiously when mandating the release of information that risks the protection of public officers who have acted as whistleblowers.’¹⁶⁹

The Commission recommended that the government of Sri Lanka implement a law protecting whistleblowers and their families. This would be an important step to demonstrate the serious intention of the government in combating and curbing corruption.

2.4 G. Dileep Amuthan v. Ministry of Defence¹⁷⁰

Information was requested from the Ministry of Defence (PA) and the Sri Lanka Army regarding the business ventures including shops, canteens, outlets and /or restaurants run in the North and East along with relevant rules, procedures, guidelines and/or policies pertaining to the Army Directorate of Welfare and the allegations of Sri Lankan peacekeepers in Haiti being perpetrators of sexual abuse of Haitian citizens in 2007. While the Navy and the Sri Lanka Air Force released the information on the hospitality ventures being run by them, the Sri Lanka Army (“SLA”) initially responded asking the appellant to furnish his identification to establish citizenship rather than by furnishing the requested information. When the appeal was taken up before the Commission, it was stressed that the PA can only ask for further information such as production of identity card if there are objective grounds to doubt the citizenship of the Appellant.¹⁷¹ Specifically, TISL v. Prime Minister’s Office Presidential Secretariat¹⁷² was quoted, wherein it was held that requesters should be asked for proof of citizenship only in the

169 RTIC Appeal (In-Person)/21/2017, p 4.

170 RTIC Appeal (In-Person)/70/2018

<<http://www.rticcommission.lk/web/images/pdf/rticappeal-70-2018/rtic-70-2018-en-25082018-2.pdf>> (accessed 1 February 2019).

171 *ibid*, this decision was made on March 23, 2018.

172 RTIC Appeal/05/2017 & RTIC Appeal/06/201, RTIC Minutes of 23.02.2018.

‘rarest of cases’¹⁷³ and only where there is a bona fide doubt on the part of the PA as to the information requester.

The PA had also conducted a background check on the Appellant, stating that it was hesitant to release information due to concerns that the Appellant, being a journalist, would use the information to perpetuate a negative image of the PA overseas, thereby negatively impacting the defence of the state or national security. However, the Commission found that the background of the Appellant and the purpose of his information request do not qualify as grounds of refusal or exemption under the RTI regime¹⁷⁴ as stipulated in Section 24(5) (d) of the RTI Act. Further, the Commission strongly emphasized that if a PA obtains background reports (Military Intelligence Reports) on a person simply because he or she files an RTI appeal, then the fundamental objectives of the RTI Act would be negated. Responding to the objection that information regarding the hospitality ventures run by the Army Welfare Society Fund was not on ‘public funds,’ the Commission held that the term “public funds” must be interpreted broadly.¹⁷⁵ Eventually the information was released. Where the sexual abuse of Sri Lankan peacekeepers in Haiti was alleged, it was directed that a summary of the information asked for, must be provided.

An Analysis of G. Dileep Amuthan v. Ministry of Defence¹⁷⁶

Asking RTI applicants to provide identification should be critiqued as a tactic to intimidate the applicant and a strategy to delay the giving of information by the PA. The Commission was stern in its reprimand, stating that “the PA cannot keep questioning further without substantial reason for belief that the Appellant

173 Vide also *Shri K. Balakrishna Pillai v. National Human Rights Commission*, No; CIC/OK/C/2008/00016, Minutes of the Central Information Commission of India, 26th May 2008.

174 RTIC Appeal (In-Person)/70/2018, p 14-15.

175 *ibid* 15.

176 We are indebted to Attorney-at-Law Sushmitha Thayanandan for her assistance in locating comparative law precedents in this segment.

is not a citizen. Requesting for proof of citizenship can only be on objective grounds.”¹⁷⁷ Further, the PA seemed to know that the applicant was a journalist so the request for identification and citizenship was presumably not on objective grounds. The Commission categorically stressed the importance of not intimidating or otherwise pressurizing citizens seeking information since any hindrance to the access of information undermines the entire RTI Regime. The PA had also conducted a background check conducted on the Appellant. This was a gross overstepping on the part of the PA and depicts a continuing culture of state secrecy and ways to side step the requirement of disclosure. Again, the Commission was severe in its condemnation, stating;

*‘In principle, it must be strongly emphasized that if any Public Authority commences to obtain Military Intelligence in regard to citizens purely on the basis that they are filing Right to Information requests which is a legitimate legal procedure ... then the fundamental objectives of the Act would be negated.’*¹⁷⁸

This is a vital reminder that the Commission would leave no room for interpretation in this regard and PAs have to conduct themselves within the confines of the RTI Act.

Intimidating or otherwise harassing RTI applicants is not a problem unique to Sri Lanka. It is pertinent to look into intimidation of RTI applicants in other jurisdictions. In India, according to the Commonwealth Human Rights Initiative, there were 56 suspicious deaths of RTI activists between 2005 and 2016. There were a further 130 cases involving attacks and intimidation of RTI applicants in the same time period.¹⁷⁹ The CIC in India has responded to the problem, stating in *Johinder Dahiya v. Rajesh Khanna*,

177 *RTIC Appeal (In-Person)/70/2018*, p 6.

178 *ibid* 14.

179 ‘Stop RTI proceedings if applicant dies, proposes government’ *Express News Service* (4 April 2017) <<https://indianexpress.com/article/india/stop-rti-proceedings-if-applicant-dies-proposes-government-4598339/>> (accessed 1 February 2019)

*Municipal Cooperation, Delhi*¹⁸⁰ that “the Commission takes matters of threats to RTI users very seriously.” The CIC in India held, in the aforementioned case, that even delays in delivering information constituted harassment.

The scope of the term “public funds” was also pivotal to the decision. The RTI Act is in place to ensure that transparency is exercised in governmental agencies in all areas, especially in the use of tax-payer money, which are public funds. At a bare minimum, citizens ought to have a right to know where and how their money is being used. In this case, the PA argued that the ventures were maintained by private funds of the SLA and not public funds. The Commission observed that although the ventures were funded by private funds, they were controlled, operated and maintained by members of the PA who receive public government funds. By allowing the release of the requested information on this basis, the Commission construed the use of “public funds” widely. This is a progressive interpretation as it militates against allowing PAs to deny information on unsubstantiated technicalities.

In India, the case law has developed a thorough definition of public funds. The Kerala High Court in *Thalappalam Service Co-operative Bank Ltd v. Union of India (UOI)*¹⁸¹ held that the funds which the government deals with are categorically public funds and that the collective national interest of the citizenry is always concerned with national wealth. The term ‘public funds’ had to be interpreted broadly in order to provide transparency, curtail corruption and promote accountability. *Delhi Integrated Multi Model Transit System Ltd v. Rakesh Aggarwal*,¹⁸² established the ‘substantially financed’ test. As per the test, when a government

180 CIC Decision No. CIC/SG/A/2012/000557/18356<<http://rtiactivist.com/wp-content/uploads/2012/04/MCD.pdf>> (accessed 1 February 2019).

181 *Thalappalam Service Co-operative Bank Ltd v. Union of India (UOI)* (2009)WP(C) No 18175 of 2006 (L)<<https://indiankanoon.org/doc/322018/>>(accessed 1 February 2019).

182 *Delhi Integrated Multi Model Transit System Ltd v. Rakesh Aggarwal*, WP(C) 2380-81/2010 <<https://indiankanoon.org/doc/48920981/>> (accessed 1 February 2019).

substantially finances a body, public money is use and the public has an interest and right to obtain information regarding the substantial financing from the state.

A precedent from Canada, *Northern Cruiser Co v. R*,¹⁸³ further concurs in the position taken by courts in India and the RTI Commission in Sri Lanka. In *Northern Cruiser*, the court held that any information regarding government spending of funds is *prima facie* government information. Exceptions to the release of information that is *prima facie* government information is to be limited and specific. This is prudent as allowing for exceptions to the release of government information is in essence working against any right to information or access to information regime.

The PA moreover sought to rely on Section 5 (1) (b) (i) and (ii)¹⁸⁴ of the RTI Act, arguing that the disclosure of information would undermine “defence of the state” and /or “national security” and that disclosure would affect “affect international relations.” The observations of the Commission with regard to Section 5 (1) (b) (ii) however leave no room for ambiguity:

‘It is important to note that the reliance on an international agreement to deny information pertains strictly to instances where the requested information was given or obtained in confidence and further, where provision of the same is assessed as being “seriously prejudicial to Sri Lanka’s relations with any State, or in relation to international agreements or obligations under international law.” As such it is manifest that this exemption cannot be applied in a vague or generalized manner as to include all information relating to any international agreement.’

183 *Northern Cruiser Co. v. R.* [1991] 47 FTR 192 [FCTD].

184 Section 5 (b) (i), reads: ‘disclosure of such information would undermine the defence of the State, or its territorial integrity or national security.’ Section 5 (1) (b) (ii) of the RTI Act, such information ‘that would be or is likely to be seriously prejudicial to Sri Lanka’s relations with any State, or in relation to international agreements or obligations under International Law, where such information was given by or obtained in confidence.’

This appeal shows that although there may be complexities that emerge from the new RTI regime since provisions of the RTI Act are stringently worded, disclosure would not be refused on flimsy grounds provided the Commission maintains a high standard of review. Further, this case is a sterling example of the need to protect the interests of RTI users in order to prevent PAs intimidating, harassing or otherwise hassling them.

***2.5 Nibras Mansoor v. Municipal Council of Kalmunai*¹⁸⁵**

The appellant had preferred two appeals. The first appeal requested detailed information about the extent of the Santhankerni Playground in Kalmunai, the survey plan of the playground, whether there had been any illegal encroachments thereof, whether there had been any complaints in that regard and the action that had been taken thus far. He was provided an answer of “not known” for all of his queries except one which was in regard to the extent of the land. With the information given, the appellant had determined that people had encroached upon the border of the playground. During the proceedings it was ascertained by the Commission that the encroachment was a hotly contested issue as the appellant had not been the first person to ask or complain about the encroachments to the Municipal Commissioner and there had been other oral complaints previously.

According to the PA, control of the land had been split between the Kalmunai Municipal Council and the Divisional Secretariat. There had been many instances since 1999 where it had been recognized that the land should be in the control of the Council and where it had been recognized that there are encroachers on the playground land. However, the Divisional Secretariat had been unable to transfer the land until the encroachers were evicted. This relevant information was released to the appellant and the

185 RTIC Appeal/46/2017

<<http://www.rticommission.lk/web/images/pdf/nibras-mansoor-new-31-10.pdf>> (accessed 1 February 2019).

Municipal Commissioner stated, on record before the Commission that legal action would be taken forthwith to evict the encroachers and properly define land boundaries.

The second appeal against the same PA related to disclosure of a copy of the lease agreement and the monthly income derived from the lease of the Council's building to a private company for six months. The appellant wanted information regarding the lease and its profits as this involved public money. The lease agreement was furnished to the Commission with the PA claiming that the information had been widely available in media when the lease had been entered into. However, the appellant argued that though he had attempted to obtain a copy of the lease, it was always kept secret. The Commission ordered that a copy of the lease document be provided to the appellant.

An Analysis of Nibras Mansoor v. Municipal Council of Kalmunai

In this case, disputes over information pertaining to land highlight the critical role that the RTI Act can play even in what may generally be viewed as "routine disclosures." The PA attempted to withhold the lease agreement on grounds that the public were already aware of the same. The Appellant had to approach the Commission to enable disclosure. For the RTI regime to bear fruit, it is critical that governmental agencies proactively disclose information and in applicable instances disclose immediately on receipt of request, save in exceptional circumstances. This push back from Public Authorities, if manifested generally, will undoubtedly hinder the development of a flourishing RTI regime in Sri Lanka.

The flow of information from PAs to citizens is an important step in achieving results, and important for a well-functioning democracy. For instance, citizens were able to obtain information regarding the names and addresses of encroachers (list compiled in 2005) as a result of filing this appeal. However, no

responsible state officer had taken appropriate action in regard to what was a clear infringement of the law, depicting the laxity of the concerned agency. Different state organs had shifted responsibility to each other, leading to lack of concrete results. The RTI regime provides the tool for citizens to reverse this process, holding the PAs responsible and accountable.

2.6 A.M. Ahamed v. Divisional Secretariat Manthai West¹⁸⁶

The appellant had requested information regarding permits given to certain persons by land development officers. The IO of the PA claimed a third-party exemption, since the permits had been issued to other parties. The DO failed to respond to the appeal. The Appellant then preferred an appeal to the Commission. The PA relied on Section 5 (1) (i) of the RTI Act to refuse the information.¹⁸⁷ The Appellant reiterated the overriding public interest in the information requested and argued that after the death of the original owner, the land had been transferred to another person, not to the persons currently holding the permit. The Appellant sought for information to use the land as a public playground for the relevant persons. After careful consideration of the facts, the Commission held that the third-party exemption would not apply as the information had not been supplied in confidence to the PA. The Commission ordered that the copies of the permits be provided for inspection by the appellant.

186 RTIC Appeal/287/2018

<http://www.rticommission.lk/web/images/pdf/rticappeal-287-2018/rtic-287-2018-en-19122018.pdf> (accessed 1 February 2019).

