
MEMORANDUM

TO: The Honourable Chairman and Members
Joint Committee on Constitutional, Legal and Parliamentary Affairs, and
Communication, Parliament of Ghana

FROM: The Right to Information Action Campaign

SUBJECT: Right to Information (RTI) Bill, 2018: Comments and Contribution

DATE: April 20, 2018

CC: Office of the Attorney-General

We are grateful to your Committee for the invitation and opportunity to submit this memorandum to assist the Committee in its review and consideration of the Right to Information Bill, 2018. The Right to Information (RTI) Action Campaign welcomes the launch of this consultative process and hopes that the latest exercise will culminate in the enactment of a robust and credible law that gives effect to citizens' fundamental right to access information from public institutions in Ghana.

We represent an ad hoc coalition of national civil society organizations and individuals (the "RTI Action Campaign") that share a common and longstanding commitment to promoting integrity in public life, improving access to information for development and the quality of governance in Ghana through advocacy, research and publication, and public education. The Campaign is under the joint leadership of the Coalition on the Right to Information (RTI Coalition), Ghana Integrity Initiative (GII) Consortium comprising the Ghana Anti-Corruption Coalition (GACC) and SEND-Ghana, the Ghana Centre for Democratic Development (CDD Ghana) and the Commonwealth Human Rights Initiative (CHRI).

For more than a decade, the RTI Coalition had initiated series of advocacy to secure the passage of the Right to Information Bill including mobilizing public support for the passage of the Bill as well as lobbying the Executive and Members of Parliament to secure their commitment for the passage of the Bill. The Coalition has maintained a high profile as a pressure group during the several review processes of the RTI Bill. For example, in 2003, the Coalition was invited to be a member on a planning committee set up by the Ministry for Information to strategize on how the government could open up consultations on the right to information bill, which has been approved by Ghana's Cabinet, to the wider public for input that will shape the bill before it is taken before Parliament.

In 2010 the RTI Coalition submitted a critique of the Bill as well as an 'Options Paper' which provided alternatives to the problematic clauses of the Bill as identified by members of the public, to the Joint Committee on Constitutional, Legal and Parliamentary Affairs and Communication of the 5th Parliament. In 2013 and 2016 respectively, the RTI Coalition submitted a memorandum on the RTI Bill to the Committee on Constitutional,

Legal and Parliamentary Affairs of the 6th Parliament and was invited by the Committee to the Committee's meeting organized to gather the views of stakeholders on the Bill. The Coalition was instrumental to the review and submission in 2016 of a revised version of the Bill titled 'RTI Bill 2016' which incorporated all the proposals captured by stakeholders on the Bill and which was nearly passed in 2016.

In February 2018, the RTI Coalition and GII Consortium launched a joint Campaign, with funding support from the Accountable Democratic Institutions and Systems Strengthening (ADISS) to not only put the RTI Bill on the front burner of policy in 2018 but also secure its passage before the end of this year. Since the launch of the campaign, series of multi-stakeholder roundtable engagements and coordinated advocacy initiatives have been implemented with key civil society institutions and actors.

The RTI Action Campaign supports the passage of the RTI Bill. We submit this memorandum in part to underscore that support but, principally, to highlight and propose changes to certain aspects and portions of the bill that, in our opinion, require further reflection, modification, and fine-tuning in order to achieve the policy goals and objectives set forth in the Memorandum to the Bill.

We note that the RTI Bill 2018 which has been tabled before the 7th Parliament and which is now before your Committee, dated March 21, 2018, to a very large extent addresses the concerns raised by civil society in the previous Bill – RTI Bill 2016 and submitted to the Select Committee on Constitutional, Legal and Parliamentary Affairs of the 6th Parliament. As such the RTI Bill, 2018 contains several positive provisions such as clearly laid down access procedures, three stage review process if a public institution rejects a request for information, focus on disclosure of certain categories of information suo motu and the creation of a multi-member RTI Commission to guide and monitor the implementation process. The draft legislation also prescribes sanctions for contravention of certain provisions of the proposed law. We consider this to be a very positive development.

The RTI Action Campaign has collated inputs from a cross-section of its members and with external support from the CHRI, New Delhi Office, to offer a preliminary analysis of the RTI Bill, with suggestions for improvement of certain areas based on examples of good practices adopted in other countries, and consistent with the Model Law on Access to Information for Africa, prepared by the Africa Commission on Human and Peoples' Right. We believe that these issues if addressed will further strengthen the Bill and ensure an effective access to information regime in Ghana.

The remainder of the memorandum proceeds as follows. In Part I, we set forth and briefly offer General Suggestions on improving the Bill as outlined in this memorandum. We commend these General Suggestions for your consideration. In Part II, we provide Clause-by-Clause Suggestions, focusing on those parts or portions of the Bill that we believe need further reflection or modification. Where necessary, we offer suggestions to improve the text. In other instances, we simply raise questions and provide commentary to provoke further thinking and deliberation on particular provisions.

I. General Suggestions:

1) **Include Preamble:** Unlike previous RTI Bills, the RTI Bill, 2018, does not contain a Preamble. As laws giving effect to constitutionally guaranteed fundamental rights, it is advisable to include a Preamble that explains the purpose and objectives of the legislation. This is also important for interpretation. A gist of the paragraphs immediately preceding the clause-by-clause explanation contained in the Memorandum attached to the RTI Bill may be used for this purpose. Preamble clauses contained in the Model Law on Access to Information for Africa and the RTI laws of India and Sri Lanka may be used as further guidance.

2) **Reordering of clauses:** In the current schema of the RTI Bill, clauses listing out the exemptions to disclosure take precedence over access and review procedures. The RTI Bill seeks to give effect to the fundamental right to seek and obtain information guaranteed under Article 21(f) of the Constitution. The general rule of disclosure and confidentiality of information held by public institutions is only an exception under the exemption clauses listed in the Bill. Therefore, primacy must be given in the schema of the RTI Bill to access and implementation provisions, including clauses relating to the constitution, powers and functions of the Right to Information Commission (RTI Commission). The exemption clauses may be listed further down in the order of provisions.

