



CENTRE FOR LAW
AND DEMOCRACY

Sri Lanka

**Comments on the Draft Freedom of
Information Act**

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Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) on the draft Sri Lankan Freedom of Information Act (draft Act). The draft Act was prepared by an opposition Member of Parliament, UNP (United National Party) Deputy Leader Karu Jayasuriya. Jayasuriya has been trying for some time, so far without success, to have this Bill introduced into Parliament.¹

The Bill is unlikely to make much headway under the current governing coalition, which has not demonstrated any interest in adopting a right to information law. At the same time, it has generated important debate in Sri Lanka about this key human rights issue, and highlighted the ongoing failure of Sri Lanka to recognise it through legislation. This debate continues, including at a National Seminar on this issue, to be held on 18 November 2011.

There have been discussions on and off for many years now about adopting a right to information law in Sri Lanka. The country came close to adopting legislation in 2002, when the government was dissolved and new elections were held. Since that time, there has been little formal discussion about right to information legislation, although civil society has continued to push for it.

These Comments aim to provide interested stakeholders with an assessment of the extent to which the draft Act conforms, and does not conform, to international standards and better comparative practice regarding the right to information. They provide recommendations for reform, as relevant, with a view to helping to ensure that a draft Act can be developed which gives effect, as fully as possible, to this fundamental right.

The draft Act has a number of strengths. These include a broad definition of information, relatively strong procedural rules, a fairly limited regime of exceptions, the establishment of an independent oversight body and a number of promotional measures. At the same time, we have a number of concerns with the draft Act and recommendations for improvement. These include the limited scope of public authorities covered, the need for more detailed procedural rules, a far more robust regime for proactive publication, the need for the right to information law to trump inconsistent secrecy provisions, the need for a stronger public interest override, the need for the Commission to have greater powers of investigation and the need to put in place a system for record management.

¹ See <http://www.digathanews.com/newsarchive/political/karu-again-prevented-from-tabling-freedom-of-information-draft>.

These Comments are based on international standards regarding the right to information, as reflected in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe.² They also reflect better legislative practice from other democracies around the world.³ We have prepared an assessment of the draft Act based on the RTI Methodology and the relevant sections of this assessment are pasted into the text of these Comments at the appropriate places. The overall score of the draft Act, based on the RTI Methodology, is as follows:

Section	Max Points	Score
1. Right of Access	6	2
2. Scope	30	15
3. Requesting Procedures	30	15
4. Exceptions and Refusals	30	21
5. Appeals	30	15
6. Sanctions and Protections	8	3
7. Promotional Measures	16	9
Total score	150	80

As a regional comparison, this score would place Sri Lanka's draft Act behind India, which scored 130, Bangladesh, which scored 109 and Nepal, which scored 105, but ahead of Pakistan, which scored 70.

Right of Access and Scope

There is no constitutional guarantee of the right to information in Sri Lanka, although Article 14(1)(a) does guarantee freedom of expression.

The preamble of the draft Act notes that there is a need to foster a culture of transparency and accountability in public authorities, but the law does not otherwise establish rules on how it should be interpreted. Section 2 provides that "citizens" shall have a right to access "official information which is in the possession, custody or control of a public authority". Section 36 defines a 'citizen' as including bodies or persons, whether corporate or not. Under international law, everyone has the right to information and better practice national laws apply to everyone.

² This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other mechanisms in Europe, Africa and Latin America. It is available at: http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final_.pdf.

³ See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd Edition (2008, Paris, UNESCO), available in English and several other languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Official information is defined in section 36 as including correspondence, maps, machine-readable records, computer records and “any other documentary material, regardless of its physical form”. This is a broad definition. It appears to apply to both specific records (documents) and to information which is contained in or may be extracted from several records, but it would be preferable to make it quite clear that requesters have a right to access both specific records and information.

