

A critique of the draft *Freedom of Access to Official
Information Bill 2003* (Sri Lanka)
**Submitted by the
Commonwealth Human Rights Initiative**

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."
--- Kofi Annan

1. It is extremely positive that the Government of Sri Lanka is currently considering the enactment of legislation to entrench the right to information. It is well recognised that the right to information brings enormous benefits to society:
 - *It strengthens democracy:* The foundation of democracy is an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
 - *It supports participatory development:* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess why development strategies have gone askew and press for changes to put development back on track.
 - *It is a proven anti-corruption tool:* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
 - *It supports economic development:* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
 - *It helps to reduce conflict:* Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.

What a Right to Information Law Should Contain

2. **Maximum Disclosure:** The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access. Those bodies covered by the Act therefore have an *obligation* to disclose information and every member of the public has a corresponding *right* to receive information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.
3. To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to “information” rather than only “records” or “documents” is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies *“that carry out public functions or where their activities affect people’s rights”*. This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act 2000* provides a very good example to draw on.
4. Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public.
5. In order to support maximum information disclosure, the law should also provide protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.
6. **Minimum Exceptions:** The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing.
7. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.
8. Even where exemptions are included in legislation, they should still ALL be subject to a blanket “public interest override”, whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it. The test for exemptions (articulated by Article 19) is in 3 parts:
 - (i) Is the information covered by a legitimate exemption?
 - (ii) Will disclosure cause substantial harm?
 - (iii) Is the likely harm greater than the public interest in disclosure?**Simple Access Procedures:** A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which

people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law. The law should provide strict time limits for processing requests and these should be enforceable.

10. All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.
11. *Independent Appeals Mechanisms*: Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access.
12. In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation with review and enforcement powers. Additionally, final recourse to the courts should be permitted.
13. The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.
14. *Monitoring and Promotion of Open Governance*: Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often be empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.
15. Although not commonly included in early forms of right to information legislation, it is increasingly common to actually include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

Analysis of draft Act and suggestions for improvement

16. For right to information legislation to be effective, it needs to be respected and 'owned' by both the government and the public. Experience shows that this is most likely where legislation is developed participatorily. Participation in the legislative development process requires that government proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

17. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*, provides more detailed discussion of these standards. The critique below draws on these standards. NB: all of the legislation referred to in this analysis can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm.

Short Title

18. Section 1 sets out requirements for the Act to come into force. The provision is quite complicated and reliant on subsequent action by the Government. It is not clear why this complexity is necessary. Ideally, the Act should come into force on the date it is given Presidential assent. If it is felt that any additional time is required to allow the bureaucracy to prepare for implementation, explicit provisions to that effect should be included in the Act. Experience from around the world shows that a maximum of 12 months should be sufficient preparation time.

Application of the Provisions of the Act

19. Section 2 of the Act unnecessarily restricts the right of access to "official information" that is in the "possession, custody or control" of a public authority. These additional terms could be interpreted to restrict the coverage of the Act. To more effectively implement the principle of maximum disclosure, s.2 should confer a more general "right to information" (eg. s.1 UK *Freedom of Information Act 2000*), which would only be restricted by those exemptions specifically described in the remainder of the Act. Further, the right of access is restricted to "citizens" only. While the definition of "citizen" in s.36 does not specifically exclude persons who do not hold Sri Lankan citizenship, it is arguable that the definition was intended only to clarify the ordinary meaning of the term. Consideration should be given simply to allowing all persons, whether citizens, residents or non-citizens, access to information under the Act.

20. Following the best practice example of Part 3 of the South African *Promotion of Access to Information Act 2000* (POAIA), consideration should be given to extending the coverage of the Act from public authorities only to enable access to information held by private bodies which is necessary to exercise or protect a person's rights. Private bodies are increasingly exerting significant influence on public policy, especially as a result of the outsourcing of public functions, such that they should not be exempt from public scrutiny simply because of their private status. In the event that this broad extension of coverage is not acceptable, consideration should be given to including at least all of those bodies exercising public functions.

21. Section 3 is confusingly drafted and should be reworded and reconsidered for clarity. Sub-section (1) appears to attempt to override any laws inconsistent with the Act, but sub-section (2) then exempts from the coverage of the Act any official information held by bodies whose constituting Acts prohibit the release of such information. The latter provision may seriously undermine the Act and should be deleted. The exemptions clauses contained within the Act itself should be sufficient to protect information which should legitimately be exempt from disclosure. No other law should be necessary to protect information. In practice, the retention of secrecy provisions in other legislation can cause confusion in the public service and support a continuing culture of secrecy.