3) **Expanding the Interpretation Clause:** Clause 91 contains definitions of several words and phrases used in the RTI Bill. This is a very useful provision as it clarifies terms of art used in the draft legislation. However, there are several terms and phrases whose interpretation or meaning must be clarified. For example, terms such as “person”, “third party”, etc. must be specifically defined in this Clause to lend greater clarity for these terms. For example, the term “person” is not defined in the Constitution either. The fundamental rights chapter in Ghana’s Constitution seems to connote an “individual” by the use of the term “person”. However in recent years, it is common practice for RTI laws to recognise the right of artificial juridical entities also to seek information under RTI laws. In India this is common practice. Sri Lanka’s RTI Act specifically recognises artificial juridical entities as “citizens” eligible to seek information under its RTI Act if three-fourths of its members are Sri Lanka nationals (see Section 43). See para #II.7 below for a discussion on the need for defining a “third party” in the RTI Bill.

Also, the expansion of the definition in the interpretation ***section 91*** of “*public institution*” by the inclusion of “*which receives public resources*”, which was missing in section 84 of the 2016 Bill, is highly commendable. However, we propose that the definition of ‘public institution’ should be expanded to read as follows:

“*public institution*” includes private entities *including natural persons* that receive public resources *and benefits or engages in public functions* or provide *public services*”.

This will clearly cater for both artificial entities and individuals.

4) **Removing undefined or rarely used terms:** Clause 74 of the RTI Bill, 2018 contains a reference to “relevant private body” which is not used elsewhere in the provisions. As Clause 91 include private bodies under the definition of “public institutions”, this reference may be omitted wherever it occurs.

5) **Include an enforcement date:** The RTI Bill 2018, does not contain any date for operationalising the law after Parliament duly enacts it and the President gives his assent. Experience from India in 2002 and from Uganda which enacted its Access to Information Act in 2005 has shown that the law may not be enforced by a resistant bureaucracy for several years. So it is advisable that Ghana’s draft RTI Bill contain an enforcement date to ensure certainty of implementation. The United Kingdom gave itself five years for operationalising the [Freedom of Information Act, 2000](#) after enactment. Section 1(3) of [India](#)’s RTI Act provided only a 120-day period for preparation after which the law became fully operational enabling citizens to make formal requests for information. Section (1)(3) of [Sri Lanka](#)’s RTI Act set a deadline of six months for full implementation. Ghana might like to give itself between six to twelve months for enforcing the RTI act after it is duly gazetted. However, this date of enforcement must be clearly mentioned in the law itself. These types of enforcement provisions will be consistent with approach in the passage of the Office of Special Prosecutor Act 2017, where the Minister was given ninety days upon assumption of office of the Special Prosecutor to make regulations to the Act.

7) **Definition of ‘national security’:** We observe that reference was made to national security as a basis for which an information may be exempted from disclosure, however no definition was proffered for same. We therefore, propose the following definition:

"threat to national security or security of the state' means "any act that threatens the defence, stability or survival of the state/Republic, or its territorial integrity, political independence or the lives or livelihoods of the population or communities in the Republic".

II. Clause by Clause Proposals

1) **Clause 1:** Sub-clause (1) is a replication of Article 21(f) of the Constitution which guarantees persons’ access to information from the government. As the RTI Bill intends to give effect to this fundamental right, the general rule of access to information contained in this clause must be subject to the provisions of this Bill itself. Further, sub-clause (2) unduly emphasises the exercise of this right through the request procedure specified under Clause 18. In fact, Clauses 3 and 4 place greater primacy on the disclosure of information *suo motu*. This position must be recognised in Clause (1) unequivocally.

Suggestions for improvement:

- 1) Sub-clause (1) may be amended as follows: “*(1) A person has the right to information subject to the provisions of this Act.*”
- 2) Sub-clause (2) may be omitted.

2) **Clause 2:** First, the heading for Clause 2 is not consistent with the general description of sources of information in the Bill. As the Long Title states – this is a bill relating to information held by ‘a public institution’. This is treated as a term of art and defined in clause 91. To be consistent the heading should read “Responsibility of Public Institutions to provide information”. In this rendition “on governance” should be deleted because it limits the types of information. Second, and proceeding from the logic above, the Clause 2 should read;

“Public Institutions shall make available to the public information without application from a specific person”

3) **Clause 3:** It is laudable that the RTI Bill, 2018 places primacy on the need for disclosure of information *suo motu*. However, the number of categories of information which must be proactively disclosed falls short of international best practice standards. Second, experience in countries like India and Bangladesh have shown that without pinpointing responsibility for implementation of proactive disclosure provisions on any official of a public institution, it will become a non-starter, Third, the person responsible for giving effect to this provision need not also be the person responsible for ensuring its access to the public. That duty may be placed on the designated Information Officer in every public institution so that people may access such information easily. Fourth, the manner of dissemination of the information disclosed *suo motu* must also be specified in the law itself.

Suggestions for improvement:

- 1) The categories of information required to be disclosed *suo motu* may be expanded further. Guidance may be taken from Clause 7 of the [Model Law on Access to Information for Africa](#), Section 4 of [India’s RTI Act](#), [Regulation No. 20](#) issued under [Sri Lanka’s RTI Act](#) and Article 7 of [Mexico’s ATI Law](#).
- 2) The head of the public institution must be held personally liable for ensuring compliance with the *suo motu* disclosure requirements and updating them every year.
- 3) The Information Officer should be the custodian of the information proactively disclosed by every public institution and should make this information available to any person on demand.
- 4) The manner of dissemination of the information disclosed *suo motu* may be added as a new sub-clause. The “Explanation” clause under Section 4 of [India’s RTI Act](#) which lists a variety of methods of dissemination may be used as a reference point.