Section 36 defines a public authority as including ministries and departments, bodies established under the Constitution “other than the Parliament and the Cabinet of Ministers”, State owned enterprises and companies in which the State is a shareholder, local authorities and any “other authority or institution established or created by a Provincial Council”.

This is a relatively broad definition, but it fails to conform fully to international standards in several respects. First, it specifically excludes the Parliament and Cabinet, and by implication the courts (although these might be covered as bodies established under the Constitution). All of these are public authorities and better practice right to information laws include them within their scope. Second, although it includes bodies established under the Constitution, it does not include statutory bodies. Also, while other authorities established by Provincial Councils are covered, such authorities established by national government bodies are not. In most countries, these bodies play an increasingly important role in terms of delivery of public services and functions and they should be brought within the scope of the law. Third, the draft Act does not cover private authorities operating with public funding or providing public functions.

Recommendations:

- The law should include a statement of the overall benefits which the right to information is expected to provide, along with an interpretive rule that states that it should be interpreted in the manner that best gives effect to these benefits.
- The right of access should apply to everyone, not just citizens.
- Consideration should be given to making it explicit that requesters have a right to access both specific records and information.
- The scope of the law should be expanded to include the Cabinet, Parliament and courts, all public authorities established by statute or by other public authorities, and private bodies undertaking public functions or operating with public funds.

Right of Access

Indicator	Scoring instructions	Max	Points	Article
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1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	Score 0 point for no constitutional right to information. 1 point for a limited constitutional right, 2 points for a recognized constitutional right to access all public information.	2	0	
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	No=0, Partially=1, Yes=2	2	2	2
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law.	(Y/N - max 1 point)	1	0	
	The legal framework emphasises the benefits of the right to information?	(Y/N - max 1 point)	1	0	
TOTAL			6	2	

Scope

Indicator		Scoring Instructions	Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	Score 0 points if only residents/citizens; 1 point for all natural persons; 1 point for legal persons.	2	1	2, 36
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	Score 1-3 points if limited definition of information such as not "internal documents" or databases excluded, 4 points for all information with no exceptions.	4	4	36
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents).	Score 1 point for only documents, 1 point for information	2	2	2

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7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	Score 4 points for central government agencies covered: 1 for the head of state, 1 for ministries, 1 for other non-statutory agencies created by the ministries, 1 for state and local government if the government is unitary. If it's a federalist system, 2 points for the non-statutory agencies. This can be determined by examining the length and thoroughness of the list, if such a schedule exists. Score 1 point for the archives. Add three points and deduct 1 for each exempted central agency (such as the armed forces, police, etc).	8	5	36
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	Score 1 point if the law only applies to administrative documents, 2-3 points if some bodies excluded, 4 points if all legislative branch at all levels of government	4	0	36
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	Score 1 point if the law only applies to administrative documents, 2-3 points if some bodies excluded, 4 points if all judicial branch at all levels of government	4	0	36
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	Score 1 point if some, 2 points if all	2	2	36
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	Score 1 point if some bodies, 2 points if all	2	1	36
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	1 point for public functions, 1 point for public funding	2	0	36
TOTAL			30	15	

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Requesting Procedures

Section 20 of the draft Act sets out the procedure for making requests, providing that requests must be forwarded to the information officer in writing and specify the “particulars of the information requested”. Writing includes requests made electronically. Where a requester is unable to make a request in writing, he or she may make it orally, and the information officer shall reduce it to writing. The draft fails to specify that requesters may not be required to provide reasons for their requests and it also fails to make it clear that they cannot be required to provide details beyond those which are strictly necessary for identifying and delivering the information requested. In particular, by stating only that requests must describe the information sought, the draft Act leaves it open as to what else might be required to be provided (since at least some additional information is necessary, such as an address of some sort for delivery of the information). It also does not preclude the possibility of public authorities establishing complex forms for making requests for information. Finally, the draft fails to require officials to provide a receipt or formal acknowledgement that a request has been filed.