187 Section 5 (1) (i) of the RTI Act that states '*subject to the provisions of Section 29(2)(c), the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure.*'

An Analysis of A.M. Ahamed v. Divisional Secretariat Manthai West

Similar to Nibras Mansoor (supra), this case deals with land disputes and corruption. The appellant discovered that the land in question may currently be encroached on by a party in which the land's interest did not vest. The PA attempted to withhold information on grounds that it was exempted under Section 5 (1) (i) of the RTI Act. The Commission, while holding that the exemption relied on would not apply, added that the information itself was not "supplied in confidence to the PA." The reluctance of the PA to disclose information relying on exemptions is clearly evident here. To build public trust in the government and its apparatuses, the PAs should be more willing to disclose information and also must hold themselves responsible to pro-active levels of transparency and accountability. This would go a long way in instilling public confidence.

2.7 G. Dileep Amuthan v. Presidential Secretariat¹⁸⁸

The information request pertained to travel details of the former and current President of Sri Lanka to the Northern Province, respectively former President Mahinda Rajapaksa (during 2010 to 07 January 2015) and current President Maithripala Sirisena (01 December 2005 to 98 January 2017 to 10 March 2017) as well as overseas visits of both. The IO responded denying the request on the basis of "defence and national security" (Section 5 (1) (b) (i) of the RTI Act).¹⁸⁹ An appeal to the DO resulted in no response. In response to the request for information on travel details of the former President, the PA stated at the outset that it did not have the details. In response to the travel details of the current President, a

188 RTIC Appeal (In person)/114/2017

<<http://www.rticommission.lk/web/images/pdf/rticappeal-114-2017/rtic-114-2017-en-06122018.pdf>> (accessed 1 February 2019).

189 The said Section provides that 'information shall be refused, where – (b) disclosure of such information – (i) would undermine the defence of the State or its territorial integrity or national security.'

plethora of exemptions were relied on, including national security (Section 5 (1) (b) (i); parliamentary privilege (Section 5 (1) (k))¹⁹⁰ and privacy (Section 5 (1) (a)). In any event and in response to the Commission's approach which did not look favourably on upholding the cited exemptions, the PA then fell back on Section 3 of the RTI Act, stating that the information sought was not within its '*possession, custody and control.*'

The Commission held that Section 5 (1) (b) (i) (national security/ defence) of the RTI Act would be inapplicable given that information sought for i.e. travel details and dates thereof were ordinarily available in the public domain through newspaper reports and other media. On application of Section 5 (1) (a) of the RTI Act, it was categorically stated that claim of privacy would not arise, as travel information of the President could not be considered as personal information. On the submission of an exemption on grounds of parliamentary privileges, the Commission emphasised that such privileges were only applicable to the President "*in the discharge of (attending parliament) of such function.*" Further since public funds were used for travel purposes parliamentarians should be made accountable for use of such funds. It is pertinent to note that in this case, the information request could not be complied on grounds that the PA was not in *possession, custody or control* of the same as the said travel details were not documented in lieu of the personal security of the President of Sri Lanka.

Analysis of G. Dileep Amuthan v. Presidential Secretariat:

The observations of the Commission in the above case were as follows;

The President of Sri Lanka is an elected public official for whom public funds are made available for use in his official capacity as President. The importance of maintaining public transparency regarding the expenditure of public funds is the

190 Section 5 (1)(k) states: '*the disclosure of such information would infringe the privileges of Parliament or of a Provincial Council as provided by Law.*'

golden thread underlying Sri Lanka's RTI Act and indeed, all RTI Acts...The Commission urges that required mechanism to be put in place by the relevant public authorities for the auditing of such expenses so that all such expenditure is held accountable forthwith.'

The Commission also compared global trends where travel expenses of heads of state are disclosed routinely including New Zealand, Canada and the US. The travel and hospitality expenses of the Canadian Prime Minister and several other Government officials are reported and are available for public access on the official website of the Government of Canada.¹⁹¹ Similarly, all expenses, including travel of the Department of the Prime Minister and all Cabinet Chief Executives of New Zealand, are available on the official government data website.¹⁹² There is clear jurisprudence in the US to demonstrate the use of the Freedom of Information Act to obtain information regarding travel expense of Presidents.¹⁹³ The concluding observations of the Commission captured the reasons as to why information such as travel details of key public figures should be maintained:

'While it is imperative for the use of public funds in this manner to be closely monitored in order to ensure accountability of public authorities, it is also prudent for Sri Lanka to keep pace with regional and international counterparts in terms

191 'Travel and Hospitality Expense Reports' <http://www.pco-bcp.gc.ca/di/expense_list.asp?cat=1&clientDeptID=1370&dept=65&year=2018&lang=eng> (accessed 1 February 2019).

192 'Department of the Prime Minister and Cabinet Chief Executive Expenses' <<https://catalogue.data.govt.nz/dataset/departement-of-the-prime-minister-and-cabinet-chief-executive-expenses>> (accessed 1 February 2019). 193 *Judicial Watch v. U.S. Dept. of Homeland Security* (No. 1:17-cv-01007); *Judicial Watch v. U.S. Department of Homeland Security* (No. 1:15-cv-01983); *Judicial Watch v. U.S. Dept. of Homeland Security* (No. 1:17-cv-01341).

193 *Judicial Watch v. U.S. Dept. of Homeland Security* (No. 1:17-cv-01007); *Judicial Watch v. U.S. Department of Homeland Security* (No. 1:15-cv-01983); *Judicial Watch v. U.S. Dept. of Homeland Security* (No. 1:17-cv-01341).

of full and proactive disclosure of travel expenditure of elected and high ranking public officials, as this would be fundamental to the ethos of the RTI regime.'

Given the observations of the Commission based on foundational principles of RTI to enforce transparency and accountability, the PA (the President's Office) is now put under an obligation to keep records of such nature bearing in mind the requirements of the RTI Act. While that is so, the appeal also demonstrates the limitations of the RTI process when a PA states on record that it does not maintain the relevant files and/or does not have the relevant information in its possession/custody and/or control. It is hoped that greater public exposure of these matters would result in the RTI process being an instrument of change, bringing in greater transparency and accountability into the existing system and altering deficient existing practices of state accountability.

3. Comparative Analysis; Successes and Challenges of RTI in India, Mexico and South Africa

The use of RTI in other regions, specifically in conflict-affected or other disadvantaged communities, is essential so that those learnings and experiences can be adopted in a Sri Lankan context. This comparative analysis focuses on India, Mexico and South Africa.

3.1. India

While the RTI movement in India has been the subject of thorough scrutiny and analysis,¹⁹⁴ the use of RTI in Jammu and Kashmir (J&K) through the J&K Act of 2000 has been less so.

194 Aruna Roy and MKSS Collective, *The RTI Story: Power to the People*, Roli Books, 2018; Aishwarya Deb, Prithwish Roy Chowdhury, "A Decade of "The Right to Information Act, 2005 - Critical Exploration of the Scope and Impact of the Act," CNLU LJ (6) [2016-17] 200.

The Report on the Situation of Human Rights in Kashmir,¹⁹⁵ widely referenced and used by academics, including by these writers for this paper, has obtained a large chunk of its information by using material from several RTI applications. For example, it was revealed through an RTI application in J&K that over 1000 people were detained under the J&K Public Safety Act between March 2016 and August 2017.

But ten years into the new legislative regime in J&K, it has been observed that “impunity for human rights violations and lack of access to justice are key human rights challenges in the State of Jammu and Kashmir. Special laws in force in the state, such as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and the Jammu and Kashmir Public Safety Act, 1978, have created structures that obstruct the normal course of law, impede accountability...”¹⁹⁶ Public officers still do not seem to fully understand the right to information law.¹⁹⁷

In *Shri Khurram Parvez v. PIO Home Department*,¹⁹⁸ the applicant was told that the information was not available and that it did not fall under the ambit of information available to be disclosed. In *Khurram Parvez v. PIO Zonal Police Headquarters J&K*, the public information officer similarly denied information on an exemption without explanation.¹⁹⁹ Due to curfews, checkpoints, difficult terrain and monetary limitations, citizens cannot freely

195 ‘Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan’ United Nations, Human Rights, Office of the High Commissioner (2018)

<<https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>> (accessed 1 February 2019) [Kashmir Report].

196 Kashmir Report, *ibid*.

197 Raja Muzaffar Bhat, ‘Denying Land Compensation Information’ *Daily Excelsior* (3 January 2019) <<http://www.dailyexcelsior.com/denying-land-compensation-information/>> (accessed 1 February 2019).

198 J&K State Information Commission, Decision No. SIC/ CO/SA/263/2015/801.

199 J&K State Information Commission, Decision No. SIC/ CO/SA/265/2015/788.

travel throughout the State.²⁰⁰ Furthermore, assistance for illiterate people to access rights under the RTI regime is limited²⁰¹ resulting in the “aamaadmi” or “regular person” being rendered helpless.²⁰² Attempts to make J&K’s RTI system more accessible to citizens have been beset with many difficulties.²⁰³

3.2. Mexico

RTI legislation in Mexico has been lauded for its excellent provisions,²⁰⁴ the country has had RTI legislation since 2002 with the recent General Transparency Law being enacted in 2015.²⁰⁵ RTI regime has led to successful outcomes going beyond the general scope of access to information with several states creating action plans that include a commitment to secure RTI.²⁰⁶ Journalists have used the law to gather information on public spending.²⁰⁷

200 Raja Muzaffar Bhat, ‘Hearing RTI Appeals & Complaints’ *Greater Kashmir* (16 Dec 2014) <<https://www.greaterkashmir.com/news/gk-magazine/hearing-rti-appeals-complaints/182415.html>> (accessed 1 February 2019).

201 *ibid.*

202 *ibid.*

203 *ibid.* For instance, Dr. Bhat attempted to use video conferencing for a hearing he was unable to attend but was instead told to record his statement.

204 ‘Congratulations Mexico for the world’s best right to information law’ <<https://www.law-democracy.org/live/congratulations-mexico-for-the-worlds-best-right-to-information-law/>> (accessed 1 February 2019); ‘Global Right to Information Rating’ <<https://www.rti-rating.org/country-data/>> (accessed 1 February 2019).

205 Adriana Garcia, ‘Transparency in Mexico: An overview of access to information regulations and their effectiveness at the federal and state level’ *Wilson Center* (2016) <https://www.wilsoncenter.org/sites/default/files/transparency_in_mexico_an_overview_of_access_to_information_regulations_and_their_effectiveness_at_the_federal_and_state_level.pdf> (accessed 1 February 2019).

206 Office of the Information Commissioner of Canada, ‘Conference Proceedings: Transparency for the 21st Century’ (2017) <<http://www.oic-ci.gc.ca/eng/conference-transparence-21e-siecle-transparency-21st-century-conference.aspx>> (accessed 1 February 2019).

207 Freedom Info, ‘Mexico, Freedom of Information: an overview’ <<http://www.freedominfo.org/regions/latin-america/mexico/mexico2/>> (accessed 1 February 2019).

Furthermore, the Mexican State has responded to public pressure by creating a web portal for information requests to be lodged.²⁰⁸

Freedom Info claims that “electronic information sharing will likely continue to play a pivotal role in Mexico’s shift from state secrecy to political openness.”²⁰⁹

Even so, governmental agencies make the task of obtaining information somewhat daunting. Individuals who attempt to obtain information claim that up to 90% of their claims are turned down the first time they are made.²¹⁰ Furthermore, it often takes up to 40 days to receive a response, which would defeat the purpose of the request, considering that this law is most often used by journalists who need information at a faster rate in order to effectively complete their task of bringing awareness on issues to the public.²¹¹ In fact, it is claimed by some writers that access to RTI has, in fact, decreased with the new law²¹² with the law being mostly used by investigative journalists²¹³ and over 75% of the information claims being filed by college graduates.²¹⁴ The government is yet to comply with its duty to supply information proactively.²¹⁵

3.3. South Africa

South Africa enacted the Promotion of Access to Information Act in 2000 (“PAIA”), six years after the end of the Apartheid regime. The right to information has been used to uncover and

208 *ibid*

209 *ibid*

210 Information freedom new era for Mexico’ *Mexico News Daily* (6 November 2015) <<https://mexiconewsdaily.com/news/information-freedom-new-era-for-mexico/>> (accessed 1 February 2019) [Mexico News Daily].

211 *ibid.*

212 *ibid.*

213 *ibid.*

214 *ibid.*

215 *ibid.*

fight “fraud on an enormous scale”²¹⁶ but apartheid-era government embodied policies of extreme secrecy, some of which seem to have continued during the post-apartheid period. McKinley writes that three years after the information law was enacted, there remained a host of serious problems.²¹⁷ He goes on to point out as to how records held by the Truth and Reconciliation Commission (TRC), as well as records held by the police, defence force, cabinet and cabinet committees are not accessible.²¹⁸ Moreover, McKinley found that 50% of public officials in 2003 had not heard of the PAIA as they had not undergone systematic training.²¹⁹

Case law substantiates that the governmental agencies lean in favour of secrecy.²²⁰ The fact that each ministry can decide whether or not to classify information as secret is highly problematic.²²¹ In another instance, a request filed by the South African History Archive (SAHA) to the TRC to ask for information in order to construct a TRC victim database was refused²²² on the basis of the information being personal to a third-party, despite the fact that victims had unanimously agreed to have their information released to help with reparations.²²³ Eventually, documents were given in an unusable manner and it took ten years for SAHA to acquire documentation that was usable.²²⁴ Moreover, there is significant mismanagement of public records, especially when dealing with apartheid-era documents. Much of the TRC archive

216 Karyn Maughan, ‘Exclusive: Officials looted millions in land reform scam’ *Business Live* (24 January 2019)

<<https://www.businesslive.co.za/bd/national/2019-01-24-officials-looted-millions-in-land-reform-scam/>> (accessed 1 February 2019).