4) **Clauses 5 to 16:** The exemptions to the rule of disclosure are listed over 12 clauses in the RTI Bill. Some of the clauses contain exceptions to these exemptions. At first count, these Clauses contain at least 64 grounds on which access to information may be denied to any person (this is in addition to Clauses 23, 28 and 84 which contain more grounds for refusing a request). Further, some of the exemptions contain two thresholds for harm tests which will make their application complicated for the Information Officers and also the end

result will be harm test based exemption into a blanket exemption – thereby contradicting the explanatory clause contained in the Memorandum attached to the RTI Bill, 2018.

For example, Clause 8(1)(a) exempts information pertaining to international relations if the disclosure can reasonably be expected “to damage or prejudice the relations between the Government and the government of a foreign country. Similarly, Clause 9(1)(a) exempts information whose disclosure can reasonably be expected “to damage or prejudice the defence of the Republic or a foreign State allied to or friendly with the Republic”. “Damage” is a higher threshold of harm than “prejudice”. To “damage” is to impair the soundness, goodness, or value of something or to harm or cause destruction whereas, “prejudice” is to have a negative impact on the position or chances of something.¹ In other words, if the Information Officer finds that disclosure of a certain information is not likely to damage these public interests protected under Clauses 8 or 9, he will then proceed to assess the negative impact on them. This decision is likely to be very subjective in nature and will increase litigation at the three stages for review of the Information Officer’s decision provided in the legislation. These exemptions will work towards converting information relating to international relations and defence of the Republic or a friendly or allied State into a blanket or category exemption. This is against the spirit of the harm test mentioned in the explanatory clauses provided in the Memorandum attached to the RTI Bill, 2018.

Further, despite the pious intentions of the explanatory portions of the Memorandum Clauses pertaining to information prepared for submission or which has been submitted to the Office of the President, the Vice President and the Cabinet, the language of the exemptions in Clauses 5 and 6 turn them into category or blanket exemptions. This is against the principle of minimum exemptions based on harm tests recognised by the [Model Law on Access to Information for Africa](#) and other international best practices. In fact, all decisions of these high Constitutional offices and bodies, the reasons informing such decisions and the materials that formed the basis of the decisions including deliberations of officials and constitutional functionaries involved in the decision-making process must be made public at the end of the process. This kind of transparency fosters accountability and also helps people to understand the rationale behind such decisions. The protection of secrecy must be available only prior to reaching a decision on an issue and that too only if premature disclosure will unduly frustrate the outcomes of the process. In many cases *a posteriori* disclosure will not be of much help to people if the decision made is patently bad in law or is in bad faith. People should have access to information prior to the making of such poor decisions so that they may oppose it. This is good for the health of any democracy. Moreover, in Ghana, the Office of the President has several agencies under its supervision, management and control, including seven ministries operating from its offices, is the public information generated by these ministries, departments and agencies to be treated the same way as information from the core Office of the President?

Again, some of the exemption clauses are excessive or are redundant in view of their being covered by other exemption clauses. For example, Clause 13(1) exempts all

¹ See, “Damage vs Prejudice – What’s the difference” at: <https://wikidiff.com/damage/prejudice>, accessed on 12 April, 2018.

information relating to internal deliberations of a public institution. This is a blanket exemption and will emasculate the very purpose of an RTI law, namely to ensure transparency in decision making processes so that people may hold the public institutions accountable. Next, tax-related information is sought to be exempted from disclosure *in toto*. This is also excessive because it will disempower people from seeking information about tax evasions – a common phenomenon across many developing countries in Africa and Asia.

Similarly, trade secrets retained by business entities and individuals can be protected from disclosure under one Clause instead of the two [Clause 10(b) and Clause 16(2)(b)] as is planned under the RTI Bill. Again, information relating to medical records or health records of an individual can be protected under one Clause instead of two [Clause 15(1)(b) and 16(3)(l)] as is planned under the RTI Bill.

Suggestions for improvement:

- 1) The exemption clauses must be simplified and the [Model Law on Access to Information for Africa](#), Section 8 of [India's RTI Act](#) and Section 5 of [Sri Lanka's RTI Act](#) serve as good reference points.
- 2) Redundant exemptions may be weeded out by locating them in one Clause so as to cover all dimensions of the public interest that require legitimate protection.
- 3) As far as possible exceptions to exemptions must be done away with in order to prevent confusion during implementation. Similarly, there must be only one threshold in the harm test included in every exemption and it must be set at a level where disclosure is reasonably expected to cause real damage and not mere suspicion of damage that is not borne out by any factual material.
- 4) No blanket or category exemptions that insulate entire classes of information must be permitted in the legislation.
- 5) There is a need to define what is meant by the Office of the President to clearly define which institutions are envisaged under clause 5.
6. Moreover, nothing stops the Office of the President and Vice President from publishing or granting exempt information as provided in clause 6(3) in the case of Cabinet.

- 6) ***Clause 17:*** It is laudable that the RTI Bill, 2018 contemplates a public interest override

clause. However, the current language of Clause 17 makes it a two-stage test before information that attracts one or more exemptions may be disclosed. First, one or more grounds listed in sub-Clause (1) must be satisfied and additionally, the benefits of disclosure must clearly outweigh the harm or danger that disclosure will cause. In fact, this goes against the very grain of the principle of public interest override. All grounds listed under sub-clause (1) are instances where public interest will clearly outweigh any harm or danger that disclosure may cause to the public interests protected under Clauses 5 to 12 of the RTI Bill.

Suggestion for improvement:

The last limb of sub-clause (1) beginning with: “and the benefits of disclosure clearly

outweigh..." may be omitted.

- 7) **Clause 18:** Clause 18 makes payment of gateway fees compulsory for every applicant.

There is no reason why a law guaranteeing the fundamental human right to know what the government is doing must be contingent on the payment of an application fee. No other human right requires payment of a fee for its enforcement unless the intervention of a competent court is sought. It is enough if the public institution is empowered to collect the cost of reproducing and supplying the information to the applicant.

It is indeed laudable that Clause 18 creates convenience for the visually disabled by allowing submission of information requests in Braille. However, in actual practice this may create problems for the Information Officers many of whom may not be able to decipher Braille. Unless every public institution is linked to resources that can provide transcription services, there will be undue delays in the processing of information requests. Instead, the visually impaired applicant will be served better under sub-clause (2).