Section 19(2) provides that information officers must provide “all necessary assistance” to requesters to help ensure that they get the information they have requested. Section 19(3) further provides that other officials must provide such support to the information officer as he or she may need. These rules, read together with section 20(1) regarding the reduction of oral requests to writing, appear to provide for a broad obligation of assistance in favour of requesters. It might, however, be useful to specify in more detail the specific obligations of information officers in this area. For example, where a request is reduced to writing, a copy should be provided to the requester, with the name of the information officer indicated. Special mention could be made of the need to provide assistance to those with disabilities or who are illiterate.

The draft Act does not indicate what public authorities should do if they do not hold the information requested, but are aware of other public authorities that hold it.

Section 23 provides that requests should be granted in the form stipulated by the requester, unless that would be detrimental to the safety or preservation of the record. In this case, the information officer should render all possible assistance to the requester, so as to facilitate compliance with the request. These are positive rules on form of access.

Pursuant to section 21, requests must be answered as soon as possible and in any case within 14 working days. There is no provision for extension of this timeline. These are positive rules on time for responding to a request. At the same time, it might sometimes be necessary for a public authority to extend the timeline, for

example for purposes of consulting with third parties or examining a large volume of records. However, extensions should be limited to an additional 14 days, and be allowed only in limited circumstances and upon providing notification to the requester with reasons for the delay.

The rules on fees in the draft Act are not very clear. Section 21(1) refers to providing information “on the payment of a fee”, while section 21(2) refers to an “additional fee”, suggesting that one may be an application fee and the other a response fee. Public authorities are required to display a notice of the fees they charge for requests prominently at their offices, which shall be in accordance with any recommendations to this effect issued by the Commission (see below under Appeals) (sections 22 and 13(d)). The Minister may issue regulations regarding circumstances in which fees may be waived (section 21(3)).

It should be free to file a request, but it is not clear from section 21 whether or not this is the case under the draft Act. Fees for responding to requests should be limited to the costs of reproducing and sending the information to requesters (so that electronic provision of information is free). Furthermore, fees should be in accordance with a central schedule of fees, so that the same fees are being charged by all public authorities. Finally, the primary legislation should set out the main rules regarding fee waivers, rather than leaving this to the discretion of the Minister.

Section 27 of the draft Act provides that giving access to information should not be taken as authorisation to publish that information. It may be legitimate for public authorities to impose reuse constraints on requesters where the information in question is subject to copyright held by a private third party. Otherwise, however, requesters should be free to reuse information provided in response to a request as they wish.

Recommendations:

- The law should describe in detail the procedure for making requests, making it quite clear that only information which is relevant to the request – namely a description of the information sought and an address for provision of the information – may be required, and specifying that officials may not ask requesters what their reasons are for making a request.
- The law should make it clear that if forms are provided for making requests, they must comply with the above and also that requests which are not made on the form should be treated in the same way.
- Requesters should be provided with a receipt when they make a request.
- The rules on provision of assistance to requesters could be made more explicit, for example by making it clear that assistance should be provided to disabled and illiterate requesters, and that where requests are reduced to

writing by an information officer, the requester should be given a signed copy of the request.

➤ Where public authorities do not hold the information but are aware of other public authorities that do hold it, they should be required to transfer the request to that other public authority or at least to inform the requester about it.

➤ Consideration should be given to providing for the possibility of extending the timeline for responding to a request by an additional 14 days where this is strictly necessary and where the requester has been notified of the reasons for the delay.

➤ The law should make it quite clear that no fees may be charged simply for making a request for information and that fees for responding to a request may only relate to the costs of reproducing and sending the information.

➤ Instead of simply allowing the Commission to issue guidelines on fees, this body should have the power to establish a binding schedule of fees which limits what public authorities may charge.

➤ The law should set out the main rules regarding fee waivers (such as that this should apply to the poor and to requests in the public interest).

➤ Section 27, establishing limits on reuse of information, should either be removed or at least limited to information which is subject to copyright held by a third party.