217 Dale McKinley, *The State of Access to Information in South Africa* (Centre for the Study of Violence and Reconciliation 2003)

<<http://www.csvr.org.za/docs/trc/stateofaccess.pdf>> (accessed 1 February 2019).

218 *ibid.*

219 *ibid.*

220 Discussions with Sri Lanka RTI Commissioners following study tour of South Africa, 2017.

221 Dale McKinley (2003).

222 *ibid.*

223 *ibid.*

224 *ibid.*

has been destroyed by the State, stalling the reconciliation project and hindering the right of access to information.²²⁵ A key factor obstructing RTI in South Africa is that the PAIA had no body to facilitate the right to information²²⁶ with this burden being put on the Human Rights Commission. In 2016, sixteen years after the PAIA was enacted, a regulator was established to facilitate the high volume of access to information requests.

4. Concluding Analysis

There has been a progressive, pro-transparency, pro-accountability, pro-disclosure approach in RTI decision making during the two years in review. According to statistics of the Transparency International Sri Lanka, from the cases concluded in the first year of the RTI Act coming into force, the RTI Commission has ordered the release of information in an overwhelming 84 percent of the cases.²²⁷ This sends a positive signal to RTI users who are thus encouraged to file information requests secure in the knowledge that even if the requests are initially rejected, this will not be the final determination on the merits.

While this paper has looked at some significant appeals filed from the North and East and notes a common focus in the scope of the information asked from state authorities when compared to the rest of the country where corruption and maladministration is concerned, a concerning difference is the impact of a militarized environment on RTI users as highlighted in one appeal, *G. Dileep Amuthan v. Ministry of Defence (RTIC 70/2018 supra)*. As noted by us, it is vital that a safe and secure environment is provided for RTI users not only in the North and East but in all parts of the country. Attempts to intimidate RTI users must be met with the strongest possible resistance. Difficulties affecting ordinary citizens in marginalized and conflict-affected communities in India, Mexico and South Africa provide illustrative lessons for

225 *ibid*

226 *ibid*

227 Walter Wuthmann, 'RTI, One year on' *Daily News* (16 February 2016) <<http://www.dailynews.lk/2018/02/16/features/142984/rti-one-year>>(accessed 1 February 2019).

Sri Lanka. The RTI Commission together with ‘RTI champions’ in the public sector and civil society should work together to address these issues.

Meanwhile, cooperation from PAs, proactive engagement of citizens, and increased contributions from Non-Governmental Organisations are essential. While the burden is on the statutory appeal body under the RTI Act (viz; the Commission) to be forward- thinking and set a high standard in encouraging maximum disclosure, state agencies in particular must proactively foster the goals of accountability and transparency. Any RTI law is only as powerful as its users want it to be.²²⁸

228 ‘As pointed out earlier, the majority of such appeals have been made by ordinary citizens. They are made from rural areas and by citizens who are well aware of the Act and its Regulations. In fact, many are using the Act to get things done which would otherwise have involved going to court with all the expenses that this involves and laws delays,’ Kishali Pinto-Jayawardena, ‘Challenges for Sri Lanka’s RTI for the future’ *Colombo Telegraph* (29 September 2018) <https://www.colombotelegraph.com/index.php/challenges-for-sri-lankas-rti-for-the-future/> (accessed 1 February 2019).

**OBSERVATIONS ON
PROACTIVE DISCLOSURE**

PROACTIVE DISCLOSURE OF INFORMATION THE UNMET OBLIGATION OF OUR RIGHT TO INFORMATION

Wijayananda Jayaweera

1. Introduction

With the adoption of the 19th Amendment to the Constitution, the right to access information held by public authorities became a constitutional right for citizens of Sri Lanka. The State as a whole and all the public authorities defined in the Right to Information Act No. 12 of 2016 ('RTI Act') are considered as the duty bearers of this right. Thus, it is their legal obligation to enable the citizens, who are the legitimate holders of this right to claim it without a hindrance.

There are two ways by which the public can access information held by public authorities. The first is when citizens receive information as a response to a specific request that they have submitted to a public authority. The second is when information held is proactively published by public bodies irrespective of such requests. While the first is known as reactive disclosure, the preemptive publication of information by a Public Authority on its own is known as proactive disclosure.

Our RTI law is robust in regard to fostering reactive disclosure of information. It prescribes the exact procedures for seeking information, time frames for compliance, what information is exempted (unless justified by an overriding public interest), the adjudication mechanism to resolve disputes and penalties for non-compliance. This strong focus on reactive disclosure appears to have made most stakeholders deduce that providing information on the basis of individual requests is the general way in which citizens can claim their right to information.

2. The Indian Experience

In comparison to our law, the Indian RTI law is stronger on proactive disclosure. Our law, as it was enacted, only required the public authorities to publish the biannual RTI implementation reports and the Ministers to provide prescribed details of their intended projects of a certain value in advance to those who are affected by them. Other than that, there was nothing else in our RTI Act which could be construed as a proactive disclosure of information.

By contrast, Section 4 of the Indian law prescribes information categories every Public Authority must proactively publish. These information categories are very vital for institutional transparency. The Indian law also sets a time frame of 120 days to accomplish proactive disclosure. Having recognised the need to address the lack of robust proactive publication directives in our law, Sri Lanka's Right to Information Commission advised the Minister dealing with the subject to gazette the reinforcing Regulation No. 20 setting the minimum requirements of essential information a Public Authority must proactively publish. Upon acceptance of this advice, this regulation came into force on 03 February 2017.²²⁹ The RTI Commission innovatively used its powers under Section 15(d) of the RTI Act to direct public authorities to provide information in a particular form in order to enable the issuance of this regulation by the Minister. We shall refer to the information categories prescribed by Regulation No. 20 when we examine the need for a well-defined government strategy to foster proactive disclosure of information. However, the Indian experience shows that in spite of the legal obligation prescribed in Section 4 of their RTI Act, the proactive publication of information was still weak even after six years of implementing the RTI law. A task force for strengthening compliance with provision for proactive disclosures appointed by the government of India in 2011 'felt that the weak implementation of Section 4 of the Act is partly due to the fact that certain provisions

229 The Gazette of the Democratic Socialist Republic of Sri Lanka No. 2004/66 (3 February 2017).

of this Section have not been fully detailed and, that there is need to set up a compliance mechanism to ensure that requirements of Section 4 are fully met.²³⁰ This shows that without a common strategy and a feasible compliance mechanism to implement it most public authorities are less likely to meet their legal obligation in proactive disclosure of information, even to meet the minimum requirements prescribed in the Regulation No. 20.

3. Encouraging Public Commitment to Transparency

Essentially, proactive disclosure means the necessity for public authorities to place the information they hold out in the public realm, without waiting for citizens to obtain information in a piecemeal manner through individual requests.

Thus, the maximum possible proactive publication of information indicates the Public Authority's own commitment to accountability and transparency which are the key expected outcomes highlighted in the preamble describing the purpose of our RTI law. Before the RTI legislation took effect, public authorities had virtually no public-facing transparency mechanisms in place. However, the public confidence in institutional commitments to transparency and accountability is more likely to increase mostly with proactive publication of information rather than infrequently satisfying the reactive disclosure robustly ensured by our law.

To fulfill citizens' right to information essentially means public authorities disclosing information to the wider public and not merely to the requesters. Unlike with the Indian RTI law, Regulation No: 20 gazetted under our RTI law does not set a time frame for public authorities to comply with the proactive publication of information. Nonetheless, the listed information requirements in Regulation 20 are sufficiently comprehensive for the purposes of

230 Implementation of Recommendations of Task Force for Strengthening Compliance with Provisions for Suo Motu/Proactive Disclosures under Section 4 of the RTI Act, 2005. – Note for the Committee of Secretaries from the Cabinet dated 10th July 2012.

any Public Authority demonstrating its genuine commitment to transparency and thereby to its efficiency.

Therefore, the Government should develop and implement a strategic approach to ensure full compliance of public authorities with Regulation No. 20 to achieve satisfactory results within a reasonable period of time beginning with the state sector. Citizens and civic organisations which have been active in supporting reactive disclosure should give equal, if not more importance to the proactive disclosure of information. There are a number of very important reasons for both the government and the citizens to put more effort into making proactive disclosure the norm of the right to information.

3.1. Mutual benefits

Proactive disclosure of information enables the government to inform the citizens of various services the public authorities are providing and how to access them. It allows the government to explain concrete steps that they are taking to serve people and enables citizens to be equitably aware of those services to reap the benefits.

Proactive disclosure increases the flow of information within the government and between different public authorities. There is much useful information residing within various government ministries, departments and agencies in silos. The opportunity to publicly share all the important information kept in these silos through the organisations' websites could contribute to a better clarification of each organisation's role and of the public services they are required to render. Sharing information with the public helps the public authorities to raise their visibility and to improve public perception of their role.

Proactive information disclosure enables the different organisations and their staff to easily relate to each other and to find common grounds to increase their service efficiency. The transaction costs of government business increase when public

officials do not have an open information system by which they can easily access information not only of their organisation but also of relevant information held by others. It is often difficult for citizens to obtain a convincing picture of the mission of a Government Ministry unless each organisation coming under its purview publicly share necessary information to justify their existence and the role they play.

Elected governments are expected to be accountable for their actions as well as their spending. Voluntary disclosure of information on government expenditure signifies 'nothing to hide' attitude on the part of the government. Putting all information relating to expenditure, procurement, government contracts etc. under public scrutiny deter corruption and compel authorities to take objective decisions instead of favouring specific interest groups. Transparency in procurement generate competition and enable everyone to check what is spent, for what purpose and with what results.

Addressing each information request separately takes considerable time and cost for both the requester and the provider, whereas proactive disclosure of information reduces the time and resources spent in processing individual information requests. Citizens are less likely to spend time to file individual requests when the required information is already available in the public domain. Proactive disclosure makes information accessible to everyone as opposed to just the requester, ensuring that there is equality of access for all citizens. The ability for people to access information without making specific requests significantly reduces suspicions and increase trust in government.

Therefore, the public authorities should endeavour to publish all disclosable information so as to limit the need of the public to resort often to the RTI Act to obtain information. Instilling proactive disclosure of information among the staff as an institutional culture is a key management requirement to increase the efficiency of the public authorities.

3.2. Citizens' informed engagement in shaping policies

Proactive information dissemination entails communication among government, citizens and businesses that contribute to policymaking. Citizens' engagement in shaping public policy requires them to readily access information on laws and regulations, an explanation of current strategies and policies and information on other options under consideration. Such information could be distributed via online newsletters, forums, blogs, community networks, text messaging, email, open data or other services all integrated into the institutional website. For policy consultation to be effective, and for the stakeholders to trust the outcome, it is important to acknowledge and respond to feedback from citizens and other stakeholders.

For example, policymakers may report on the outcome of a dialogue with citizens by summarizing the positions of various stakeholders and announcing a way forward. The relevant website could include polls, surveys, chat rooms, blogs, social media, text messaging, email, open data and other interactive services to facilitate a high level of engagement. The public authorities can elicit feedback from various stakeholders to their online consultation by allowing citizens groups to submit electronic petitions on policy issues. Alternatively, citizens' groups might want to use the website to introduce their own proposals for creating or amending public policies or programmes which could be eventually taken up by elected leaders and government officials.

The task force appointed to improve proactive disclosure of information in India recommended to hold web-based public consultations wherever any legislation is proposed or amended and when major policy decisions which directly affect public at large are taken particularly to shape national policies on health, education, social welfare, natural resources, etc.²³¹

231 Implementation of Recommendations of Task Force for Strengthening Compliance with Provisions for *Suo Motu*/Proactive Disclosures under Section 4 of the RTI Act, 2005. – Note for the Committee of Secretaries from the Cabinet dated 10th July 2012.

Government information is increasingly becoming a form of infrastructure, no less important to contemporary life as education and health systems, roads, electrical grid, or water systems. Increasing the proactive publication of information and making the government information highway a real public utility is an important obligation of any democratic government which care for citizens' ability to make well-informed decisions.

3.3. Innovative reuse of information

Access to information in the public sector has been motivated largely by societal goals such as improving the transparency and accountability of the public sector. However, proactive disclosure of information has ancillary economic benefits as well. For example, the availability of public sector information for royalty-free reuse would encourage the innovative entrepreneurs to produce useful knowledge products gleaned from the public sector information.