Suggestions for improvement:

- 1) Sub-clause 18(1)(f) may be omitted.
- 2) If provision of Braille transcription services to all public institutions is likely to be a challenge, sub-clause 18(6) may be omitted for the time being until such time that all public institutions have easy access to such transcription services.

- 8) **Clauses 19 and 75:** Clause 19 contains no guidance as to who may be appointed as Information Officers by a public institution. Should they be hired from the market afresh for handling duties under the RTI Act or will they be appointed from among officers already serving with the public institution? Clause 75 states that an existing information officer may be appointed under the RTI Act, but all public institutions, especially private institutions that may eventually be brought under this law may not have such posts.

Also, all Information Officers will not be custodians of all information created and held by a public institution. Several files and records may be available with their colleagues. The law must make it obligatory for the colleagues of every Information Officer to provide reasonable assistance to him or her on demand in order to process an information request, on pain of sanctions for non-cooperation. The RTI laws of India and Sri Lanka make it compulsory for colleagues of an Information Officer to provide reasonable assistance on demand.

Suggestions for improvement:

- 1) Clause 19 and 75 may be clubbed together in Clause 19 and the new Clause 19 may be amended to clearly indicate that serving officers of sufficient seniority and experience must be appointed as Information officers, with adequate powers to request the assistance of their colleagues or any officer junior or senior to them in

order to dispose of an information request.

- 2) A new provision may be added in this clause to make it compulsory for colleagues to provide reasonable assistance to an Information officer on demand along the lines of Sections 5(4) and 5(5) of [India's RTI Act](#).

9) **Clause 22:** The language of this Clause regarding time limits for responding to an information request and for actually supplying copies of the information requested creates some confusion. For example, if the Information Officer gives notice of his decision to provide access to information to the applicant on the 13th day of receipt of the request, will the information be provided within the next 24 hours or within the next 14 days as specified in sub-clause 3(a)? The explanation to Clause 22 contained in the Memorandum attached to the RTI Bill, 2018 indicates that both processes must be completed within 14 days only under ordinary circumstances.

Sub-clause (8) deals with “third party” procedures. However, this phrase is not defined anywhere in the RTI Bill as pointed out under “General Suggestions” above. Apart from including such a definition, the draft law must also state that all information relating to third parties will not be subject to such procedures. If this is what is intended, then all information requests, unless they are for personal information of the applicant, will be bogged down by “third party” procedures causing undue delays. Only confidential information pertaining to third parties must be subject to these procedures.

Further, third party procedures must also be restricted to specific time limits at the request and review stages. Ordinarily the time limit for making decisions is extended by a few days when the request involves information relating to third parties.

Suggestions for improvement:

- 1) Clause 91 may be amended to include a definition of “third party” as follows: “*Third party means any person including a private entity but does not include the information applicant or the public institution which holds the information requested.*”
- 2) Clause 22 may be amended to ensure that the information officer gives both the notice of his decision and also access to the information requested, within the time limit specified in the Act. The time taken by the applicant for paying the cost of obtaining the information may be excluded from the calculation of the time limits for the purpose of the Act. Section 7(3) of [India's RTI Act](#) may be taken as a reference point for this purpose.
- 3) Clause 22(8) may be expanded to include a detailed procedure and specify unequivocal time limits for providing access to information pertaining to third parties. Clause 39 of the [Model Law on Access to Information for Africa](#) and Section 11 of [India's RTI Act](#) may be used as reference points.

10) **Clause 23:** Despite its noble intentions, Clause 23 opens up the door for mischief to be committed by denying access to information whose disclosure may cause inconvenience or embarrassment to the public institution, any private entity or the Government on the ground that it cannot be found or does not exist. If the information cannot be found, then it must be treated as a case of missing public property and the relevant laws and procedures must be set in motion, such as causing a police investigation to be launched. On the other hand, if the information sought simply does not exist it means that either the public institution has no duty to collect the information or that it has been weeded out or destroyed as per the record retention schedule applicable. In such an instance, as the information simply does not exist in material form, there is no obligation to make a decision on the request except to say that the information does not exist and was never required to be created or collected under any law. There is no need for a separate exemption to be listed in the RTI Act. Clause 22 may be amended to include a provision to state that the information does not exist.

Suggestion for improvement:

Clause 23 may be omitted. In order to account for non-existent information a new sub-clause 10 may be inserted under Clause 22 as follows: “*10) Where any information sought does not exist because there is no duty placed on a public institution by any law, rule or regulation for the time being in force to hold or collect such information or if it has been destroyed as per the record retention schedule applicable to such information, the Information Officer may give a notice to the applicant so stating.*”

11) **Clause 24:** In view of the submission made at para #II.5 above, there is no need to include a reference to application fee in Clause 24(1). Further, there is no reason why an applicant must be required to pay a “reasonable deposit” for obtaining access to information. It should be the responsibility of the Information Officer to intimate to the applicant the actual fee payable for obtaining the information in the form requested keeping in mind the fee rates prescribed in the Regulations that the Attorney-General and Minister for Justice is empowered to make under Clause 90. In fact, instances of Information Officers overcharging fees in order to discourage an applicant from obtaining access to information is not uncommon in South Asian countries. Further, the fee rates for copying or reproducing the information must not be so high as to inhibit people from making a request. So the RTI Bill must also indicate that all fee rates prescribed must be reasonable and only cover the actual cost of reproducing and supplying the information to the applicant. Further, as the intimation of fee payable is also a decision of the Information Officer, it is amenable for review at all higher stages. Prescribing a time limit for paying the fees takes away the right to seek a review of the fee charged. This is an unfair practice.

Again, it is not clear whether the costs anticipated under ***clause 78 (3) and (4)*** qualifies as costs that exceeds the cost of providing the information as specified under ***clause 24***. If this is so, then we would propose that it is specified to avoid the abuse of discretion by the public institution.