Indicator		Scoring instructions	Max	Points	Article
13	Requesters are not required to provide reasons for their requests.	Y/N answer 0 or 2 points	2	0	
14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	Score Max 2 points and deduct if requesters are required to give any of the following: ID number, telephone number, residential address, etc.	2	0	
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	Max 2 points. Considerations include that there is no requirement to state that the request is under the RTI law, to use an official form or to identify the document being sought.	2	1	20(2)

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16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.	Score 1 point for help in formulation and 1 point for clarification procedures	2	2	19(2), 20(1)
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	Score Yes=2 point, No=0	2	2	19(2), 20(1)
18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	Score 1 point for receipt, 1 point for max 5 working days	2	0	
19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	Score: 1 point for information not held, 1 for referrals or 2 for transfers	2	0	
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	Score: 2 points for Yes, only 1 point if some limitations	2	2	23
21	Public authorities are required to respond to requests as soon as possible.	Score: No=0, Yes=2 points	2	2	21(1)
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	Score: 1 point for timeframes of 20 working days (or 1 month, 30 days or 4 weeks). Score 2 points for 10 working days (or 15 days, or two weeks) or less.	2	2	21(1)

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23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.		2	2	
24	It is free to file requests.	Score: No=0, Yes=2 points	2	1	21(2)
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	Score 1 point for fees being limited to reproduction and delivery costs and set centrally, 1 point for at least 20 pages free of charge or for fees being optional	2	1	13(d), 21, 22
26	There are fee waivers for impecunious requesters		2	0	
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	Score: No=0, Yes=2 points	2	0	27
TOTAL			30	15	

Duty to Publish

Section 7 of the draft Act provides for the President and ministers to publish, on a bi-annual basis, a report containing a range of information, including about the organisations under their management, their functions and duties, the powers and functions of their officers, procedures for decision-making, norms regarding the exercise of their powers, rules, regulations and instruction manuals, the manner in which citizens may obtain information and contact details for information officers. Pursuant to section 8, prior to the commencement of work on a major project (as defined in dollar or rupee terms), the President or relevant minister must communicate to the public, and in particular to individuals who may be affected, relevant information in accordance with guidelines issued by the Commission.

Section 8, on project information, is an innovative and positive provision. Otherwise, however, these are very limited proactive publication obligations. First, they are

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limited to bodies falling directly under the control of the President or a minister. Instead, every public authority should be subject to positive obligations to publish. Second, the scope of information covered is limited. It does not, for example, include any information about budgets, benefits provided to individuals or the results of tender processes. Third, the manner in which information is to be provided, through the bi-annual publication of a report, is hardly in line with modern communications technologies, which allow for information to be updated more-or-less continuously at relatively little cost.

These provisions should be fundamentally revised to address these problems. At the same time, in recognition of the fact that it may be difficult for public authorities to comply immediately with extensive proactive publication obligations, a system should be put in place for levering up the amount of information required to be provided over time. Thus, the law should set out extensive obligations, but public authorities should be given some time to meet them. There are various possibilities for such a system, which could include a direct oversight role for the Commission.

Recommendations:

- The proactive publication obligations should be fundamentally revised so that they apply to all public authorities, so that they cover a far more extensive range of information, including financial information, and so that they make use of modern communications technologies to make updated information available forthwith instead of only once every two years.
- A system should be put in place for levering up the amount of information that is provided proactively over a period of time, say five to seven years, to allow for public authorities to develop their capacity in this area.

Note: The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

Exceptions and Refusals

The rules in the draft Act regarding its relationship with other laws are confusing. Section 3(1) provides that the draft Act shall prevail over inconsistent provisions in other laws. Section 3(2), however, limits this in relation to information under the control of any public authority established by law where the officials working for that public authority are prohibited by that law from releasing the information. This would appear to substantially undermine the rule set out in section 3(1). Under international law, the provisions of the right to information law should prevail over those of other, inconsistent (secrecy) laws. In most cases, the right to information law is more consistent with international rules regarding the right of access while

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secrecy laws, many of which were adopted some time ago, are often not. Better practice right to information laws do prevail over secrecy laws.