Information and content produced or held by the public-sector bodies including statistical agencies, cultural establishments, different archives as well as any kind of information that is produced and/or collected and held by a public authority as part of its public functions are considered as public sector information. Ranging from demographic, economic and meteorological data to artworks, historical documents some of such information can be innovatively repackaged by the entrepreneurs for various educational and cultural purposes making proactively disclosed information a major source of educational and cultural knowledge for the wider population. According to the gazetted regulation No. 19, any information disclosed by a public authority under the RTI Act is subject to a royalty-free, perpetual, non-exclusive licence to reuse the information.²³²

232 The Gazette of the Democratic Socialist Republic of Sri Lanka No. 2004/66 (3 February 2017).

4. Means of Publication

A public authority can achieve proactive disclosure using a variety of means ranging from publications, gazette notifications to notice boards, to radio and television announcements, to publishing on the Internet via the public authority's website.

The Internet has provided unprecedented possibilities to increase information sharing. By the end of last year, 30% of the Sri Lankan population had access to the internet either through fixed or mobile broadband facilities. Moreover, there were 131 cellular mobile subscription per every 100 inhabitants.²³³ All pre-paid SIMs provided by the major operators in Sri Lanka are data enabled. The 4G coverage is being aggressively expanded by the providers to catch more customers. Therefore, any citizen with a data compatible mobile phone can use the Internet, even without subscribing to a specific data plan.

Most public authorities have their own websites and use them selectively to publish information relevant to their functions. But the extent to which they are being used for proactive publication as prescribed by the RTI regulations varies considerably. A survey carried out by Verité Research in December 2017 across 55 public authorities to ascertain the status of proactive disclosure of information revealed that the implementation of the online proactive disclosure is overall limited and uneven across public bodies and categories of information prescribed by the RTI regulations.²³⁴

The website is the public face of an organisation. A professional, useful, functional, up to date and disclosure friendly website reflects the organisation's desire to keep public informed. Users should be able to access most of the information listed in the organisation's website in the preferred language. The aesthetical

233 <http://www.trc.gov.lk/images/pdf/status_q2201824082018.pdf> (accessed 6 October 2018).

234 Verité Research Pvt. Ltd. (2017), *Online Proactive Disclosure under the RTI Act in Sri Lanka: A Monitoring Framework and Baseline Assessment*. Final report, World Bank, Colombo.

appeal, clarity of the organisation's mission and justification of its expression to the users through regularly updated quality content are among some of the potential reasons for users to return to the website. Ease of comprehension of web content can be improved with graphics, animations and use of multimedia such as video and audio. It is also important to make sure surfer interaction processes is appealing with the possibilities to form user groups, online chats, participate in webinars and to receive regular email updates on the subjects covered by the public authority.

Websites of public authorities could simplify the complex components with use of synopsis, summaries, and use frequently asked questions (FAQ) to explain issues to the citizens. It would be useful to devise feedback options for the users by introducing a content rating system. Public authorities can expand their outreach by live streaming the key events and automating the websites to send alerts to the journalists each time new updates are published on the websites. After all, mainstream media increasingly use institutional websites as sources of information for their news reporting.

5. Towards a Common Strategy

To fulfill a citizen's right means duty bearer takes active steps to put in place, policies, procedures, and resources to enable citizens to satisfactorily enjoy that right. It is in that sense developing an overall government strategy to improve the proactive disclosure across all public authorities becomes paramount. The key outcomes expected from enforcing the RTI Act such as openness, transparency and accountability justify a need for a well-articulated feasible government strategy to foster proactive disclosure. Sections 8 and 9 of the RTI Act and Regulation No. 20 on 'Proactive Disclosure of Information' constitute obligations the public authorities should fulfill in meeting the requirements of routing proactive disclosure. RTI Regulation No. 20 prescribes nearly 16 categories of information as minimum proactive disclosure requirements public authorities must adhere to.

Yet, how does one go about measuring proactive disclosure of information given the diversity of approaches, lack of overall guidance and varying level of online presence by different public authorities, unless all public authorities are required to adopt a common approach steered and monitored by their senior managers?

The recast of proactive disclosure requirements detailed in Regulation No. 20 into a well-structured Publication Scheme and requiring senior managers to use it as a common template could be an excellent starting point to get all public authorities to fall in line with their proactive disclosure obligations. A number of countries with a good track record in implementing the right to information have developed and implemented similar Publication Schemes to organise and explain what is being proactively published.

6. What is a Publication Scheme?

A Publication Scheme is a structured list of information that a public authority should make available for public perusal. The Publication Scheme should provide the details of:

- the categories of information the Public Authority will proactively make available, in keeping with the principle of maximum possible disclosure facilitated by the RTI Act and its regulations;
- how the information can be accessed. Is it through the website of the Public Authority, or as hard copies, other formats, or as printed publications;
- a list of material available only in hard copy including in the printed form or in other formats for examination. This list should be published on the website;
- terms on which the information will be made available, including any charges for printed material;
- any third party copyrighted material included in the Publication Scheme for which permission to reuse beyond

what is already allowed by copyright law should be sought from the copyright holder;

- the alternative formats in which information is available; and
- how to make a complaint when information included in the Publication Scheme is not available, false or has not been updated. (Regulation No. 20. gazetted under the RTI Act enables citizens to complain to the Head of the public authority if the proactively disclosed information is improper and/or false and/or has not been updated. The citizen can request the RTI Commission to intervene if the Public Authority fails to rectify it.)

The Publication Scheme should include a summary describing the documents, together with details on how to obtain access to the information whenever the disclosed information is available only in hard copy. All 'significant' information should be listed under the Publication Scheme unless there is a good reason for withholding it. There are a number of factors which can assist public authorities to determine the significance of information held by them. Among them are the following:

- information experiencing repeated demand by the requesters or where there is a good likelihood of a request for it.
- whether the information is required to be published by law. (Sections 8 and 9 of the RTI Act and its Regulation No. 20 describe the obligatory information to publish under the law);
- information relating to problems currently faced by the government which the citizens could help resolve;
- the information relating to future challenges, such as national energy requirements, food security, disaster management and events associated with climate change etc;
- whether the information will facilitate industry development, efficient markets and growth in trade and commerce;

- documents tabled in Parliament and relevant judgements interpreting laws related to the organisations' tasks;
- whether the information assists members of the public to identify what information is held by the organisation, such as an information asset register or various indexes;
- whether publication would promote public authority's accountability, such as reasons for certain decisions, governance arrangements and the achievement of key performance targets;
- statistical information and data sets that could inform the researchers, journalists and development partners about the organisation's policy, programme work and performance;
- whether the information relates to a programme or initiative that was the subject of a media release, debates of legislative bodies and local councils or highlighted in a corporate plan or strategy;
- plans that underpin the achievement of the organisation's strategic and operational goals; and
- whether the information promotes people's well-being.

What is considered significant will likely change over time as circumstances faced by the country and government priorities might change? All effort should be made to ensure that the information included is accurate, in terms of what has already been published, or what may be published on the relevant topic. The Publication Scheme should make provisions to publish the information provided in response to RTI requests which could be of interest to others.

It is particularly important for the Publication Scheme to list the organisation's key documents such as annual reports, strategic plans and budget highlights and any registers that the organisation is required to maintain by a law. For example, Section 8 of the

RTI Act requires the Public Authorities to produce and to make available copies of its biannual reports for inspection by the public. Similarly, Section 9 of the RTI Act requires the Ministers to prior disclose details of projects categorised in the Act.

All Public Authorities should make available their Publication Scheme through the organisation's website for public perusal. It is important to update Publication Schemes as well as the actual disclosure of information to include new information, for example, when:

- new or revised legislation is passed;
- new or revised policies are introduced;
- new publications are released;
- new initiatives or projects commence;
- information is updated; or
- the public authority is restructured.

Once finalised, it is important to publish the Publication Scheme on the organisation's website and in other accessible formats for public scrutiny.

At a minimum, a Publication Scheme could be structured in line with the different categories of information prescribed in Regulation No. 20 gazetted under the RTI Act. The following is a template for such a publication scheme. In this template, the information categories mentioned in the Regulation No. 20 are re-casted to give the Publication Scheme a public service-minded orientation.

7. Investing in Information Digitalisation

Our RTI law requires every Public Authority to maintain all its records duly catalogued and indexed in such form as is consistent with its operational requirements to facilitate the right of access to information.²³⁵ As a matter of routing, all Public Authorities

235 RTI Act, Section 7(1).

should move to make available all the new documents produced or commissioned by them in accessible digital formats. All such documents should have searchable metadata such as the keywords, author, publication date and the publisher etc.

Unlike ours, the Indian RTI law requires public bodies to computerise all records which can be transformed into digital formats and be made accessible all over the country through a computerised network. Section 4 of the Indian law requires to "... ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated.”²³⁶

It is more likely that much disclosable information held by our Public Authorities are in hard copies and other more perishable formats. Therefore, every Public Authority should devise its own action plan to identify and incrementally digitise important information, beginning from the most sought out documents by the public, including the archives.

Digitisation is the process of converting information from a physical format into a digital one. Section 7(3) of the RTI Act, requires all Public Authorities to preserve all their records for a period of 10-12 years. The digitalisation of documents with a proper system in place to manage them would make it easy to preserve, index and readily access information.

When planning for information digitisation, each Public Authority will have to determine how to maximise the utility of existing resources and technical facilities to accomplish it. The information digitalisation plan should address the need to provide documents in accessible and searchable formats such as Word (.doc), text- searchable Portable Document Format (.pdf) or Rich Text Format (.rtf) etc with embedded metadata tags to identify information. When choosing information for digitisation, the Public

236 Right to Information Act No. 22 of 2005 India, Section 4(a).

Authorities should aim to build on an initial base of core classes of information that meets pressing public information needs, gradually increasing the volume and scope of material released.

Many government agencies produce various types of useful data. The veracity of the data sets has to be checked before they are released to the Public domain. When releasing digitised data sets the Public Authority should:

make datasets available in open formats such as Excel, Comma-Separated Values (.csv) and Extensible Mark-up Language (.xml)

- follow metadata standards to easily identify and locate the information.
- have clear usage licenses.
- publish data as soon as possible after collection
- not compromise intellectual property rights or commercial confidentiality, and advice of data quality and length of time data will continue to be produced.

In some cases, the Public Authority may have to allocate additional resources or even to outsource the information digitisation when volumes are larger, or when the task cannot be accomplished in-house. This would mean the need for sufficient budgetary allocations to improve proactive disclosure and information digitisation. Large information digitalisation programmes would encourage entrepreneurs to establish information digitalisation businesses. Multiple benefits of proactive disclosure and their potentials to increase transparency and accountability justify investments in incremental digitisation of information held by Public Authorities.

8. Issues of Compliance

A government cannot be transparent and accountable unless its top leaders are willing to perceive proactive disclosure of information as an important pre-condition to establishing open government systems. A lack of political will to perceive as such

may be driven by a number of factors including fear of public scrutiny; fear of exposure of the failure of government programmes and policies; the threat to personal interests or increased vulnerability to political opponents. However, the alleviation of such fears depends mostly on the readiness of leaders to genuinely engage with the citizens in an open dialogue to discuss important challenges they face. Proactive sharing of information help builds the trust between the government and the citizens to engage in a constructive dialogue. It also generates a mutual understanding to face common challenges and to develop better-informed policies to address them. Open systems of government are possible only when leaders believe in public consultations and treat citizens as a source of inspiration instead of relying purely on leaders' own superiority and perceived wisdom.

Experience in working with less democratic regimes often make many bureaucrats believe non-disclosure as a good sign of their authority. Transparency and public scrutiny weaken their power and influence. Compulsory transparency training programmes designed for executive grade officers of affected entities might be helpful in changing such attitudes.

The momentum to foster a culture of transparency and accountability needs to come from both the right holders and the duty bearers. Three sets of players are important here: the government leaders and ministers; senior and middle-level public officials and the civil society. Without the total consent and active participation of all three players, the road to transparency and accountability will be merely a set of words mentioned in the preamble of our RTI Act.

It is paramount that political leaders and Public Authorities understand why proactive disclosure of information is more efficient. To that end, in formulating the overall strategy, both current publishing habits of organisations and the likely demand for information from the public must be accounted for. Compliance should be realistic from the Public Authority's viewpoint, with additional resources, if required, in place. Complying for

other reasons is more likely to lead to a superficial result where obligations are met at a bare minimum out of sheer necessity to meet the requirements prescribed by the regulation 20, rather than a genuine desire to satisfy the expected outcomes of the RTI such as transparency and accountability.

According to the RTI law, the responsibility of effective implementation of the provisions of the Act and its Regulations lies squarely with the nodal agency, the Ministry of the Minister assigned with the subject of mass media. To that end, the establishment of a transparency certification by the nodal agency as an effective compliance incentive for the government entities will be useful. At least by adhering to a common Publication Scheme, the nodal agency could award a base level of certification upon full compliance with all the proactive disclosure requirements mentioned in the RTI Act and its regulations. Such certification, for instance, could be publicly displayed on the entity's website. The nodal agency can publish a compliance rating of all entities, as established by a monitoring process, which could help to hold entities accountable to the public. Thus, the quality and quantity of proactive disclosure of information should become an important indicator of the Public Authorities' performance.