Denial of Access to Official Information

22. While the exemptions regime is laudably relatively narrow, section 4 suffers from the fact that it does not make every single exemption subject to a public interest override. The test that should be applied to all exemptions is set out in paragraph 8 above.

23. More specific critiques of the exemptions include:

- Section 4(1)(a) is too broadly worded and could therefore be open to misuse by officials. The exemption should not apply to “any matter”. Best practice shows that the protection of an exemption should be legitimately extended only *“the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy”* (see s.44(1)(b)(ii) POAIA South Africa).
- Section 4(1)(b)(ii) and (c): The public interest override included in these sections should not require that disclosure should be “vital” in the public interest; depending on interpretation, this may unjustifiably restrict the application of the public interest override.
- Section 4(1)(f): Query what “medical secrets” is intended to cover. Consideration should be given to deleting this clause on the basis that relevant information will be protected either by s.4(1)(b) or s.4(1)e). If this suggestion is unacceptable, the phrase “medical secrets” should be deleted, or at least be specifically defined, or the clause reworded for clarity.

24. Paragraph of section 4(3) is unnecessary, as bureaucrats will usually be subject to disciplinary action for unwarranted disclosures under public service regulations and their own employment contracts. In practice, the result of the section will likely be to undermine the operation of the Act by making bureaucrats wary of releasing any information for fear of prosecution. Section 4(3) also conflicts with section 34 dealing with whistleblowers.

Duties of Ministers and public authorities

25. Consideration should be given to rewording section 6(1) to more strongly reflect that record keeping and management practices should be implemented with a view to ensuring that the purposes of the Act are furthered. For example, *“Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act.”* Consideration should also be given to whether the Information Commission should be responsible for developing a Code of Practice or other such regulation to provide guidance to bodies covered by the Act on how to keep, manage and dispose of their records (see s.46, United Kingdom *Freedom of Information Act 2000*).

26. Section 7 imposes obligations on the Government to proactively disclose information of relevance to the public. Currently, the provisions fall short of best practice standards.

- To ensure consistency with the coverage of the Act, the obligations for proactive disclosure should be explicitly imposed on all bodies covered by section 2 of the Act (howsoever that section is finally drafted (see paras 18-19)). It may be confusing for the public to be required to know which Minister has responsibility for a certain body. The reports may also become unnecessarily complicated if only one report needs to be published for a huge range of bodies covered by one Minister.
- The reports should be published/updated every 6-12 months, rather than every 2 years to ensure that the public has access to up to date information without imposing too heavy a burden on the bureaucracy.
- The manner of publication should not be determined by each Minister, as it may be confusing for the public if each Minister decides upon a different method of publication. It is suggested that section 7 should be reworded to require information to be published “in such a manner as to ensure that it is easily accessible by the public”, with a minimum obligation that the report described in section 7 is published in both of the national languages on every body’s website and a copy held for (free) inspection at all of the body’s offices, ie. not just the body’s headquarters. (See the South African *Promotion of Access to Information Regulations 2002*, ss.2-3 for more.)

27. In addition to the current provisions in section 7(i)-(vi), consideration could be given to the inclusion of addition categories of information with which the public should be proactively provided. Best practice principles are listed below:

Every public body shall, in the public interest, publish and disseminate in an accessible form, key information including but not limited to: -

- a. a description of its structure, functions, duties and finances;*
- b. relevant details concerning any services it provides directly to members of the public;*
- c. any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;*
- d. a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;*
- e. a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;*
- f. any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;*
- g. the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and*
- h. any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body. (Article 19 Model Law, s.17)*

28. Section 8 is confusingly drafted. The provision should be reworded for clarity, taking into account the following:

- The section requires the communication of specified information “prior to the commencement of any work or activity relating to the *initiation* of any project”, but at such an early stage (ie. prior to initiation) one must query just how much useful information will be available.
- Communication is required in relation to information that is “available as on the date of such communication”, but this overlooks the fact that for the public to be meaningfully informed and engaged, they need to be provided with information throughout the life cycle of a project. In reality, it is a well known fact that many public projects take years to complete and undergo significant changes during their implementation. Consideration should be given to amending the section to require the government to provide updated information both at the time a project is being developed and at least annually during the implementation of the project.
- The costs limits which apply to the section 8 are too high. The intention of the section is to enable people to more effectively monitor development projects, but the cost limits will in practice operate to exclude a large range of development activities which still have a major effect on people’s lives. In contrast, similar provisions in the Indian *Freedom of Information Act 2002* apply no such limitation.
- Taking into account bullet point 3 of paragraph 26 above, consideration should be given to including a minimum publication standard in section 8 which is the same as that for the information to be published under section 7. The Information Commission can then be empowered to issue supplementary guidelines as appropriate.