The regime of exceptions is found at section 4 of the draft Act. It includes four exceptions which are not recognised as legitimate under international law. First, section 4(1)(a) excludes all information relating to a matter in which a decision is pending. It is legitimate to exclude sensitive advice, for example where necessary to protect the free and frank provision of such advice. But the exclusion of all information relating to pending decisions is not justifiable. Indeed, many right to information laws specifically require the provision of factual and statistical background information relating to pending decisions.

Second, section 4(1)(d) excludes information relating to the assessment of collection of revenue. It is true that much of this information will be private in nature (and so protected by the privacy exception), but it is not legitimate simply to exclude all such information. Section 4(1)(g) excludes all information that is subject to professional privilege. It is common for right to information laws to exclude information subject to legal privilege, but not other professional privileges. As with the revenue exception, other exceptions may well be relevant here (such as privacy). Fourth, section 4(1)(j) excludes information relating to an examination, including the results. There is simply no warrant for keeping such information secret and in most countries it is freely available (the education authorities in Nepal, following a decision of the National Information Commission, have recently agreed to release answer sheets for examinations).⁴

All of the exceptions, apart from the four described above as being unduly broad, are subject to harm tests. In some cases, the test is “would cause serious harm” or prejudice, in others “would or would be likely” to cause harm and in yet others “could cause” harm. The latter is too low a standard.

Three of the exceptions include a public interest test, so that information which would cause harm should still be released where this “is considered to be vital in the public interest”. This is problematical for two reasons. First, the standard is not consistent with international law, which requires the release of information whenever the overall public interest in accessing the information is greater than the harm such disclosure would cause. This is clearly a much lower standard than requiring release only of information deemed to be “vital in the public interest”. Second, the rule only applies to a small number of exceptions.

Section 4(2) provides that the exceptions shall not apply after ten years, apart from those exceptions in favour of private commercial interests, medical information and professional privilege. This is a positive rule in favour of disclosure. However,

⁴ See <http://www.ekantipur.com/the-kathmandu-post/2011/10/18/nation/slc-students-can-now-review-answer-sheets/227344.html>.

consideration should be given to extending the exceptions to this rule to cover all private information. Otherwise, private information other than medical information could be disclosed after ten years, even if the person was still alive.

Section 25(1) provides for third parties to be consulted where a request relates to information provided by a third party and treated by that party as confidential. Section 25(2) stipulates that where a third party objects to disclosure of the information, the information officer shall “deny access to the information”, unless disclosure of the information is “vital in the public interest”.

It is appropriate to consult with third parties who have supplied information to public authorities, so as to provide them with an opportunity to make representations as to why the information should not be disclosed. It is, however, inappropriate to give such third parties a veto over the release of the information and the vast majority of national right to information laws do not operate in this way. Instead, the views of the third party should be taken into consideration in determining whether or not one of the exceptions applies. As noted above, all exceptions should be subject to a different public interest override than is set out in the draft Act.

Section 5 provides for the partial release of information where only part of a record is covered by an exception, in accordance with international standards. Section 24 provides that where access to information is refused, the information officer shall give notice of this to the requester, which notice shall include the ground(s) on which access is being refused and the right of the requester to appeal against this refusal. This is also largely consistent with international standards, provided that it would be useful to require public authorities to indicate the specific provisions in the law that they are relying on to refuse access.

Recommendations:

- The access law should prevail over inconsistent provisions in secrecy laws, regardless of the nature of the public authority to which the secrecy law applies.
- The list of exceptions should be limited to those that are recognised as being legitimate under international law. In particular, the exceptions in favour of pending decisions, assessment of revenues, professional privilege and examinations should be either removed or revised so as to limit their scope.
- The standard for exceptions should be at least “would or would be likely” to cause harm.
- A public interest override should apply to all exceptions so that information must be disclosed whenever the public interest in disclosure outweighs the harm that this would cause.