Reactive disclosure, which is about disclosing information as a response to an individual request, enables partial fulfillment of the right to information. Citizens are able to fully enjoy their right to information only when proactive disclosure of information becomes the standard norm of our right to information. It is important to keep that thought in mind as the RTI Act and the RTI Regime in Sri Lanka becomes gradually entrenched in society.

*Annex***A Model Publication Scheme**

The Publication Scheme of (name of the public authority)

We are committed to providing the citizens with greater access to information in order to fulfill our obligations towards their constitutional right to access information held by public authorities as defined by the Right to Information Act No. 12 of 2016.

Our Publication Scheme describes information that is routinely published through our website and in other formats. The information is grouped as described under the following categories as prescribed in Regulation No. 20 gazetted under the RTI Act:

1. About us (who we are and why we exist)

- Information about our organisation and its mission and vision.
- Our functions and powers.
- Our location (indicated in the google map), opening hours, contact details including of our branches.

2. Our Organisation (How are we organised)

- Our organisational structure (organigram) and the number of employees in each division/department and their grades and gender.
- Names, designations, duties and contact details of our executive grade officials.
- Remunerations, emoluments and allowances of our executive grade officials.
- Our ancillary organisations, their functions and links to their websites.

3. Our operations and decision-making process (The way we decide and work)

- Rules, regulations, instructions and manuals and other documents which are used by our officers and employees in the discharge of their functions, duties and exercise of power.
- Our strategic plan.
- Our decisions and formal acts which directly affect the public.
- Data and documents, we used as the basis for each such decision.
- Our decision-making processes, the internal criteria we use for judgement; the procedures we administer.
- Reports on our completed/ongoing projects.
- Whom do we consult, the mechanisms for our consultations?

4. Our Public Services (What services do we offer)

- A description of the services we offer to the public, including related advice, guidance, manuals, forms, fee structures, deadlines, booklets, leaflets, and media releases.
- How to access our public services.

5. Our Policies and legislation (Policies and legislations guiding us)

- Our current written policies and protocols we administer for delivering our functions and responsibilities.
- Information relating to our strategic and performance requirements, including plans, assessments, inspections, and reviews.
- The facts and other documents and data being used as a basis for formulating our policies and priorities.

- Key legislative enactments we are bound by.
- Regulations and circulars, we must follow.
- Reports submitted by us to the Parliament.
- Relevant judgements related to our functions handed down by courts of law.

6. Our Public Consultations (How the public can engage with us)

- Our meetings which are open to the public and how to attend them.
- Live to a stream of our important meetings.
- Our online discussion forums.
- Our presence on social media platforms.
- Our complaint mechanisms.

7. Our Public Procurement and Subsidies (How we procure and the subsidies we provide)

- Information on subsidies we provide/manage; objective, amounts and implementation targets relating to subsidies.
- Information on the beneficiaries of our subsidies.
- Our purchasing procedures, which sets out how our officers will buy goods and services.
- Public procurement information and detailed information on our tendering process.
- Copies of our contracts.
- Reports on completed contracts.
- Details of our ongoing contracts including:
 - i. description of the items/works for which bids were invited;

- ii. total number of bids received;
- iii. name of the successful bidder/s;
- iv. the amount at which the contract/s were awarded;
- v. targeted date of completion;
- vi. and in the case of a contract awarded to a foreign principal the details of the local agent
- Our budgets, expenditure and finances (what we spend and how we spend) \
- Our projected itemised budget for the current year.
- Our itemised disbursements in the previous year.
- Reports on audits carried out by Auditor General/ designated auditors, by the year of audit.

vii. The information we hold (information held by us and how to access them)

- Information held and maintained by us as required by the law.
- Our Information index: the index of documents, reports, lists, registers, and databases held or produced by us with relevant hyperlinks if accessible from our website.
- Our product samples and how to obtain them.
- Our printed publications: titles, year of publication, whether they are free of charge or for sale and available online to download.
- Contact details of our Information Officer and model application forms for RTI requests and appeals.
- The Fee Schedule for obtaining information as determined by the Right to Information Commission.

- The designated officer and contact details if you have a complaint concerning your RTI request.
- Our Ministers report published as per Section 8 of the RTI Act.
- Annual reports submitted by us to the Right to Information Commission in accordance with Section 10 of the RTI Act.

viii. Our reactive disclosures (Information we provided following RTI requests)

- The list of information we have already supplied as responses to RTI Act and are likely to be interesting to others.
- Hyperlinks are embedded in the list if they are available and accessible through the website.

ix. Our foreign-funded projects above USD 100,000 and locally funded above Rs. 500,000 (the projects we intend to implement)

- Notification of project commencement.
- Pre-feasibility and feasibility studies of projects.
- Terms and conditions of investment (including expected costs, benefits and rate of return).
- Detailed project costs, including disaggregated budgets.
- Project timeline.
- Arrangements to visit project sites through a formal RTI request, if applicable.

Terms of access and reuse of information

Unless stated otherwise, all digitalised information in our Publication Scheme is available free of charge on our website and

can be reused. All information disclosed under our Publication Scheme, barring third-party copyrighted information, is subject to a royalty-free, perpetual, non-exclusive licence to reuse the information. Reuse of our information includes copying, publishing, translating, adapting, distributing or otherwise using in any medium, mode or format for any lawful purpose.

Where possible, the information is directly linked and available for you to download. If you are having difficulties in accessing any of these documents, please contact us so that we can assist you by providing the information in an alternative format.

Complaints about the publication scheme

You have the right to complain if information identified in our Publication Scheme is not available, improper/false or outdated.

Please do address such complaints to the Head of our organisation with a copy to our information officer. You can request the Right to Information Commission to intervene if we fail to respond to your complaint or to rectify the deficiencies you pointed out.

The contact details you provide when complaining will be used purely for the purpose of investigating and addressing your complaint and may be referred to relevant organisational units or regions for action and response.

We value your comments and any feedback you provide will be used to make improvements to our Publication Scheme. You can contact us at any time to provide feedback.

Last updated (indicate the date)

Once such a Publication Scheme is in place, a steering committee led by senior managers of the organisation could oversee its implementation and make periodic revisions. This committee should have the ability to ensure that effective structures, supports and resources are in place to facilitate the implementation of the

publication scheme. Initially, the committee can assess and take stock of the current status of proactive disclosure of information. Identifying information and the form in which they should be made available to the public could be guided by this steering committee with due regards to exceptions defined in Section 5 of the RTI Act.

Based on respective publication schemes the Ministries could collect data to assess the levels of proactive disclosure of public authorities coming under its purview. This would enable the Ministries to identify which organisations have been successful in rolling out proactive disclosure Publication Schemes, which are facing problems, and consequently to identify the underlying reasons behind lack of compliance and how to overcome them.

COMPARATIVE
PERSPECTIVES ON RTI

SRI LANKA'S LEGAL REGIME FOR THE RIGHT TO INFORMATION IN COMPARATIVE PERSPECTIVE

Toby Mendel

1. Introduction

Sri Lanka's Right to Information Act, No. 12 of 2016, ("RTI Act") was certified on 4 August 2016 and came into effect in the country six months later, on 4 February 2017.²³⁷ At the outset, i.e. even before the RTI regulations and Rules of the RTI Commission were adopted, the RTI Act scored 121 points on the RTI Rating, the respected global methodology for assessing the strength of right to information (RTI) laws,²³⁸ occupying ninth position globally from among all RTI laws on the Rating at that time. With the adoption of Regulations and Rules in February 2017,²³⁹ it jumped to a very strong 131 points, ranking third globally, and first in South Asia and indeed all of Asia.²⁴⁰

This was a remarkable achievement for Sri Lanka, which was one of the last countries in South Asia to adopt an RTI law,²⁴¹ and which had struggled to adopt the law over a period of decades. The government of Ranil Wickremesinghe, which ruled Sri Lanka from December 2001 to April 2004, had been working on a draft RTI law but the government fell before the law was adopted and

237 The Official Gazette version of the Act in English is available at: http://www.news.lk/images/pdf/RTI-Act-Sri-Lanka_E.pdf.

238 'The RTI Rating' <<https://www.rti-rating.org/>>.

239 First Part of the Regulations and the Right to Information Rules of 2017 (Fees and Appeal Procedure), adopted 3 February 2017. Available at: https://www.rti.gov.lk/images/resources/2004-66_E_feb.pdf.

240 It has since fallen to fourth place globally and second in Asia with the adoption of a super-strong new RTI law in Afghanistan in May 2018. See <https://www.rti-rating.org/country-data/>.

241 When the Sri Lankan RTI law was adopted, every country in South Asia except Bhutan had already adopted such a law, and Bhutan remains the only country without such a law today.

subsequent governments showed little interest in the issue until President Maithripala Sirisena was elected in January 2015 and Ranil Wickremesinghe was again appointed as Prime Minister. Constitutional guarantees for this right were adopted in short order in April 2015 and the Act followed about a year later in August 2016.

Early indications suggest that implementation of the RTI Act has also been strong in various ways, although it remains too early to really assess this. Requests for information appear to be coming from all over the country and from ordinary citizens as well as from elites. The subject matter of requests also appears to be very varied, with many focusing on public interest issues, alongside those which are more personal in nature. Finally, a large number of appeals have been lodged with the Right to Information Commission (RTIC), the independent administrative oversight body for the Act.²⁴²

This paper focuses on the legal framework for RTI in Sri Lanka and, in particular, the strengths and weaknesses of the RTI Act. The first section looks at the overall strengths of the Act itself, while the second section assesses the ways the Regulations and Rules improved the Act. Both of these sections rely heavily on the RTI Rating as a source. The third section focuses on some of the more innovative features of the legal regime for RTI in Sri Lanka, namely approaches which not only score points on the RTI Rating but introduce new or specifically effective ways of addressing an issue. Finally, the fourth section looks at some of the ways in which the legal framework for RTI could still be further improved in Sri Lanka.

242 Much of the information in this paragraph comes from a speech made by Mahinda Gammampila, Chairman, RTI Commission of Sri Lanka, on 28 September 2018 at the conference, 20 Anniversary 1998-2018: The Colombo Declaration on Media Freedom and Social Responsibility.

2. The Strengths of Sri Lanka's RTI Act

Perhaps the best way to show the strengths of the RTI Act is to present its scores on the RTI Rating disaggregated into the seven main categories into which the 61 separate Indicators of the Rating are divided (see Table 1). This shows that the best scoring category was Scope, based mainly on the breadth of information and public authorities covered by the Act. This is followed closely by Promotional Measures, a collection of various features which support effective implementation of an RTI law, and Appeals, based largely on the independence and powers of the administrative oversight body for the Act, the RTIC. Right of Access comes next, reflecting the constitutional guarantee of the right and the clear statement of the right in the law.

Table 1: RTI Rating Scores of the RTI Act on its Own

Section	Max Points	Score	Percentage	Position
1. Right of Access	6	5	83	15 th
2. Scope	30	27	90	44 th
3. Requesting Procedures	30	22	73	16 th
4. Exceptions and Refusals	30	23	77	14 th
5. Appeals	30	26	87	10 th
6. Sanctions and Protections	8	4	50	32 th
7. Promotional Measures	16	14	88	12 th
Total score	150	121	81	9th

However, the picture changes somewhat when viewed from a more comparative lens, i.e. when looked at from the perspective of the position of Sri Lanka's scores relative to other countries. This is somehow a more objective assessment because if countries generally do well in one or another category, Sri Lanka should also expect to do well in it. The most dramatic change here is that Scope, formerly the best performing category, drops to the very bottom, at 44th position globally. This reflects the generally high scores that countries achieve in this category. Appeals, formerly in third place, goes to the top, at 10th position globally, while Exceptions and Refusals also jump two places.

Looking more closely at the strengths of the RTI Act, it has a very broad scope, covering all public authorities with no specific exclusions. This is unlike many of the laws in the region, such as the Indian law, which excludes a number of intelligence bodies. It also covers State owned enterprises and private bodies which undertake public functions or operate with public funding.

The Act does superlatively well in terms of the procedures for lodging requests, earning full points on the indicators here. The procedures for responding to requests, the other part of the Requesting Procedures category, has some important gaps, but several of these are due to the fact that the Act allocates the power to the Commission to set rules in this area. Thus the score for this category increased substantially after Regulations and Rules were adopted in February 2017.

In terms of Exceptions and Refusals, one of the key strengths is the fact that the Act overrides other legislation to the extent of any inconsistency, an indicator where only 26 other countries from among the 123 currently on the RTI Rating also get full points. Other strengths are the strong public interest override, so that even otherwise exempt information shall be disclosed where this serves the wider public interest, good rules on consulting with third parties, a rule on severability and strong notice requirements when public authorities refuse requests.

In the category of Appeals, the Act gets full points on the indicators relating to the independence of the RTIC, which is a key feature underpinning the success of RTI oversight bodies, and the RTIC also has strong powers. Other positive features here are a three-tier system of appeals – starting with an internal appeal, then an appeal before the RTIC and finally an appeal to the courts – and very broad grounds for lodging an appeal. Importantly, the burden of proof in an appeal lies on a Public Authority to show that it acted in accordance with the Act.

Sanctions and Protections is the weakest category by percentage for the Sri Lankan Act. However, it provides for both disciplinary proceedings and criminal offences for a broad range of actions which obstruct access to information. It also provides broad protection for good faith actions by officials to implement the Act, which is very important because it gives those officials the confidence to disclose information knowing that they do not face any risk of retaliatory measures.