Additionally, we propose that all clauses on fees should be brought together for ease of reference for example, ***clauses 78 and 79 could be moved to clause 25***

Suggestions for improvement:

- 1) The fee related clauses may be amended keeping Section 7 of India's RTI Act as a reference point.
- 2) Sub-clause (4) may be substituted with a provision akin to Section 7(3) of India's RTI Act.

12) **Clause 26:** In light of the analysis of Clause 22 given at para #II.7 above is some confusion about the time limits specified for extending the time limit for dealing with an RTI application. While an extension cannot be taken for more than 14 days under sub-clause (2), intimation of the extension of time limit must be made within 30 days of receipt of the application by the Information Officer. This discrepancy will create confusion about time limits.

Suggestion for improvement:

Clause 26 may be tightened to explain the time limits for providing access to information if it involves more than 14 days.

13) **Clause 27:** Sub-clause (1) also opens wide a door for potential mischief to be committed by an Information Officer whose end result will be denial of access to information. In the absence of any guidance as to why the public institution is unable to process an application, this may become the default option for unscrupulous Information Officers who will simply return the fees deposited by the applicant and wash their hands of the duty to process the RTI application.

Suggestion for improvement:

Clause 27 may be omitted.

14) **Clauses 28, 84 and 92:** *This Clause empowers a public institution to refuse access to information if it is manifestly frivolous or vexatious.* While the problem of people making requests that are either frivolous or vexatious in nature is likely to occur in Ghana, permitting a public institution to simply reject such a request is not an advisable method for dealing with the problem. It must be remembered that by making an information request an applicant exercises his/her right to freedom of speech and expression which is an internationally recognised basic human right and guaranteed domestically by almost all Constitutions around the world. Free speech may be subjected only to reasonable restrictions.² Therefore adequate care must be taken while regulating the process of making information requests to ensure that free expression is not curtailed unreasonably. Further, such requests are often a very small sub-set of the total number of requests as noted a few years ago by the Justice Committee of UK's Parliament and do not justify the imposition of harsh measures. The province of

² For example see Article 19(1) and (2), *Constitution of India*, accessible on the website of the Ministry of Law and Justice at: <http://indiacode.nic.in/coiweb/welcome.html>, accessed on 12 April, 2018.

Ontario, Canada has devised a more requestor friendly procedure to deal with such requests under its access law as follows:³

"A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 26,

- (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;*
- (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and*
- (c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision."*

This procedure contains explicit safeguards against misuse of the power to reject a request by labeling it as frivolous or vexatious.

Further, the RTI Bill, 2018 seeks to exempt access to information that is available under other laws such as public registers, information available for inspection otherwise and also libraries. While it is true that several other laws and regulations create public registers which any person may access, in reality such laws often do not contain provisions for redressing grievances if access is not provided to the applicant. So also, if the national archives, libraries and museums deny access to information they hold, the only redress possible is through a court of law which is expensive. This is why such information is also included in many RTI laws around the world and the option of choosing between the two sets of laws for accessing information is left to the best judgment of the applicant. If special fees are charged under other laws for providing access to information, the same may be legitimized under the RTI Act as well. Further, some information might have been published in priced publications earlier but publishers run out of stock. In such cases people should have the right to seek photocopies of the publication under the RTI law as available in the record of the public institution which caused it to be published in the first place. As for museums, copyrighted publications where the copyright vests in private entities such rights may be protected by inserting a new sub-clause under Clause 10. So Clause 92 already seeks to subject all other laws that provide access to information to the RTI Act. So the sub-clauses (1)(c), (d) and (e) of Clause 28 in effect contradict Clause 92 (also see para #II.26 below).

Suggestions for improvement:

- 1) In Clause 28, sub-clause (1)(a) may be amended along the lines of the provision contained in Ontario's access law as described above.
- 2) In Clause 28, sub-clauses (1)(c) (d) and (e) may be omitted.
- 3) Clause 84 may be omitted. Instead a new sub-clause may be inserted after sub-clause (f) under Clause 10 as follows: "(g) the disclosure of information is likely to infringe a

³ Section 27.7.1 of Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, accessible on the website of the Government of Ontario (Services Ontario, E-laws) at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90f31_e.htm, accessed on 30 October, 2012.

15) **Clause 33:** As Clause 22(5) of the Bill specifies that where an Information Officer fails

to give a decision on an RTI application within the stipulated time limit, it shall be deemed to have been refused. As a legal fiction is created by this clause, this should be adequate ground for the applicant to escalate the matter to the internal review procedure under Clause 33. Currently Clause 33 links the right of appeal to the “receipt of a decision of an information officer”. In a situation of deemed refusal there will be no such “receipt of a decision”. The applicant should not be deprived of the right of appeal under such circumstances.

Further, the applicant is required to submit a fee along with the application for review. There is no reason why an appeal fee should be charged by a public institution to review its own decision – whether formally communicated or deemed. The public institution should not seek to make money out of the exercise of a fundamental right of its own people.

Further, sub-clause (5) requires the Information Officer to submit the application for review to the head of the institution. This is not a desirable procedure for multiple reasons. First, sub-clause (1) specifically states that the application for internal review should be addressed to the head of the institution. So there is no reason why the Information Officer should be involved at this stage except to justify or explain his or her actions or omissions. Second, there is every likelihood that an Information Officer may unduly delay submission of the application for internal review and the head of the institution may be blissfully unaware of its existence. Third, it is improper to require an Information officer to handle an application which seeks review of his or her own actions or omissions. Instead any of the officer subordinate to the head of the public institution may be required to put the matter up to the head of the institution. These procedural details may be included in the Regulations. There is no need to burden the principal Act with it.

Suggestions for improvement:

- 1) The opening limb of sub-clause (1) may be amended as follows: “*(1) An application for internal review shall be made within thirty days of the receipt of the decision of an information officer or within 30 days of the date on which such decision ought to have been made under Section 22 of the Act.*”
- 2) Sub-clause (c) may be omitted.
- 3) The phrase “*where available*” may be inserted at the end of Sub-clause (e).
- 4) Sub-clause (5) may be amended to replace the phrase “information officer” wherever occurring, with “*any officer designated for the purpose of processing appeals*”.

