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Date: 03/03/2016

To,

Hon. Jayantha Chandrasiri Jayasuriya

Attorney General of Sri Lanka

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Dear Mr. Jayasuriya,

Please accept my congratulations on your appointment as the Attorney General of Sri Lanka.

I had the opportunity of meeting your predecessor Hon. Y. J. W. Wijayatilake, P.C. when I visited Colombo in December last year accompanied by your colleague, Senior State Counsel Mr. Nirmalan Wigneswaran. We discussed at length the need for strengthening the Draft Right to Information Bill that had been approved by the Cabinet.

As the first Chief Information Commissioner in India, between 2005–2010, I had the responsibility and the privilege of guiding the effective implementation of the Right to Information Act (RTI Act) in the Central Government. It is my experience that a law that requires government and other public authorities to be transparent is best implemented by taking the citizenry into confidence at every stage. The reason why the RTI Act continues to be one of the most popular laws in India is because citizens, civil society groups, academics and the media were closely involved in the crafting of this law and later have continued to give valuable feedback to the government for overcoming the bottlenecks in the implementation process.

While resourcing a consultation on the Draft RTI Bill, jointly organised by CHRI and the International Centre for Ethnic Studies (ICES), in Colombo last December, several participants voiced their expectations that the Government would put in place a mechanism for conducting meaningful consultations with the people on what they would like to see included in the draft law. I am given to understand that while the Provincial Councils have been consulted on its contents, the citizenry at large has not had an opportunity to give feedback to your Government on the Draft Bill. I have also learnt that this Bill is likely to be tabled in Parliament next week. I urge you to advise the Government to open up a consultative process through which Parliament may receive comments and suggestions from

the people about what they would like to see improved in the Bill. For this to happen, it is absolutely essential that the Draft Bill itself be placed in the public domain before it is tabled in Parliament. Surely, such a step would signal your Government's commitment to transparency at the outset.

I have enclosed a brief note prepared by CHRI on some key aspects of the Draft Bill that require further examination and improvement. These issues were identified and discussed in depth at the December consultation held in Colombo. I urge you to take note of the concerns raised in the enclosed note and take such measures as you may deem appropriate to address them.

May I also offer you CHRI's expertise for developing an action plan to implement the RTI law and also for designing training programmes for public authorities. Several governments in India and other countries in the Commonwealth such as Afghanistan, Bangladesh, Maldives, Nepal and Uganda have benefitted from the advice and assistance provided by CHRI for the effective implementation of their RTI laws.

If you wish to discuss these matters further, please feel free to contact me [email: whabibullah@gmail.com; +91-981859370 (M)] or my colleague Mr. Venkatesh Nayak, Programme Coordinator, Access to Information Programme at CHRI [email: venkatesh@humanrightsinitiative.org; +91-9871050555 (M)].

Thanking you,
Yours sincerely,



(Wajahat Habibullah)
Chairperson, CHRI (India)
&
Former Chief Information Commissioner
Central Information Commission, India

Sri Lanka's Draft Right to Information Bill, 2015

Commonwealth Human Rights Initiative's (CHRI) Preliminary Comments & Key Concerns

CHRI welcomes the initiative of the Government of Sri Lanka to approve a draft legislation to give effect to the fundamental right of people's access to information guaranteed by Article 14A that was recently inserted in the Constitution through the 19th Amendment to the Constitution. However the following key areas need to be addressed urgently to make the draft legislation stronger and bring it in line with well recognised international standards:

1) **Clause 40** - The RTI Commission proposed to be set up under the RTI law is virtually toothless with no power to impose any sanctions on anybody for non-compliance. The RTI Commission will not be able to impose its writ and champion the cause of transparency in the absence of powers to impose sanctions.

2) **Clause 5(1)** - The Attorney General's Office has included an exemption to protect its communication with Government. This is a blanket exemption which is not in tune with international best practice standards.

3) **Clause 5(1)** - Trade secrets and intellectual property (IPR) related information may be disclosed in public interest but only by a public authority- the power to direct such disclosure must also be given to the RTI Commission as they are an appellate body under the RTI law.

4) **Clause 5(1)** - All exemptions are not subject to a sunset clause of ten years which means that some of the exemptions will be applicable eternally. The international best practice standard is to disclose exempt information when it is no longer sensitive and such disclosure will not harm any public interest.

5) **Clause 5(3)** - Trade negotiations have an interminably long period of secrecy and must be reduced to a period of ten years.

6) **Clause 5(5)** - By making the RTI Commission to get involved in deciding on exemptions at the application stage, the appeals procedure is effectively rendered nugatory.

7) **Clause 7(3)** - The requirement for maintaining all categories of official records for 12 years is an unnecessary burden on every public authority. Some categories of records may not be required for any official purpose beyond a period of 2 or five years. The RTI law should not become a bar on the destruction of records that are no longer necessary for official use and have no archival value.

8) **Clause 8** - The proactive information disclosure categories are too limited in the Draft Bill. They must be expanded to include all categories mentioned in the RTI laws of Bangladesh, Khyberpakhtunkhwa in Pakistan, Mexico and India.