Finally, the Act includes a number of important Promotional Measures. All Public Authorities are required to appoint Information officers while the RTIC has a role in training them. Both the Commission and ministers are given broad public education roles in relation to the Act and the Commission also provides leadership in terms of setting minimum records management standards which all public authorities are required to respect. The Act also requires both individual public authorities and the RTIC to prepare annual reports on what they have done to implement the Act.

3. Ways the Regulations and Rules Further Improved the RTI Regime

With the adoption of Regulations and Rules in February 2017, the score of the Sri Lankan RTI system jumped ten full points, to 131 points. The new breakdown of the score by category is shown

in Table 2. In three categories – Right of Access, Exceptions and Refusals and Sanctions and Protections – there was no change. This was not unexpected. These are inherently legal areas which it is very difficult to change through subordinate legislation. For example, if an exception protects an interest that is not recognised as legitimate under international law or fails to condition protection on the interest being exposed to a risk of harm, Regulations and Rules cannot change them. In the same way, if the law fails to provide protection to whistleblowers, Regulations and Rules also cannot change that.

Similarly, the fact that Requesting Procedures increased the most, by four points or 14%, is not unexpected. The Act explicitly left several issues here to be addressed by subordinate legislation and, in any case, procedures are normally more amenable to being addressed in this way than substantive issues. It is also not surprising that Appeals experienced the second largest increase in terms of points, namely of three points. This is something that lies particularly within the ambit of the RTIC, in part due to legislative design and in part simply inherently.

Table 2: *RTI Rating Scores of the RTI Act After the Adoption of Regulations and Rules*

Section	Max Points	Score	Percentage	Change (%)	Position
1. Right of Access	6	5	83	0	15 th
2. Scope	30	28	93	3	32 nd
3. Requesting Procedures	30	26	87	14	3 rd
4. Exceptions & Refusals	30	23	77	0	14 th
5. Appeals	30	29	97	10	1 st
6. Sanctions & Protections	8	4	50	0	32 nd
7. Promotional Measures	16	16	100	12	1 st
Total score	150	131	87	6	4th

Looking at this from a comparative lens, once again, and for the same reasons, the high score on Scope did not translate into a similarly strong position among countries, with a 93% score (third highest) leaving Sri Lanka just in 32nd position (ranking in a tie for last, with Sanctions and Protections, from among the different categories). Promotional Measures and Appeals were top in terms of percentage and also in terms of position (necessarily in the case of Promotional Measures, since a perfect score automatically generated a first place position). Otherwise, for most categories there was rough parity between the rank in terms of both percentage and comparative position. Of note is the fact that Exceptions and Refusals ranks sixth in terms of percentage but jumps to fourth in terms of comparative position.

From among the ten-point gain, six were based on Regulations and four on Rules. The former included both clarifications – such as that requesters have a right to access both information and specific documents and that public authorities need to transfer requests when they do not hold the information – and extensions on the obligations of public authorities – such as to publish lists of all of the documents they hold and to provide training to their staff. One more significant one, Regulation No. 19, provided for the free reuse of information disclosed under the Act.

Two of the points associated with Rules were about fees, namely clarifying that it is free to file both requests and appeals before the RTIC. Rule 27 is again more significant, making it clear that the RTIC can order public authorities to undertake structural measures such as improving their records management or training their staff – to improve their performance in terms of implementation. One might wonder whether it was entirely appropriate to make such a significant change through a ‘mere’ rule.

4. Some of the Key Innovations in Sri Lanka’s Legal Regime for RTI

Looking beyond the core features assessed by the RTI Rating Indicators, Sri Lanka’s legal regime for RTI contains a number of innovative features which are either not found in other laws or

are found only very rarely. One of the key features of the regime, overall, is the very strong role accorded to the RTIC which is, in addition, a robustly independent body, as noted above.

In a general way, Section 14 of the Act grants the RTIC a very broad mandate to conduct a range of activities in addition to hearing appeals. In addition to this broad positive mandate to undertake activities, the RTIC is also allocated a number of specific tasks and regulatory powers, including the following:

- Information officers may specifically seek advice from the RTIC regarding the application of exceptions, which advice shall be provided within 14 days (Section 5(5) of the Act).
- The RTIC may set rules regarding records management standards, which public authorities must comply with (Section 7(2) of the Act).
- The RTIC may determine the “form” for the proactive disclosure of information (Section 8(1) of the Act).
- The RTIC may set rules for the publication, to affected persons, of information relating to projects (Section 9(1)(b) of the Act).
- The RTIC is given broad powers to set fees for access to information (Section 14(c)-(e) of the Act) and to direct public authorities to reimburse fees where information has not been provided in time (Section 15(g) of the Act and Rule 12). Fees are also waived whenever a requester is successful in an appeal (Rule 11).
- The RTIC can refer disciplinary matters to the appropriate authorities and those authorities must, in turn, notify the RTIC of any action taken (Section 38 of the Act).
- Prosecutions for criminal offences under the Act must be “instituted” by the RTIC (Section 39(4) of the Act).

- Individuals who find that authorities have not met their proactive publication obligations may make complaints about that to the head of the authority and then to the RTIC, potentially resolving a common problem with RTI laws, namely the lack of enforcement for proactive publication obligations (Regulation 20(4)).

Together, this is a very impressive package of responsibilities and powers which places the Sri Lankan Commission among the most powerful in the world. As noted generally above, an independent oversight body is one of the key contributing factors to the success of an RTI law. Sri Lanka has gone above and beyond in this respect.

Sri Lanka also provides for an eminently practical system for handling appeals before the RTIC. According to Rule 18(1), the RTIC may dismiss an appeal summarily, after giving the parties a chance to show cause as to why this should not be done. Otherwise, Rule 18(3) provides for appeals to be processed in “Documentary Proceedings” or via an “In-person hearing”, at the discretion of the RTIC, while Rules 19 and 20 set out the separate procedures for each type of proceeding. This is a departure from common practice, which is normally to deal with appeals via one or the other type of proceeding. The Sri Lankan approach makes sense. While the vast majority of appeals can be dealt with through the leaner documentary process, some require in-person hearings and oversight bodies should be able to choose which route they wish to take.

The regime also includes a number of other strong institutional provisions. According to Section 2, the relevant minister has the responsibility to “ensure the effective implementation” of the Act. While rather general in nature, it is still useful to assign such responsibility as a way of supporting strong implementation of the right to information. When it comes to proactive disclosure, pursuant to Section 8(1) clear responsibility for ensuring that the rules are met is laid at the feet not just of the head of each public

authority but of the minister who is responsible for all public authorities falling under his or her responsibility. This creates a more centralised and high- powered locus of responsibility which will presumably be easier to enforce.

As is the case in many countries, public authorities are required to appoint Information Officers (Section 23(1)(a)) and, where this has not been done, the head of the authority is deemed to fill this position (Section 23(1)(b)). Information Officers are given an extremely broad set of responsibilities, not only to deal with requests but generally to ensure proper implementation of the Act (Regulation 21(2)). Beyond that, authorities must formally (in writing) appoint Information Officers, and they must be allocated the “appropriate time and other forms of support” as they may need to fulfill their responsibilities and be given the necessary training to do so (Regulation 21(2), (5) and (6)). These are all better practice approaches but Sri Lanka is among the only few countries to have formalised them in this way. Other officers are required to assist the information officer where the latter requests such assistance (Section 23(3)). While this is not uncommon, in an interesting innovation the Act also makes it a criminal offence for other officers to fail to provide such assistance (Section 39(2)).

Public authorities are also required to appoint “Designated Officers,” individuals with dedicated responsibility for hearing internal appeals. This should help to formalise the internal appeal process, ensuring that it is accessible and also represents a proper level of appeal (i.e. by ensuring that the appeal goes to a more senior individual within the authority rather than back to the Information officer, as happens all too often). The responsible minister is also required to compile a central registry of all Information Officers and Designated Officers (Regulation 18).

The system incorporates some interesting approaches towards scope. Any enterprise which has 25% or more ownership by public authorities is itself deemed to be a Public Authority (in

addition to any enterprise which is controlled by public authorities). This should help give clarity to the scope of the law in this area. According to Regulation 4(7), information includes content that may, with reasonable effort, be compiled from records held by public authorities. While authorities in many countries often do undertake such efforts to compile information, formalising it as a responsibility in this way is a further step. Regulation 19 also includes a basic rule on reuse of information. While this is useful, it needs to be developed in order to become effective operationally.

Beyond these institutional measures, the system incorporates a number of practical approaches that facilitate the flow of information to the public. Some of the more innovative or unique measures here include the following:

- According to Section 5(2), some of the exceptions cease to apply after only ten years, a much shorter period than is provided for in most laws.
- In addition to the general proactive rules, authorities are required to disclose a wide range of information about higher value projects both to the public in general and also specifically to affected persons (Section 9).
- Section 24(4) provides expressly for “immediate responses” to requests. While many laws require requests to be answered “as soon as possible”, the inclusion of a specific regime for immediate responses is an interesting innovation.
- According to Section 26(1), authorities are required to display, both on their websites and in a conspicuous place at their offices, not only information about the contact details of the Information Officer (which is common) but also information about fees relating to requests.
- Where information cannot be provided in the format preferred by the requester, the information officer is required to consult with the requester to agree on an appropriate format (as opposed to the approach in most laws which simply allows

the Information Officer to provide the information in another format) (Section 27(2)). This is supported by Rule 8 which, in the context of larger requests, requires the Information Officer to inform the requester about different format options and the fees associated with them, thereby helping the requester make an informed choice about this.

5. Areas for Further Improvement

Although the legal regime relating to the right to information in Sri Lanka is admirably strong, there are still ways in which it could be further improved. Article 14A(1) of the Constitution guarantees the right to information in the following terms:

‘Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen’s right ...’

While it is important to have a constitutional guarantee for this right, there are clear weaknesses with this particular formulation. Specifically, it could be understood both as creating a right to access “any information” or only information which is “required for the exercise or protection of a citizen’s right,” which would be significantly more limited protection.

The RTI Act appropriately overrides other laws, to the extent of any conflict (Section 4). However, as with all such provisions, this only applies in a backward-looking fashion. In other words, it only overrides laws passed before the RTI Act, since parliament is clearly free, in future, to pass other laws which in turn override the RTI Act, subject to the Constitution. This has already happened in Sri Lanka, specifically in the case of the National Audit Bill,²⁴³ clause 9(1) of which ousted the RTI Act in relation to information received by members of the Audit Service Commission in relation to their duties under the Act.

In a constitutional challenge to the Bill, the Supreme Court decided that the Bill did not contravene Article 14A(1) of the Constitution,²⁴⁴ despite the blanket nature of the ouster and the lack of any attempt by the drafters to narrow the scope of the ouster to information that might in fact be sensitive. The Bill has now come into force as a law, with this provision retained.²⁴⁵ It remains to be seen how this will develop in future but the risk it may cause to the right to information seems clear.

The preamble to the RTI Act refers to a number of the benefits which flow from it – including accountability, participation, combating corruption and good governance – which is helpful. However, it would be preferable if the Act contained a specific instruction to those tasked with interpreting it to do so in the manner which best gave effect to those benefits.

Similar to all of the laws in South Asia, the Sri Lankan RTI Act limits the right to make requests for information to citizens. While it is perhaps understandable that Sri Lanka would follow an established regional practice, at the same time this is unfortunate. The issue has already come up in cases before the RTIC, thereby demonstrating how such a rule is unfortunate even in the context of requests by actual citizens.²⁴⁶ However, it is also unfortunate to exclude non-citizens from the right to make requests. The vast majority of such requests will fall into one of two categories: business people with an interest in investing in Sri Lanka; and researchers of one sort or another doing research on Sri Lanka. In both cases, there is a clear national public interest in facilitating access to the information.

One of the peculiarities of the Sri Lankan Act is that after giving public authorities 14 days to respond to requests, it then grants

244 *Transparency International Sri Lanka and others v. Attorney General*, SD 14/2-18

245 National Audit Act No. 19 of 2018.

246 See *TISL v. the Prime Minister's Officer/Presidential Secretariat* RTIC Appeal 5/2017 & 6/2017.

them another 14 days to provide the information (Section 25(2)). This is completely unnecessary. The authority will presumably already have compiled the information to make the original (14 day) determination, and the information should then be provided forthwith, as is the case under many RTI laws. In addition, while 14 days is a relatively tight initial time limit, full points on the RTI Rating are only awarded for a limit of ten days or less. 51 of the 123 countries currently on the RTI Rating get full points on this indicator, suggesting it is not an excessively short time limit.

Overall, the system for fees in Sri Lanka is very user-friendly and the fees are appropriately modest. One minor shortcoming is that RTI Commission Rule 6(1) only provides for four pages to be provided free of charge, whereas a better practice is to provide for a larger number of pages, say ten or twenty, for free. It would also be a better practice to provide for fee waivers for impecunious requesters, something that is yet to be done in Sri Lanka.