29. Section 9(2) appears out of place in a section dealing with reporting to Parliament. Consideration should be given to moving the provision to the Part on “Appeals Against Rejections”.

Establishment of Freedom of Information Commission

30. It is very positive that the Act seeks to create a dedicated body with responsibility for monitoring the Act, raising public awareness, training public officials and with powers to act as a cheap independent appeals mechanism. It is imperative that the Government supports the creation of the new Information Commission by properly resourcing the body to enable it to perform its new role.
31. Under section 13(c) the Information Commission is given the power to hear and determine appeals. In order to ensure that the Information Commission can perform these functions effectively, additional provisions should be included which explicitly grant the Commission the powers necessary to undertake a complete investigation and ensure enforcement of its orders (see paragraph 44-46 below for more re enforcement). The powers granted to the Canadian Information Commissioner under s.36 of the *Canadian Access to Information Act 1982* provide a good example:
- (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power*
- (a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*
 - (b) to administer oaths;*
 - (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;*
 - (d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;*
 - (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and*
 - (f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*
- (2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.*
32. Section 18 requires the Commission within 6 months of its establishment to determine its own procedural rules for the submission of appeals. It is imperative that any such rules are published as soon as possible. The rules should be developed following public consultation, to ensure that the procedures are user-friendly and simple.

Information Officers

33. Section 20(1) permits the imposition of a fee prior to the provision of information. In accordance with best practice, the section should be reworded to clarify that no fee should be charged for inspection or for the time taken by bureaucrats to process requests, and that only the actual cost of reproduction should be passed on to requesters.
34. It is not clear how the fee provisions in section 21(1) and (2) interact; specifically, there does not appear to be any justification for the imposition of the “additional fees” permitted by section 21(2). Sub-section 2 should be deleted.

35. Section 21 is confusingly drafted. The section should be reworded to make it clear that both the decision regarding disclosure and its communication to the requester should be done within fourteen days. Further, a time limit should be included for granting access to information once the decision is made. Best practice suggests a time limit of no more than 28 days. Consideration should also be given to including an additional clause requiring applications for information which relate to life and liberty to be responded to within 48 hours (see s.7(1) of the Indian *Freedom of Information Act 2002*).
36. It is very positive that section 21(3) allows for the Minister to introduce fee waiver provisions. However, for the sake of certainty and simplicity and in accordance with best practice, the Act itself should include a provision which allows Information Officers to waive fees under the Act in the public interest.
37. Section 22 should be amended to set basic parameters for the development of fee guidelines by the Information Commission. For example, fees should be reasonable, be set only to cover actual costs incurred and should cover only reproduction costs not the time taken by bureaucrats.
38. Section 25(1) is ambiguous and should explicitly deal with the issue of whether applications which relate to third party information are subject to the time limits set out in section 21. The section could usefully set out more clearly the timeline for sending notices to third parties, receiving representations and making a decision on a request. Best practice allows for an extension of time where third parties are involved, but no more than an additional 30 days.
39. Section 27 should be deleted. There is no justifiable reason why the government should try to place a restriction on publication of information which has been disclosed and is therefore in the public domain. If the intention of the section is to protect the Government from legal action for authorising breach of copyright or the like, this should be explicitly addressed. Section 38 of the Trinidad and Tobago *Freedom of Information Act 1999* provides a useful example:
38. (1) *Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –*
- (a) *no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;*
 - (b) *no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –*
 - (I) *any person who was the author of the document; or*
 - (II) *any person as a result of that person having supplied the document or the information contained in it to the public authority;*
 - (c) *no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.*
- (2) *The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.*
- (3) *Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.*

Appeals Against Rejections

40. It is very positive that the overall impact of the appeals section is to allow for independent review of the decisions of Information Officers.