➤ Consideration should be given to exempting all private information from the rule that information must be provided after ten years. ➤ The rules on consultation with third parties should provide for their views to be taken into account, but not for them to have a veto over the release of information they have provided to public authorities in confidence. ➤ When refusing access to information, public authorities should be required to indicate the exact provision in the law that they are relying on for this purpose.

Indicator		Scoring instructions	Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	Score 4 points for a resounding "yes" and 1/2/3 points if only for some classes of information or for some exceptions. If the state secrets law is not trumped by the RTI law max score is 2 points.	4	2	3
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.	Score 10 points and then deduct 1 point for each exception which either (a) falls outside of this list and/or (b) is more broadly framed	10	6	4(1)
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	Score 4 points and then deduct 1 point for each exception which is not subject to the harm test	4	4	4(1)

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31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	Consider whether the override is subject to overarching limitations, whether it applies to only some exceptions, and whether it is mandatory.	4	2	4(1)
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	Score 1 point for each	2	2	4(2)
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	Score: 1 point for consultation, 2 points if original time frames must be respected and the law allows for expedited appeals	2	1	25
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	Score 1 point if yes but sometimes can be refused (e.g. if deletions render meaningless the document) and 2 points if partial access must always be granted	2	2	5
35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	Score Y/N: 1 point for a and 1 point for b	2	2	24
TOTAL			30	21	

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Appeals

Section 28 of the draft Act provides for requesters whose requests have been refused to appeal within 30 days to a higher internal authority and any such appeal shall be decided within one month. An appeal lies from there to the Commission, which may affirm or reverse the decision and remit it back to the information officer for action within a specified timeframe (section 29). A further appeal lies from there to the courts (section 30). These provisions are all in line with international standards.

The Commission consists of three persons of “eminence and integrity who have distinguished themselves in public life and who are not members of any political party” and, at the time of the appointment, do not hold any public or judicial office. Members are appointed by the President on the recommendations of the Constitutional Council and hold office for five years. The President nominates one member to be chair. Members cease to be members if they resign, are removed from office by the President on the advice of the Constitutional Council that they are physically or mentally incapacitated in a way that renders them unable to discharge their duties, are convicted by a court of a crime involving moral turpitude or have missed three consecutive meetings without leave (section 11). The Commission may appoint its own staff and set their terms of service, but their remuneration is subject to consultation with the minister in charge of finance (section 12). The Commission has its own fund, as voted by Parliament (section 14).

This system provides reasonably strong protection for the independence of the Commission. It would be preferable for the Commission to appoint its own chair from among its members, rather than having the President do so. It would also be preferable for the Commission to have the power to set the level of remuneration for staff without the need to consult with the minister responsible for finance, albeit subject to Parliament approving the budget, as is already the case.

The draft Act says nothing about the powers of the Commission to decide appeals, and notably nothing about the powers of the Commission when investigating appeals. In most countries, such commissions are given extensive powers to investigate, including by requiring the production of witnesses and information, and inspecting premises.

It seems implicit in the language of section 29 that the Commission can order public authorities to provide information, but this could be made explicit. The Commission does not, however, appear to have the power to impose structural remedies on public authorities, such as to conduct more training for its officials or to keep its records in better condition. Finally, the draft Act fails to stipulate that the decisions of the Commission are binding, subject to a court appeal.

In terms of the conduct of appeals, the draft Act fails to stipulate that these are free, and that the burden lies on the public authority during the appeal to justify any refusal to provide access to information. The draft Act also fails to set out even a basic framework for the processing of such appeals, such as the timeframe for decision-making and that the requester should have a right to be heard. Finally, it would appear, based on section 28, that appeals may only be launched when a requester is refused access to information; other breaches of the law, such as a failure to respond in time, charging excessive fees or providing inadequate notice of a refusal to provide access, are not mentioned.