The Sri Lankan Act loses a number of points on the substance of the exceptions. Three – namely those in favour of communications between professionals, the privileges of Parliament and trade agreements – are not considered to be legitimate to the extent that these include content which is considered sensitive, it is already covered by other exceptions, such as privacy and relations with other States. Another three – namely third party information, contempt of court and cabinet memos – are not harm tested (i.e. their engagement is not conditioned on the disclosure of the information posing a risk of harm to a legitimate interest). While the overall time limit of ten years set out in Section 5(2) is admirably short, unfortunately it only applies to a few exceptions. A better practice in this area is to apply overall time limits to all of the exceptions which protect public interests.

As noted above, the RTIC has both a very broad mandate and wide powers to exercise that mandate. It does, however, lack one power, namely the power to conduct inspections of public

authorities. This can be an important power, even if it is not often used, for example where public authorities claim not to hold information but the Commission does not believe that claim.

While the RTI Act provides for a strong system of both disciplinary and criminal penalties for individuals who obstruct access to information, it fails to provide for any sanctions to be imposed on public authorities as such, even where they are systematically failing to implement the Act properly. In practice, where information is not being provided, it is as often the fault of the authority as a whole as the fault of one individual. To address this, it is important to allow for the possibility of sanctions being imposed on the authority as a whole.

Similarly, while the RTI Act provides for protection for those who disclose information pursuant to its terms, it does not provide for protection for those who disclose information about wrongdoing, often referred to as whistleblowers. In many countries, such protection is provided for in a separate, dedicated law.

6. Conclusion

Although the last section of this paper focused on the need to further improve the legal regime of the right to information in Sri Lanka, this should not detract from the point stressed in the first three sections, namely that, overall, the legal framework for the right to information in Sri Lanka is among the best in the world. Not only does it rank very highly on the respected RTI Rating, but it also includes a large number of innovative features that both respond to the particular needs and context in Sri Lanka, and represent global innovations in terms of legal protection for the right to information.

The early signs suggest that Sri Lanka is also doing well in terms of implementing the RTI Act, albeit with some strengths and

weaknesses. This is very important because, while something of a relative honeymoon atmosphere can be expected in the early days of implementing an RTI law, that is bound to change over time. The more progress Sri Lanka can make in terms of institutionalising good practices on RTI during the honeymoon period, the better placed it will be to weather the backsliding which will almost inevitably come.

RTI REGIME IN SOUTH AFRICA; POINTS OF COMPARATIVE INTEREST

Richard Calland

1. Introduction: A Contested Space

South Africa's right to information journey has been a rollercoaster ride of peaks and troughs, reflecting the fact that transparency is an inevitably politically-contested space. Context is important. Hence, it must be recognized that South Africa went through a carefully navigated political transition from apartheid to constitutional democracy barely twenty-five years ago. Second, South Africa's period of democratic consolidation has encountered severe challenges to the constitutional order that emerged from the negotiated settlement of the mid-1990s; principally in the form the project of 'state capture' that was enabled by Jacob Zuma's leadership as president from 2009 until he was deposed by reformist Cyril Ramaphosa in February 2018.

Presenting a story of contradictions, South Africa's RTI has been a beneficiary of some elements of this process but also at times has suffered collateral damage. As the dust settles on the end of the Zuma era, it is reasonable to conclude that like the Constitution itself, South Africa's RTI has been stress-tested and has emerged intact, a vital cog in the wheel of the country's new democratic order. In a recent paper for a comparative law journal, I commented: "Enshrined in its much-admired Constitution, the right of access to information (ATI) is "proving to be a valuable tool to enable key users of the enabling legislation, the Promotion of Access to Information Act 2000 (PAIA), such as investigative journalists or opposition political parties to challenge those in power. The evidence of some of the most prominent sets of users of access to information law in South Africa suggests that while this may present itself as the task of Sisyphus, the results can be politically

as well as legally significant, thereby justifying the investment in time and resources.²⁴⁷

This paper explores some of the main features of South Africa's RTI journey, under the simple framework of: scope; implementation; and enforcement.

2. Legal Scope

South Africa's RTI law – PAIA – emerged as a part of the constitutional face-lift the country enjoyed as a product of its transition to democracy in 1994. During the constitutional negotiations it was acknowledged that secrecy had been a weapon in the hands of the country's authoritarian rulers during the apartheid era. Hence, openness and transparency were to be watchwords for the new democratic dispensation and find expression in the opening clause of the final Constitution: Section one speaks of a country based on a number of values including "...Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, **to ensure accountability, responsiveness and openness**" (my emphasis). Section 32 of the final 1996 Constitution establishes the right to access to information, thus:

'(1) Everyone has the right of access to— (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

247 Richard Calland, 'Access to Information and Constitutional Accountability: Ruffling Feathers in South Africa' in *Special Edition: The Right to Information in VRÜ Verfassung und Recht in Übersee* (Law and Politics in Africa, Asia and Latin America 2017) 367 – 389.

Pursuant to Section 32(2), PAIA was passed in early 2000, on the brink of the three year deadline for doing so that the schedule to the Constitution required, after a long and rather tortuous process of parliamentary drafting.²⁴⁸ I was a member of a civil society-based campaign group – the Open Democracy Campaign Group – that formed in order to lobby parliament. That the campaign group comprised representatives of the main trade union federation (COSATU) as well as the significant church groups, as well human rights organisations such as IDASA, reveals how important the issue of transparency was regarded. It also ensured that PAIA had legitimacy: it had been a careful and democratic process of law- making with ample opportunity for public engagement, consultation and comment.

So what emerged, legally, was a strong, if in some respects arguably unnecessarily convoluted piece of legislation. But, it should be remembered that this was the mid-to-late 1990s and so South Africa's law was passed during what one might call the second phase of global transparency law development: the first, up until 1990, involved just a handful of 'usual suspect' countries, such as Sweden, the United States of America and Australia; the second, involved significant members of Huntington's third wave of democratization, no doubt encouraged in some cases by the Washington Consensus enthusiasm for public transparency as a key element in state structural reform; the last, on-going phase, from 2000, as seen an exponential growth in RTI laws around the world, bringing the total to around 100 countries.²⁴⁹ One study from 2003 noted that "[l]ike South Africa's Constitution, PAIA has been widely lauded both at home and abroad. It is, by international legislative standards, a fairly radical law, or as one archivist called

248 The drafting history of the Open Democracy Bill can be found in Justine White, 'Open Democracy: Has the Window of Opportunity Closed?' [1998] *South African Journal on Human Rights* 14.

249 Indeed, at least one study puts the number at 123: See 'The RTI Rating' at <https://www.rti-rating.org/> (accessed 22 November 2018).

it, ‘the golden standard’ (Harris, 2003b).”²⁵⁰ Most enterprising, was the extension of the scope of the right to privately- held information. Recognising what some RTI academics, such as Alasdair Roberts, call the modern ‘structural pluralism’ of the state,²⁵¹ whereby boundaries between public and private power, authority and functions, are blurred, South Africa’s legislators, as well as the civil society campaign group, took the unprecedented (at the time) step of extending the scope of the constitutional right and, thereby, the national legislation to cover privately-held information.

The one major flaw in PAIA, which soon became apparent, was the lack of an inexpensive, speedy and specialist enforcement body – an issue to which this paper returns later. Requesters of information who were denied access, have faced a difficult choice: to abandon the matter or to launch proceedings in the high court – a slow, expensive and non-specialist option.

3. Implementation

On the implementation front, South Africa’s is a very mixed story of extremes. As I have set out in greater detail elsewhere,²⁵² PAIA and its under-pinning constitutional right, has enabled a range of significant social stakeholders – investigative journalists, opposition political parties and independent human rights organisations – to “ruffle the feathers” of those in power and thereby help instill a new culture of justification – as leading South African human rights lawyer, Etienne Mureinik, liked to describe it during the constitutional negotiations phase of the early 1990s. Very significant victories have been won as a result of RTI law - it has proved to be a significant companion in attempts to hold South Africa’s scandal-ridden former President, Jacob Zuma, to account.

250 Dale McKinley, *The State of Access to Information in South Africa*, Paper prepared for <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.560.1016&rep=rep1&type=pdf> (accessed 22 November 2018).

251 Alasdair S. Roberts, ‘Structural Pluralism and the Right to Information’ [2001] Vol 51, No 3 University of Toronto Law Journal 243< <https://ssrn.com/abstract=1305423>> pp. 243-271.

252 Calland 2017, *ibid*.

South Africa's Public Protector (Ombud) had investigated possible public unlawful expenditure of R260 million (US\$20 million) that had been spent on 'security upgrades' to Zuma's private residence, Nkandla. Pursuant to her constitutional powers, the Public Protector decided that the "remedial action" that she required Zuma to take was to pay back a reasonable proportion of the money that had unlawfully benefitted Zuma and his family.²⁵³

For more than two years Zuma refused to do so, while Zuma loyalists in and outside parliament sought to intimidate the Public Protector and to obfuscate the issues. But on 31 March 2016, Zuma's conduct in refusing to accept the Public Protector's report and to pay back the money was found by the country's Constitutional Court to be a violation of Zuma's constitutional duty to "uphold, defend and respect the Constitution."²⁵⁴ He was ordered to repay around R8m (US\$600,000) to the public exchequer. The Constitutional Court's seminal judgment was preceded by use of South Africa's access to information law. The Nkandla scandal was originally exposed by the Mail and Guardian newspaper (M & G) on 4 December 2009.²⁵⁵ The newspaper had used South Africa's access to information law to get access to documents that enabled its team of investigative journalists to build the case and the story.

It has also proved to be an important companion to South Africa's experiment in socio-economic rights. As a number of cases have demonstrated, claiming a socio-economic right such as the right to access adequate housing is rendered harder without RTI, helping to justify the idea that RTI can best be seen as a 'leverage

253 Section 182(1)(c) of the South African Constitution provides the Public Protector with the power to "take remedial action" – a power that the Constitutional Court has confirmed is binding unless subjected to judicial review: *Economic Freedom Fighters v. Speaker of the National Assembly and Others*; *Democratic Alliance v. Speaker of the National Assembly and Others* [2016] ZACC 11.

254 *ibid.*

255 Zuma's R65m Nkandla splurge' Mail and Guardian <<http://mg.co.za/article/2009-12-04-zumas-r65m-nkandla-splurge>> (accessed on 30 April 2016)

right,’ instrumentally useful in the claiming of other rights.²⁵⁶ In this context, the experience of MKSS in Rajasthan was very influential. MKSS had not only led the impressive campaign in Rajasthan to get RTI law passed in the Indian state, but had developed a social auditory technique for using the law by linking it tightly to public service delivery and to development projects that mattered greatly to ordinary communities.²⁵⁷ One of South Africa’s leading civil society lawyers, Alison Tilley, has noted that:

*‘MKSS was very important – knowing about that work and realizing how that kind of approach could directly change people’s material conditions. It was a powerful argument, but it was also partly tactical, because of the concerns about ATI being a hindrance – that it would open flood gates and create logjam that would ‘get in the way’ of government’s delivery of services” - so, we needed to have a counter- argument to show how it could support the government’s 1990s reconstruction and development program, and economic transformation. At least three different stakeholders were interested in this from the word go: Black Sash – which does work in advice offices, on social security; they really needed it as for ‘instrumental’ purposes to help improve public administration of welfare payments; COSATU, who, as a trade union federation, were looking at the employment context, and how difficult it is to negotiate with powerful employers; and, lastly, the environmental justice sector was very clear about how it would help them, again as a companion to asserting the right to just administrative action as well as the right to a clean environment.’*²⁵⁸

256 Saras Jagwanth, ‘The Right to Information as a Leverage Right’ in Richard Calland & Alison Tilley (eds) *The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice* (Cape Town 2002) pp. 3- 16.

257 For an early contribution to this strand of the international literature on ATI and socio-economic rights, and for a theoretical consideration of the ‘social auditory’ approach of the MKSS, see Robb Jenkins & Anne Marie Goetz, *Accounts and Accountability: Implications of the Right-To- Information movement in India*, Third World Quarterly 20 (1999) pp. 603– 22.

258 Calland, 2017 *ibid*.

But, despite the gains that have been made by using RTI in South Africa, it would not be easy to argue that the country's apartheid era authoritarian culture of secrecy has been reversed. The evidence suggests, in fact, that accessing public records is not an easy task, and invariably requires the intervention or support of an intermediary organisation, such as a civil society law centre.²⁵⁹ As a very useful study conducted by the civil society network, the Access to Information Network, stated in their 2016 'shadow report': "Despite the fact that access to information is a constitutionally enshrined right, and the fact that PAIA has been in operation since 2001, members of the ATI Network still experience significant challenges in accessing information from public and private bodies."²⁶⁰ During the course of a year-long period, members of the network made 369 requests for access to information pursuant to PAIA. Of these, 46% were denied by the relevant public authority. Of those, a majority (58%) were "deemed refusals" where access was not formally denied, but there was simply no response to the request.

This problem of ignoring requests has been a constant, and worrying, feature of South Africa's RTI journey. Back in 2006, a global study organised by the Open Society Foundation Justice Initiative, that examined the performance of fourteen countries including South Africa, discovered that South Africa was top of the league in what the report called "silent refusals."²⁶¹

As an example of the culture of secrecy pertaining, South Africa's main opposition party (the Democratic Alliance – DA)

259 Kristina Bentley & Richard Calland in 'Access to Information, A Theory of Change in Practice' in Malcolm Langford M, Cousins B, Dugard J & Madlingozi T (eds), *Strategies for Socio-Economic Rights in South Africa: Symbols or Substances* (Cambridge 2014).