16) **Clause 34:** It is common practice in many countries to supply information free of cost to the applicant if during the review process it is determined that the request for information was wrongfully denied by the Information Officer. So there is no good reason why an applicant who is successful in the internal review process must be required to pay the cost of obtaining the information. For example, Sri Lanka permits supply of information free of charge to every person who is successful in an appeal against the decision of the Information Officer.⁴ Further, Section 7(6) of India's RTI Act requires information to be supplied to the RTI applicant free of charge if the information officer misses the deadline for sending a response.

Suggestion for improvement:

Clause 34(2)(a) may be omitted.

17) **Clauses 38 to 41 and 68(b):** The RTI Bill 2018 creates a certain degree of confusion in

so far as external appeals are concerned. While Clause 68 makes the RTI Commission the authority competent to review decisions of a public institution regarding a request for information or an application for internal review of such decision, Clause 38 seems to permit a direct challenge to a public institution's decision of refusal to disclose information if it will be prejudicial to the security of the State or will be injurious to the public interest or for any reason. This is so despite the stipulation under Clause 68(b) that the High Court may be approached only after exhausting all other procedures under the law. The explanatory Memorandum attached to the Bill does not throw light on this provision which enables an aggrieved person to approach the High Court directly under Clause 38.

In fact, the High Court should be the last port of call for redress of any grievance under this law because moving a constitutional court is not easy for people of modest means. The draft RTI Bill should require the applicant to move the RTI Commission after the exhaustion of the internal review procedure except where the information sought is under Clause 22(7) for the purpose of safeguarding the life and liberty of an individual. In such matters it would be prudent to move the RTI Commission for quick access to the desired information. In any case the writ jurisdiction of the High Court under the Constitution will remain intact if a person elects to move the Court instead of going to the RTI Commission for seeking this information. We propose that the title of this clause be rephrased, as both legal representation and expert witnesses may be required for appearances before the court and the commission.

Additionally, it is not clear what is meant by the phrase in *line 3 of clause 41* ‘...whether before a Minister...’ if the clause anticipates that legal representation and expert witnesses will be required for the internal review processes then we would propose that the phrase be

⁴ See Rule 11 of Sri Lanka's *Right to Information Rules of 2017 (Fees and Appeal Procedure)*, accessible on the RTI Sri Lanka website at: https://www.rti.gov.lk/images/resources/2004-66_E_feb.pdf, accessed on 12 April, 2018.

changed to read as follows: ‘*whether before a public institution ...*’. This is to ensure that private institutions are covered under that section.

Further, Clause 41 contemplates the possibility of a proceeding before the Minister. There is no procedural provision anywhere in the Bill to substantiate this right? In fact, the Minister should not be involved in any matter unless he is reviewing the decision of his office on an internal review.

Suggestions for improvement:

- 1) Clause 38 may be omitted.
- 2) The reference to Clause 38 may be omitted from Clause 39.
- 3) Clauses 39 and 41 may be placed after Clause 74 after renumbering the intermediate clauses.
- 4) The title of Clause 41 may be changed to “*Appearance in proceedings under this Act*” and the phrase: “a Minister” may be replaced with: “*the RTI Commission*”.
- 5) Clause 68 may be reformulated as follows: “*68. Subject to subsection (1) and (2) of section 67, an application to:*
(a) the Commission for the review of the decision of a public institution shall only be made to the Commission after the applicant has exhausted all rights of internal review offered by the public institution:
Provided that where the information sought is necessary for safeguarding the life and liberty of any person, the aggrieved applicant may approach the RTI Commission directly after the limitation period of 48 hours specified in subsection (7) of section 22 is over; or

18) **Clause 51:** Nothing in the RTI Bill 2018, prescribes any kind of eligibility criteria for a person to be considered for appointment as the Chairperson, Deputy Chairperson or a Member of the RTI Commission. Section 12(4) of India’s RTI Act specifies that persons of eminence with knowledge and experience in the fields of law, governance, administration, science, technology, journalism and mass communication or social service may be appointed to the Central Information Commission. Similarly, there is no maximum age limit for candidates to be considered for appointment. Further, given the open ended clause regarding reappointment with no limitation, an individual may be appointed to the RTI Commission for life. These anomalies will politicise the appointments process. The Committee can take guidance on eligibility from the Office of the Special Prosecutor Act 2017.

Further, the President may terminate the appointment of a member of the Commission on grounds specified in the draft Bill after causing an investigation against such member. This procedure for removal runs contrary to the independence of the RTI Commission protected by Clause 44. Instead in the manner of Section 14 of India’s RTI Act, a reference regarding the allegations against a member must be made to a Constitutional court for impartial investigation and a decision of removal must be made only on receipt of a report containing proof of the allegations.

Further, an important aspect of ensuring the independence of the members of the RTI Commission is by laying down the principles that will govern their remuneration or compensation package. For example, Section 13(5) of [India](#)'s RTI Act fixes the salaries and allowances payable to the Chief Information Commissioner and the 10 Information Commissioners of the Central Information Commission. Their remuneration is equal to that of the members of the Election Commission of India which is a constitutional authority. The compensation package has been fixed at such a high level in order to ensure that they rank above all serving bureaucrats and are able to command respect for their authority. This was found necessary in the Indian context where unfortunately, rank and pay and consequently respect for authority, go hand in hand. The draft RTI Bill must also stipulate that the compensation package will not be varied to the detriment of a serving Member of the RTI Commission. This safeguard is necessary to ensure that the RTI Commission does not become pliant and toe the line of the Government of the day while performing its statutory functions.