41. It is recommended that section 28, which presumes some form of internal review as a first appeal, be deleted. In light of the fact that section 29 allows for appeals to the independent Information Commission, there is little value (assuming that the Information Commission develops procedural rules which ensure appeals are cheap, simple and quick) in first requiring aggrieved requesters to put their case again before another government official. In the event that section 28 is retained, it is recommended that the section be reworded to make it clear who is responsible for determining “the person designated to hear any such appeal” – the Department, the Information Commission or the Government via regulations?
42. Section 29 should include a time limit for the disposal of appeals to the Information Commission. In accordance with best practice, this time limit should be no more than 30 days.
43. Section 32(2) should be amended to require the Information Commission to make its Reports available on its website, should it eventually create one.

General

44. Section 33 is commendable in allowing for penalties to be imposed on officers for misconduct and delay. However, currently it is not clear who has the power and/or responsibility to determine whether and who should be fined and how much. Consideration should be given to redrafting the enforcement provisions (or the appeal provisions or both) to make it explicit that at least the Information Commission and the courts are empowered to exercise section 33 powers to impose penalties on non-compliant bodies and officials.
45. Section 33 also does not make it clear whether the enforcement powers can be exercised unilaterally or whether a complaint by a requester must first be received. The latter point should be clarified because, for example, it may be that the Information Commission, while exercising its monitoring functions, discovers that a department regularly delays its response to requests and could usefully use enforcement powers to impose a fine for such conduct, even in the absence of a specific complaint by a request.
46. While the penalties provisions already included in the Act are a good start, best practice would encourage the inclusion of additional enforcement/penalty provisions to ensure that departments cannot simply ignore the provisions of the Act and the orders of the Information Commission with impunity. For example:
 - s.49 of the Article 19 Model Law:
 - (1) *It is a criminal offence to wilfully: -*
 - a. *obstruct access to any record contrary to this Act;*
 - b. *obstruct the performance by a public body of a duty under this Act;*
 - c. *interfere with the work of the Information Commission; or*
 - d. *destroys records without lawful authority.[..or*
 - e. *conceals or falsifies records.]*
 - (2) *Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.*
 - s.12 of the Maharashtra (India) *Right to Information Act 2002*:
 - (1) *Where any Public Information Officer has without any reasonable cause, failed to supply the information sought, within the period specified under sub-section (2) of section 6, the appellate authority may, in appeal impose a penalty of rupees two hundred fifty, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.*

(2) *Where it is found in appeal that any Public Information Officer has knowingly given -*
(a) *incorrect or misleading information, or*
(b) *wrong or incomplete information ;*
the appellate authority may impose a penalty not exceeding rupees two thousand, on such Public Information Officer as it thinks appropriate after giving such officer a reasonable opportunity of being heard...

(4) *The penalty under sub-sections (1) and (2) as imposed by the appellate authority, shall be recoverable from the salary of the Public Information Officer concerned, or if no salary is drawn, as an arrears of land revenue.*

- s.54 of the UK *Freedom of Information Act 2000*:

(3) *If a public authority has failed to comply with [a notice of the Information Commission the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.*

(4) *Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.*

47. Section 34 is intended to protect whistleblowers but has been too narrowly worded. Currently, the section protects only disclosure relating to “official information which is permitted to be released or disclosed on a request submitted under this Act”. This seriously restricts the protection afforded – it adds little to the protection generally afforded by the introduction of the Act. Best practice whistleblower provisions require that persons should be protected from prosecution for disclosing “any information so long as such employee acted:

(a) in good faith; and

(b) in the reasonable belief that:

(i) the information was substantially true; and

(ii) such information disclosed evidence of any wrongdoing or a serious threat to the health or safety of any citizen or to the environment”.

48. The definition of “official information” in section 36 appears to be inclusive but would benefit from explicitly stating that it is “not exhaustive”. Currently, it focuses too narrowly on documentary material and should be broadened to include, for example, materials and models. It has been shown in many countries that the public’s ability to oversee government activities and hold authorities to account, in particular those bodies which deal with construction or road works, is enhanced by allowing them to access samples of materials and the like.

49. In accordance with paragraphs 18 and 19 above, the definition of “public authority” should be broadened to at least include private bodies which exercise public functions. The exemption from coverage of the Act for Parliament and Cabinet under sub-section (b) of the definition should be deleted. There is no justifiable reason for these bodies to be exempted and while it may be argued that they are liable to be in possession of sensitive information which should be protected from disclosure, such protection can be ensured by the exemptions in section 4. Best practice rejects the notion of total exemptions for entire bodies or positions.

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