260 Access to Information Network. Shadow Report, 2016
<<https://cer.org.za/wp-content/uploads/2017/02/CER-Shadow-Report-Final.pdf>> (accessed 22 November 2018).

261 Transparency and Silence. *OSF Justice Initiative* (2006)
<https://www.opensocietyfoundations.org/sites/default/files/transparency_20060928.pdf> (accessed 22 November 2018).

cites the extraordinary denial of a request for hard copies of a power-point presentation on ‘information peddling’ made by the (then) Minister of State Security Siyabonga Cwele.²⁶² The presentation was made to the *ad hoc* Committee on the Protection of Information Bill (the so - called ‘secrecy bill’) at an open meeting in Parliament with the media present. Yet, after the meeting the Minister surprisingly refused to make hard copies of the power-point presentation available to committee members because the document was “classified.” Ironically, the contents of the information-peddling briefing were reported in the media and a detailed minute of the meeting was published on the Parliamentary Monitoring Group’s website.²⁶³ The PAIA request was refused on the grounds that disclosure “could reasonably be expected to cause prejudice to the defence and the security of the republic” and that it “would reveal information supplied in confidence by or on behalf of another state or international organization.”

As my research interviews for the ‘Ruffling Feathers’ paper revealed,²⁶⁴ despite their frustrations with an obstructive government, the DA has used PAIA to expose “Cadre Deployment” – the practice of government jobs going to loyal members of the ANC²⁶⁵, ANC links

262 Calland, 2017 *ibid*.

263 *Parliamentary Monitoring Group* <www.pmg.org.za> (accessed 26 November 2017).

264 Calland, 2017 *ibid*.

265 The DA successfully requested records related to the interview process that led to the appointment of Robert McBride, an ANC stalwart, as Head of the Independent Police Investigative Directorate (IPID).

to sub - contractors²⁶⁶ and contract records relating to controversial e-tolling in the industrial heartland province of Gauteng where Johannesburg and Pretoria sit.²⁶⁷ The party also requested the hotel bills of the Minister of Trade and Industries, unsuccessfully,²⁶⁸ as well as the Burmese Ambassador to South Africa's credentials.²⁶⁹ With concerns about crime high on the political agenda, the DA also sought the record of police-to- population ratio.²⁷⁰

266 The DA requested documents related to sub-contracts entered into by state-owned enterprises, Eskom, in respect of the Medupi power plant. The Medupi project was subject to delays and there were complaints that one of the sub-contractors, Hitachi Power Africa, were to blame and that the subsidiary of the Japanese multinational had only got the sub-contract as a result of peddling undue influence by using an ANC-owned front company as its black economic empowerment partner when putting together the bid.

Although the PAIA requests from the DA did not substantiate this, the US Securities Exchange Commission subsequently investigated the matter and brought charges in the US against Hitachi Ltd., the conglomerate parent company of Hitachi Power Africa, alleging violations of the US Foreign Corrupt Practices Act (FCPA), including that during the Medupi bidding process Hitachi knew that Chancellor House was a funding vehicle for the ANC. Without admitting or denying the violations, Hitachi agreed to pay a substantial penalty of US\$19m. See 'SEC Charges Hitachi With FCPA Violations' US Securities and Exchange Commission <<http://www.sec.gov/news/pressrelease/2015-212.html>> (accessed 10 August 2017) for SEC press statement on the case and Hitachi's settlement payment, which was subsequently consented to by the US District Court for the District of Columbia on 24 November 2015. Note: the writer was retained as an expert witness on matters related to the party political funding environment and governance context, and related issues of political economy associated with the Chancellor House arrangement and its relationship with key political actors, such as the ANC.

267 The ATI "mechanism worked: 20-30 boxes of records were delivered" (interview with James Selfe, Federal Chair of the DA).

268 The request was rejected on grounds of 'national security'.

269 The Department of International Relations and Cooperation denied a request for a copy of the credentials of the Burmese ambassador to South Africa, Myint Naung, on the grounds that the documents contained "confidential correspondence". The application was made in light of the fact that between June 2007 and February 2008, the Tatwadaw (Burma's armed forces) committed a series of atrocities while under Myint Naung's control, including attacks on displaced villagers; the burning of civilian hiding sites; the destruction of schools; and the looting of food, clothes and blankets from civilians hiding from military patrols

270 The DA submitted a PAIA application to the South African Police Service (SAPS) for the police to population ratio for every police station in the country, with a provincial breakdown. The request was made after the Minister of Police, Nathi Mthethwa, failed to provide this information to a DA parliamentary question.

In conclusion: PAIA can be unwieldy; it needs patience and persistence, and often the help of an expert intermediary; invariably a public body will ignore the request; yet, the RTI system is workable, and can be used, and has been applied with satisfactory and, sometimes, powerful, game-changing ways.

4. Enforcement

Critical to the viability, as well as credibility, of any RTI system is the enforcement mechanism. Without a strong system for enforcing the right, it may prove to be a very blunt instrument. Fortunately, in South Africa, the rule of law is proving to be resilient, and its courts and judges, independent. A number of RTI decisions from the higher courts have proved to be useful and have added jurisprudential succour to the embedding of a new culture of transparency.

For example, in one case, Justice Sandile Ngcobo (as he then was – he later became Chief Justice) held that a 30-day time limit for bringing an appeal against a denial of information (whether formal or ‘deemed’) constituted a constitutionally impermissible limitation on not only the right of access to information in Section 32 of the Constitution but also the right of access to court enshrined in Section 34 of the Constitution. Citing the experience of the *amicus curiae* in the case, the South African History Archive (SAHA), Justice Ngcobo noted that:

‘SAHA’s experience in this regard is illuminating. It will be recalled that this is an NGO which collects, preserves and catalogues material of historic, contemporary, political, social and economic nature. Since 2001 it has made over 1000 requests for information from various government departments. It has brought 11 applications to court arising out of these requests. In all these applications it had to seek condonation because the applications were launched “a significant time after the expiry of the 30 day period.” SAHA has outlined the difficulties associated with complying with the 30 day limit in Section 78(2). The delays arise

from having to seek legal opinion on prospects of success; securing legal representatives; getting funding; securing approval and authorisation from its board of trustees who are scattered all over the country; and limitation of funds. If an NGO faces these difficulties in meeting the 30 day limit, I think it is fair to expect that individuals will have even greater difficulty in complying with this time limit. The applicant's predicament in this case bears testimony to this. Both NGO and individual requestors have a critical role to play in ensuring that our democratic government is accountable, responsive and open. Indeed, the Constitution contemplates a public administration that is accountable and requires that "[t]ransparency must be fostered by providing the public with timely, accessible and accurate information." Thus, the public and the NGOs must be encouraged and not obstructed in carrying out their civic duties.²⁷¹

Justice Ngcobo ordered that the 30-day limit be extended to 180 days. In another case, the Constitutional Court agreed with the decision of the lower (high) court that in many cases it will be necessary and appropriate for the court to take a 'judicial peek' at the record that is at stake in the access request.²⁷² Nonetheless, despite the helpful interventions of the courts in ensuring that RTI will not be suffocated by the 'chilling effect' of weak or intransigent organisational culture in government, the lack of a specialist intermediary appeal body, such as an Information Commissioner has proved to be a major weakness and hindrance to the effective realisation of RTI in South Africa. In submissions to the SAHRC in 2003 ODAC pointed out that,²⁷³

271 *Brümmer v. Minister for Social Development and Others* (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009).

272 *President of the Republic of South Africa and Others v. M & G Media Limited* (998/2013) [2014] ZASCA 124; 2015 (1) SA 92 (SCA); [2014] 4 All SA 319 (SCA) (19 September 2014).

273 Report on the Proceedings of the Paia Indaba: 22 and 23 May 2003 / South African Human Rights Commission. -- Johannesburg: South African Human Rights Commission, 2004 (*Report*).

‘PAIA’s greatest weakness remains the absence of such an enforcement remedy. It is worth recalling the original intentions of the Task Team appointed by Deputy President Thabo Mbeki in 1994, and chaired by his legal advisor, Advocate Mojanku Gumbi. Their white paper recommended specialist enforcement body – an Open Democracy Court – supported by a specialist promotion body, the Open Democracy Commission. These recommendations attracted controversy, and were contested by the then Chief Justice²⁷⁴. Advocate Gumbi complained about Chief Justice Corbett’s intervention and stated in the following months that she regarded the information courts as essential: “Expedition is critical in our view, the normal system does not function well. I know those courts.”²⁷⁵ Then Justice Minister Dullah Omar was quoted as saying “We could adopt procedures which give magistrates courts certain roles, or else have particular Supreme Court judges specialise in information matters”²⁷⁶. As a compromise, the notion of the information court was retained in name, but not as a separate specialist court or division, but as a special procedure.

Another member of the Task Group, Advocate Empie Van Schoor said that the motion procedure that was included in the modified version of the bill that went to Cabinet in Spring 1996 was one of the quickest of the current normal court procedures; she had included provisions to allow the court to deviate from the normal rules in order to expedite matters.²⁷⁷ Although after a long process of consultation and deliberation the Cabinet apparently decided against the original ideas of the Task Group, or the proposed compromise, parliament was mindful of the potentially negative implications of creating a system without an intermediary enforcement mechanism.

Hence, the ad hoc committee on the Open Democracy Bill

274 Parliamentary Whip, 30 August 1996

275 Parliamentary Whip, 21 February 1997

276 Parliamentary Whip, 13 September 1996.

277 Parliamentary Whip, 21 February 1997

*resolved when finalising the bill, to recommend that the Executive conduct an appropriate enquiry into the feasibility of creating an alternative adjudicatory body: The Department of Justice and Constitutional Development is requested to investigate the feasibility of establishing an enforcement mechanism like the Information Commissioner and to report back to the Committee within 12 months after the Bill has been put into operation.*²⁷⁸

This simply never happened. It took another issue, the right to privacy and data protection, to lead to the establishment of a new body, the Information Regulator, pursuant to the provisions of the Protection of Personal Information Act 2013 (POPI). This could be a game-changing development for RTI in South Africa, since the Regulator will have the power to hear appeals from PAIA denials. The office was established in 2017 following the appointment by the National Assembly of the five members of the body in September 2016, but at the time of writing (November 2018) it was still not ‘open for business’ and the relevant parts of POPI relating to appeals to the Information Regulator were still not in effect as the process of setting the new body up with appropriate budgetary allocation and public finance management authority has been slow.

Civil society organizations were encouraged by the appointment of Advocate Pansy Tlakula – the former special rapporteur on freedom of expression and access to information for Africa – and a trusted proponent of ATI as the chair of the Information Regulator, but it is too early to tell how much of a difference the Information Regulator will make.²⁷⁹ Mukelani Dimba, who is chair of the steering committee of global transparency network the Open Government Partnership, believes that it is essential that the information regulator is able to make a robust contribution towards protecting South Africa’s constitutional order and the rights of citizens: “When we campaigned for the establishment

278 Announcements, Tablings and Committee Reports, No. 4 – 2000, 24 January 2000, paragraph 7, page 19.

279 Calland, 2017 *ibid*.

of the information regulator we wanted an institution with strong enforcement powers, not just a structure for gentle persuasion. We wanted an institution that would boldly serve as a shield against egregious violation of rights provided for in South Africa's data protection law."²⁸⁰

5. Conclusion

South Africa has a potentially powerful legal regime – a constitutionally-enshrined right to information, given effect by a detailed piece of national legislation – with a wide and deep scope, supported by strong rule of law and an independent judiciary whose jurisprudence on RTI has been progressive and supportive of the realisation of the right and to inculcating a new culture of transparency. But South Africa's RTI is undermined by a resistant culture of incompetence and at times secrecy in the public service and has been battered by adverse political headwinds. However, South Africa's RTI is also proving resilient, like the country's constitution and rule of law. Now, there is a new opportunity to make substantial progress with the establishment of a new enforcement body. Although careful thought must be given to how the Information Regulator is set up and organised, the sooner it is up and running, the better - for voters, welfare beneficiaries, consumers, and for South Africa's economy.

As it establishes its systems and structure, and its *modus operandi*, the Information Regulator will be well advised to learn from other, comparable bodies, especially those with the same dual mandate (such as Germany, Japan and the UK²⁸¹) and to seek partnerships with equivalent bodies in countries that face similar institutional, political and socio-economic challenges, such as Sri Lanka.

280 Richard Calland & Alison Tilley. 'SA waits on Information Regulator' *Mail & Guardian newspaper* (23 August 2018) <<https://mg.co.za/article/2018-08-23-sa-waits-on-information-regulator>> (accessed 22 November 2018).

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She has taught at the UN University, Tokyo, Hong Kong University and the National Law University Delhi and also has served on editorial boards of international and national academic law journals including the Netherlands Quarterly on Human Rights. She holds an LLB and LLM (University of Colombo) and a Doctor of Juridical Science Degree in international human rights law from the Boalt Hall of Law, University of California at Berkeley.

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