Suggestions for improvement:

- 1) The Draft Bill may be amended to prescribe eligibility criteria for candidates to be considered for appointment to the RTI Commission.
- 2) The law must prescribe a maximum age limit after which no person will be appointed to the RTI Commission or will be eligible to continue in service. There must be a limit on the number of time a person can be reappointed to the RTI Commission.
- 3) The High Court or the Supreme Court must be vested with the responsibility of investigating allegations of misconduct or incapacity against members of the RTI Commission.
- 4) The salaries and allowances must be fixed in the RTI Act itself along with a rider that the compensation package will not be varied to the detriment of any serving Member of the RTI Commission. These conditions of service could made akin to Article 71 holders.

19) ***Clause 52:*** The RTI Bill, 2018 requires the Board of the RTI Commission to meet at least once every three months. Given the onerous responsibilities placed on the RTI Commission, it must be required to meet every working day and have a headquarters – an address with which it may be identified. However, the Commission should be free to hold its meetings and decide cases brought before it in different parts of the country in order to convey a picture of accessibility to the people.

Suggestions for improvement:

- 1) Sub-clause (1) may be amended as follows: “*(1) The Board shall attend office during working hours on all working days for the despatch of business.*”
- 2) A new sub-clause (5) may be inserted after sub-clause (4) as follows: “*(5) The headquarters of the Commission shall be in Accra and the Board may conduct its meetings at such other places determined by the Chairperson in consultation with other Members for the despatch of business.*”

20) **Clause 73:** The RTI Commission is an independent adjudicatory body for information access disputes. So it must have three kinds of powers which are missing from the draft RTI Bill. First, it must have the power to review its own decision on grounds of error of law or of fact apparent on the face of the record. Second, the RTI Commission must have the powers to enforce its decisions or it will become a toothless tiger. In the absence of powers to enforce its decisions, public institutions may blissfully ignore its directives until the aggrieved applicant moves the High Court. Section 20 of [India's](#) RTI Act, gives the Information Commissions established at the Central and State levels to impose monetary penalties against errant information officers. In cases of repeated violation of the law it must be empowered to make recommendations to the competent authorities in the public institutions for taking disciplinary action against such officers. **Third**, where an applicant has suffered any loss of detriment due to wrongful denial of information, the RTI Commission must be empowered to award compensation which must be paid up by the public institution. Section 19(8)(b) of [India's](#) RTI Act, empowers the Information Commissions to award compensation to RTI applicants for loss or detriment suffered.

Suggestions for improvement:

- 1) New sub-clauses may be inserted to empower the RTI Commission to impose monetary penalties on errant information officers for first time contraventions of the law and recommend disciplinary action to the appropriate authorities for persistent violation of the law. Monetary penalties must be individual liability of the errant information officer, payable from his or her own pocket to the public exchequer.
- 2) New sub-clauses may be inserted to empower the RTI Commission to award compensation to RTI applicants who demonstrate any loss or detriment suffered due to unreasonable denial or delay in the supply of information. The public institution must be required to pay these monies out of its own funds.

21) **Clause 74:** Sub-clause (3) places the burden of proof on the applicant if information is required from a relevant private body for the exercise of any right. As the term “relevant private body” is not defined anywhere in the draft RTI Bill and the term “public institution” includes private bodies that the Minister may notify eventually, this burden of proof need not be placed on the RTI applicant.

Suggestion for improvement:

Sub-clause (3) may be omitted.

22) **Clauses 76 and 77:** Sub-clause (2) of Clause 76 places an indirect embargo on the right

of persons to publish information they obtain under the RTI Act on grounds connected with the law on defamation. This is a very unreasonable restriction not only on the use of information obtained under the RTI Act but also on the fundamental right to freedom of speech and expression guaranteed under Article 21(1)(a) of Ghana’s Constitution. The exemption clauses in the RTI Bill adequately take care of information of personal nature whose publication may cause unwarranted invasion of the privacy of any individual.

However, sub-clause (2) will become a repressive tool in the hands of unscrupulous bureaucrats and politicians who will seek to prosecute journalists and anti-corruption or social justice activists from publishing evidence of their wrongdoing based on documents obtained under the RTI Act. The very purpose of the RTI Act, namely containment of corruption and enabling people to hold the Government and public institutions accountable will be defeated.

In view of sub-clause (1) of Clause 76, Clause 77 becomes redundant as they cover the same field.

Suggestions for improvement:

- 1) Sub-clause (2) may be omitted.
- 2) Clause 77 may be omitted.

23) **Clause 83:** The limitation period of 25 years on the application of exemptions is too lengthy. It is common practice in many countries to limit the application of exemptions to information that is more than 15 or 20 years old.

Suggestion for improvement:

Consideration may be given to reducing the limitation period to 15 or 20 years in sub-clause (1).

24) **Clause 86:** While it is reasonable to impose a punishment on an information officer for

disclosing exempt information, the penalty must not be so severe that information officers make refusal the default option. Further, the standard of proof as to the intentions of the information officer must be much higher than what is provided in Clause 86.

Suggestions for improvement:

- 1) The opening limb of Clause 86 may be amended as follows: “*A person who in bad faith and under the full knowledge that he is disclosing exempt information in violation of the provisions of this Act commits an offence....*”
- 2) As far as possible a prison term may be avoided. However if it is felt that it must be retained, the prison term may be limited to a maximum of six months and the monetary penalty may be doubled instead.

25) **Clause 88:** In view of the very specific provisions for extension of time limits for providing access to information under Clause 25 and the possibility of deferment under Clause 21 of the Bill, Clause 88 becomes redundant.

Suggestion for improvement:

Clause 88 may be omitted.