Recommendations:

- The roles, respectively, of the President and minister responsible for finance in appointing the chair of the Commission and in setting the level of remuneration for staff should be removed.
- The law should set out clearly the powers of the Commission to conduct investigations on appeal, including to compel witnesses and documents, and to inspect premises.
- The law should make it clear that the Commission can order the release of information and order public authorities to put in place structural measures to ensure implementation of the law, and that its decisions are binding.
- The law should establish a basic framework for the processing of appeals, including that they are free, that decisions must be adopted within a set timeframe, that the public authority bears the burden of proof on appeal and that requesters have a right to be heard.
- The grounds for appeal should include all breaches of the rules relating to requests, not just denial of access to the information sought.

Indicator		Scoring instructions	Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	Score 2 points if the internal appeal fulfils these criteria, 1 point if an appeal is offered that does not fulfil this criteria, 0 for no internal appeals.	2	2	28
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	1 for partial, 2 for yes	2	2	29

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38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	Score: 1 point for appointment procedure, 1 point for security of tenure	2	1	11
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	Score 1 point for reports to parliament, 1 point for budget approved by parliament	2	2	14
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	Score 1 point for not politically connected, 1 point for professional expertise	2	2	11
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	Score 1 point for reviewing classified documents, 1 point for inspection powers	2	0	
42	The decisions of the independent oversight body are binding.	Score N=0, Y=2 points	2	0	
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	1 for partial, 2 for fully	2	2	29
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	Score Y/N with Y=2 points	2	2	30
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	1 for free, 1 for no lawyer required. This can be applied to either administrative or judicial appeals. Countries that offer both need only fulfil this requirement for administrative appeals in order to be awarded points.	2	0	

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46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	Score 1 point for appealing refusals, 1 point for appealing other violations. This can be applied to either administrative or judicial appeals. Countries that offer both need only fulfil this requirement for administrative appeals in order to be awarded points.	4	2	28(1)
47	Clear procedures, including timelines, are in place for dealing with external appeals.	Score 1 point for clear procedures, 1 point for timelines. This can be applied to either administrative or judicial appeals. Countries that offer both need only fulfil this requirement for administrative appeals in order to be awarded points.	2	0	
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	Score Y/N and award 2 points for yes. This can be applied to either administrative or judicial appeals. Countries that offer both need only fulfil this requirement for administrative appeals in order to be awarded points.	2	0	
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	1 for partial, 2 for fully. This can be applied to either administrative or judicial appeals. Countries that offer both need only fulfil this requirement for administrative appeals in order to be awarded points.	2	0	
TOTAL			30	15	

Sanctions and Protections

Pursuant to section 4(3) of the draft Act, the disclosure of exempt information is an offence, unless it was done in good faith, punishable by a fine of up to Rp. 5,000 (approximately USD45), in addition to any applicable disciplinary action. Section 26 appears to contradict this, at least potentially, by stating that no action shall lie against an official or a public authority for granting access to information under the law. Members and staff of the Commission are protected against civil or criminal proceedings for any act in good faith done pursuant to the law (section 17).

These rules are progressive but it would be preferable to remove the rule providing for punishment for wrongful release of exempt information. It is important to

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provide protection for officials, among other things to give them the confidence to release information under the law, especially given that they had operated in conditions of secrecy prior to the new rules coming into force. While the rule on punishment is not very harsh, it still sends contradictory messages to civil servants.

Section 33 makes it an offence, subject to a fine of up to Rp. 5,000 (approximately USD45), to reject a request without giving reasons, to reject a request on grounds other than those provided for under the law, to fail without reasonable cause to make a decision within the prescribed timeframe or to fail without reasonable cause to provide assistance upon request. These are useful rules but they are unduly narrow in scope and would not cover a number of ways in which officials could undermine the right of access, such as though destroying information or refusing to cooperate with the Commission. Furthermore, the fine is rather small and it is doubtful that it would provide a sufficient deterrent to obstructive behaviour.