9) **Clauses 10 & 38** duplicate each other. One of them may be deleted. Annual reporting of compliance requirement should include the number of cases in which penalty was imposed by the

RTI Commission (after making provisions for the Commission's power to impose penalties) and courts.

10) **Clause 12(1)** – Only a limited number of stakeholder groups are recognized for the purpose of making recommendation of candidates for appointment as Members of the RTI Commission. IN the absence of a rational and reasonable criteria for selecting these stakeholder groups this limitation may fall foul of Article 12 of the Constitution which guarantees every person equality before the law.

11) **Clause 13(2)** - The RTI Commission should be responsible for the running of the Commission and have disciplinary control over its officers. The Director General should only be the Chief Operating Officer of the Commission. There should be a procedure for his/her removal as well.

12) **Clause 23(1)(b)** - If the Chief Executive Officer (CEO) of a public authority will be the Information Officer (IO) until a regular IO is appointed then there will be a vacuum regarding the matter of deciding internal appeals against the decision of the IO. It is best to appoint the second in command in the public authority as the IO and make the CEO the appellate authority.

13) **Clause 23(3)** - Duty of other officers to provide assistance should be linked to the probability of penalties if they fail to assist the IO in dealing with a request for information.

14) **Clause 27(3)(d)** - Diskettes and floppies have become obsolete. Instead it is better to mention emails and USB sticks instead as purveyors of information.

15) **Clause 28(a)** - The manner of communication of rejection of a request by the IO should once again mention that the reasons must be connected with Section 5(1) of the RTI law and none other.

16) **Clauses 5(1)(d) and 29** - The third party provisions spread out all over the Draft RTI Bill are unsatisfactory. There is an undue weightage given to confidentiality in one provision and also to the public interest override (disclosure of exempt information if it serves the public interest better) in another provision. This will create confusion and make almost every third party information contentious.

17) **Clause 31** - An additional ground for submitting appeals should be refusal by the IO or the appellate authority to receive and process an RTI application or appeal.

18) **Clause 31** – The time limit for filing the internal appeal is too short It should be at least 30 calendar days or 25 working days.

19) **Clause 31(4)** - The draft Bill allows two modes of appeals - one is two staged- internal plus external and another is direct appeal to the RTI Commission. This will create confusion as it has done in India. Instead the circumstances in which direct appeal to the RTI Commission may be filed bypassing the internal appeals mechanism should be specified in the RTI law itself.

20) **Clause 31** - Condonation of delay for filing internal appeal late is missing and needs to be inserted.

21) **Clause 32** – The time limit for appeal to the Commission must be increased to 90 days. 2 months may not be adequate.

22) **Clause 32(4)** -The burden of proof provision should be strengthened to include burden of proving rejections as lawful, specifically by the public authority denying access to the requested information.

23) **Clause 34** – The time limit for going to Court of Appeal is too short. This should be increased to at least 6 months.

24) **Clause 35** – The duty to disclose reasons for a decision must become routine and automatic rather than be request driven. When the decision is communicated, reasons must also be communicated simultaneously to the affected parties.

25) **Clause 39** – In this Clause, the term- "willfully" must be substituted with "unreasonably" or "without reasonable cause" or else the provision will become unimplementable and can lead to harassment of the IO.

26) **Clause 42(3)** - Parliament should also have the power to modify the regulations made by the Minister as he/she exercises the power of delegated legislation granted by it. This is the case in the Indian RTI Act.

27) **Clause 42** - Both regulations and rules must be subjected to prior publication before Gazette notification at the draft stage for the purpose of public consultation and feedback.

28) **Definitions** - It will be very difficult to separate the public functions from the private functions of a "private entity" covered by the RTI law, especially their administrative functions. So it is better to subject them to the RTI law entirely. Further, any government owned or controlled company must be required to comply with the RTI Act even after disinvestment by the Government.

29) **Political parties** should be covered by the RTI law to make them more accountable to the people as is the case under the RTI Act of Nepal.

30) **Schedule:** It may not be advisable to give the power to recommend appointment and also the removal of RTI Commissioners to the same body, namely the Constitutional Council. This goes against the principles of checks and balances. It is more advisable to involve the Supreme Court to inquire into misbehaviour or get a medical board set up to assess physical or mental incapacity of an impugned RTI Commissioner and then get Parliamentary approval for his/her removal.

31) The **salaries and rank** of the RTI Commissioners must be determined by the RTI law and not left to the discretion of the Minister. This must be kept higher than the highest ranking civil

servant in the country. This is one of the ways for ensuring that officers of public authorities will comply with the orders of the RTI Commission.

32) The **RTI Commission must work on all working days**. That is its purpose. Meeting once a month will not enable it to monitor compliance properly and adjudicate RTI appeals quickly.

*Prepared by Venkatesh Nayak, Programme Coordinator, Access to Information Programme, Commonwealth Human Rights Initiative (CHRI), New Delhi, INDIA for public discussion and debate in general and specifically for the consultation jointly organised by CHRI and the International Centre for Ethnic Studies, Colombo on the subject: **Legislating and Implementing the Right to Information in Sri Lanka**, 03-04 December, 2015, ICES Conference Room, Colombo.*