26) **Clause 89:** It is laudable that the RTI Bill 2018 contemplates coverage of entities in the

private sector in future. This Clause however does not spell out any criteria for such private sector entities. Instead it is left to the Attorney-General and Minister for Justice to extend the application of this law to the private sector by legislative instrument. The explanatory memorandum attached to the RTI Bill states that this will be accomplished in order to stamp out corruption. It will be useful to provide some criteria in the RTI Act itself as guidance for the Minister to accomplish this task. There are examples of good practice from Africa and South Asia which can serve as reference points. For example, Section 1.4 of [Liberia's Freedom of Information Act, 2010](#) makes the law applicable to private sector entities that “receive public resources and benefits, engage in public functions and or provide public services, particularly in respect of information relating to the public resources, benefits, functions or services.” Terms such as “public function” and “public services” are defined in the law itself to lend greater clarity (see Sections 1.3.7 to 1.3.8 of the [Act](#)). Similarly, Section 43 of [Sri Lanka's](#) RTI Act includes a within the definition of a “public authority” (the primary duty holder under the law) every private entity or organisation which is carrying out a statutory service 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.” However, the coverage under the RTI law is only to the extent of activities covered by that statutory or public function or service. Similarly, Clause 1 of the [Model Law on Access to Information for Africa](#) defines a “relevant private body” (a duty holder to be covered by the law if the Model is adopted by any country) as follows:

“relevant private body means anybody that would otherwise be a private body under this Act that is:

- (a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or
- (b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service;”

Suggestion for improvement:

A new sub-Clause may be inserted after sub-Clause (1) as follows: “(2) *The following criteria shall serve as guidance for extending the application of this Act to the private sector:*

- a) *receipt of public resources and benefits or engagement in public functions or provision of public services by a private entity or body, particularly in respect of information relating to such public resources, benefits, functions or services;*
- b) *carrying out of a statutory service 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, by a private entity or body, in respect of information relating to such statutory or public function or service.”*

27) **Clause 90:** It is necessary to ensure that the process of developing Regulations is also

done in a consultative and participatory manner following the tradition of the crafting of the RTI law itself. This will ensure that people who are the primary stakeholders in the implementation of this law will be consulted and have their say in the process. While Ghana's [Statutory Instruments Act, 1959](#) will apply to the Regulation making process, to the best of our knowledge nothing in the said law requires consultation with the relevant stakeholders in particular or the people in general prior to the development of the legislative instrument under any statute. So people's participation in the process of developing the Regulations will ensure that the exercise will be performed within the contours of the principal Act without curtailing any right guaranteed therein. Moreover, the law must set a timeline for making regulations pursuant to the Act when assented upon establishment of the RTI Commission and assumption of its officers or within 6 months of passage of the bill, whichever is earlier.

Suggestion for improvement:

The opening limb of Clause 90 may be amended as follows: "*The Minister may, after prior publication of the draft to enable widespread public consultation, make Regulations by legislative instrument.*"

28) **Clause 91:** It is laudable definition of the term "information" is inclusive. However, it includes only recorded matter or material. For the sake of greater clarity, terms such as "samples" and "models" may be included in the definition. The experience from South Asian countries has shown that enabling access to samples of materials used in public works has helped citizens, journalists and civil society organisations to challenge the poor quality of the materials used as a result of corruption in the process of procurement or award of contracts. Section 2(f) of [India's RTI Act](#) and Section 43 of [Sri Lanka's RTI Act](#) may be used as reference points for including these terms in the definition of "information".

Further, the term "relevant private body" defined in Clause 91 does not figure in most of the substantive provisions of the RTI Bill 2018, as is the case with the [Model Law on Access to Information for Africa](#) where access to information from such private bodies may be had for the protection of any right guaranteed by law. Further, Clause 89 contemplates bringing private entities within the ambit of the law through legislative instrument as a "public institution". So this definition may be omitted in accordance with the suggestion made at para #I.4 above.

Suggestions for improvement:

- 1) The definition of the term "information" may be expanded to include samples of materials and models used by a public institution.
- 2) The definition of "relevant private body" may be omitted.

29) **Clause 92:** As discussed at para #II.12 above, Clause 92 is very useful for the purpose of creating a uniform information access regime in Ghana by bringing all other laws that create information access rights under the umbrella of the RTI Act. It must also be pointed out that another school of thought seeks to keep such laws out of the ambit of the RTI Act for justifiable reasons such as ensuring that access rights do not disappear if the RTI Act is repealed or if monetary charges applicable for access in other laws are lower than the fee

rates prescribed under the RTI Act. So ultimately, a consensus needs to be arrived at in Ghana as to which model must be adopted – a uniformitarian model or a variegated model.

Further, Clause 92 is silent on a practical solution for any emergent situation wherein an earlier law contradicts any of the provisions of the RTI Act during application. For example, if no justification can be found for rejecting a request for information made under the RTI Act which is otherwise not accessible under another law that requires a public institution to collect or collate and retain such information in its records how should the information officer decide such matters. RTI laws adopted by several other countries deal with this problem through a shortcut method by giving the RTI law an overriding effect on the application of all other laws to the extent of inconsistency. In other words the RTI Act does not abolish or repeal other contradictory laws but specifies that its provisions will prevail over the inconsistent provisions. So in practical terms, if an earlier law prohibits the disclosure of a certain category of information but access may not be denied to such information under any of the permissible exemptions under the RTI Act (when a request for such information is made under the RTI Act) then the overriding clause will enable the information officer to disclose the information despite the prohibition in the earlier law. If on the other hand the public interest that is sought to be protected under the earlier law by prohibiting access to certain categories of information can be linked to one or more exemptions under the RTI Act, the information officer may reject the request (unless the public interest override under Clause 17 is attracted). So it is important to include a clause specifying the overriding effect of the RTI law over all earlier laws to the extent of inconsistency. Section 22 of [India](#)'s RTI Act and Section 4 of [Sri Lanka](#)'s RTI Act may be used as reference points for this purpose.

However, several other countries like the United Kingdom, Scotland and others used the more difficult route of examining all earlier laws for inconsistency with the provisions of their freedom of information laws and harmonised them one by one. Ghana could launch such an exercise during the preparatory phase for implementation.

Suggestion for improvement:

The existing Clause 92 may be renumbered as Clause 92(1) and a new sub-clause (2) may be inserted underneath it as follows: “*(2) The provisions of this Act shall have effect despite anything to the contrary in any other written law rule or regulation and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, rule or regulation the provisions of this Act shall prevail.*”

Thank you.

Submitted by the
RTI ACTION CAMPAIGN
April 20, 2018.