Pursuant to section 34, no official shall be subject to any punishment for releasing information “which is permitted to be released” as long as he or she acted in good faith and in the reasonable belief that the information disclosed evidence of wrongdoing. This is not consistent with the dominant rule on whistleblowers in countries around the world, which allows for the release of any information, including exempt information, in these circumstances.

The draft Act fails to provide for remedies against public authorities which persistently or systematically fail to meet their obligations under the law.

Recommendations:

- The rule in section 4(3) providing for punishment for the release of exempt information should be removed.
- The offences of obstruction of access in the law should be broad, and cover all wilful obstructive activities. Consideration should be given to increasing the sanction for this.
- The rule on whistleblowing should be amended to allow for the release of any information about wrongdoing.
- The law should include a system for imposing remedies on public authorities which persistently fail to meet their openness obligations.

Indicator		Scoring instructions	Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised	Score 1 point for sanctions for undermining right, 1 point for destruction of documents	2	1	4(3), 33

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	destruction of information.				
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	Score 1 point for either remedial action or sanctions, 2 points for both	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	Score 1 for oversight body, 1 for immunity for others	2	2	17, 26
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	Score 2 for strong protections, 1 for moderate protections	2	0	34
TOTAL			8	3	

Promotional Measures

Pursuant to section 13 of the draft Act, the Commission has a number of functions, including monitoring implementation of the law, making recommendations for reform, hearing and deciding appeals, laying down guidelines regarding fees, cooperating in training and publicising the law. The latter is supplemented by section 18, which requires the Commission to publicise the procedural rules regarding the submission of appeals. These are useful powers, but the role of the Commission as the central promotional body in these areas could be clearer. For example, the Commission could be required to produce and widely disseminate a guidebook on citizens' rights under the law and how to exercise them.

Pursuant to section 19, public authorities are required to appoint information officials, consistent with international standards in this area.

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Section 6 requires public authorities to maintain their records in a manner that is “consistent with its operational requirements duly catalogued and indexed”. Records should be maintained for 10 years after they have been created. This is helpful but it fails to establish a proper system for record management, which would involve the setting and enforcement of clear standards. A central body should, for example, be given the task of developing a code of conduct regarding record management, and some sort of monitoring and enforcement system should be put in place. Furthermore, it is probably not realistic for all public authorities to be required to maintain all records for ten years.

The draft Act does not require public authorities to maintain and publish lists of the information they hold. They are also not under any obligation to train their officials, although the Commission may cooperate in such training if it is being offered.

Every public authority must provide the Commission with an annual report on the manner in which they have implemented the law, which shall include detailed information about requests (section 9(1)). Pursuant to section 32, the Commission is required to report annually on its activities, and to lay this report before Parliament. There is no requirement, however, for the Commission to prepare a consolidated report for Parliament about overall implementation of the law, based on the reports provided to it by each public authority. Such a consolidated report would allow Parliament to review progress in implementing the law and to consider measures to promote better implementation.

Recommendations:

- The role of the Commission as the central promotional body should be clarified.
- A system should be put in place to set and enforce central record management standards. The requirement for all public authorities to maintain all records for ten years should be reconsidered.
- Public authorities should be required to publish lists of the records they hold and to conduct adequate training for their staff.
- The Commission should be required to lay a consolidated annual report on implementation of the law before Parliament.

Indicator		Scoring instructions	Max	Points	Article
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	Score Y/N, Y=2 points	2	2	19

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55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	Score Y/N, Y=2 points	2	1	13
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	Score Y/N, Y=2 points	2	2	13(f), 18
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	Score Y/N, Y=2 points	2	1	6(1)
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	Score Y/N, Y=2 points	2	0	
59	Training programmes for officials are required to be put in place.	Score Y/N, Y=2 points	2	0	13(e)
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	Score Y/N, Y=2 points	2	2	9(1)
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	Score Y/N, Y=2 points	2	1	32
TOTAL			16	9	

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