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RIGHT TO INFORMATION IN SRI LANKA - CRITICAL SCRUTINY OF EXISTING LAWS AND PROPOSED LAW REFORM

Kishali Pinto-Jayawardena[^]

INTRODUCTION

Open criticism of public affairs and persons wielding public authority underpins the right to free expression and information which has been historically acknowledged as the matrix of all other rights and freedoms. Freedom of expression is essentially “freedom governed by law”¹

This is reflected in the caution issued by the Privy Council that

“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.”²

This paper will set out the current constitutional and statutory framework relating to the right to information in Sri Lanka and will suggest imperative legal reform of a selection of such laws. The jurisprudence of the domestic and international courts and tribunals in this regard will be referred to wherever relevant.

The suggested legal reform will be in consonance with regional efforts to liberalise South Asian media laws in order that the right to freedom of expression and information is protected while restrictions regarding the same are well defined and do not result in an erosion of the essential right.

[^] public interest lawyer and writer; senior legal consultant to the National Human Rights Commission; rights columnist/editorial (legal) consultant for *The Sunday Times*, Colombo with an active involvement in the drafting of Sri Lanka’s Freedom of Information (FOI) law. Currently national legal research consultant for the World Bank on reform of the electronic media law framework in relation to public service broadcasting; Deputy Director, and Head, Legal Unit, Law and Society Trust, (LST); onetime visiting lecturer in media law at the University of Colombo and the Sri Lanka Foundation Institute; Salzburg (Austria) Fellow, 2002 and WISCOMP (New Delhi) Scholar of Peace for 2002-2003.

In so far as Sri Lanka is concerned, the need for a radically changed information regime is very apparent. The obnoxious laws that this paper details are not confined to theory. Rather, they operate at every step of the way to obstruct citizens and the media from obtaining the information that they desire

Two examples in this regard should suffice.

In early 2000, Section 3 of Chapter XXXI of Volume 1 and Section 6 of Chapter XLVII of Volume 2 of the Establishment Code prohibits public officials from disclosing any information to the media, was attempted to be implemented by the then government. Although this provision had been in statute books for decades, it has never been implemented.

However in February 2000, the Cabinet decided to implement this section and gave wide publicity to that effect. This frightened public servants from even confirming or denying information already in the hands of journalists and even from giving initials of public servants or from giving statistical information without the sanction of the Secretary of the Ministry, even in instances where the media plays a public interest role in highlighting a malaria epidemic for example.

Then again, in the post tsunami period, the lack of access to official information has meant that those who have been affected most grievously due to the worst natural disaster to hit the country in recent times, have been unable to obtain the most basic information regarding government policy decisions taken in respect of their homes and land.

For example, confusion continues to prevail in regard to where persons displaced by the tsunami can relocate. Formerly, a construction ban was imposed within 100/200 metres of the South and North/East, popularly referred to as the buffer zone. Thereafter, the Survey Department commenced the surveying and fixing of the boundaries of the buffer zone, indicating that over 800,000 permanent buildings, businesses, shops and houses will need to be removed in the process and millions of individuals relocated.

Recently, the Government announced a revision of the buffer zone, stating that in the Southern Districts, it will be reduced to 25 - 55 metres while the 200 metre buffer zones introduced in the districts of Amapara, Batticaloa and Jaffna would be reduced up to a minimum of 50 metres.

However, it appears that though these new rules have been announced in public, its implementation is still extremely problematic. Field workers in those areas continue to be besieged by complaints that despite the revision, local authorities were not allowing displaced persons to relocate on their old properties and lands despite the fact that they are not located within the revised buffer zone area. Demands to obtain copies of the new gazette notifications go unheeded.

These are only two of the legion instances where demands by Sri Lankans for access to official information has gone unheeded.

MEDIA LAW REFORM FROM A HISTORICAL PERSPECTIVE

A brief outline of the factual background in regard to the process of the amendment of laws affecting the right to free expression and information in Sri Lanka during the past several years may be appropriate at this point.

In 1995, the then government in power established four Committees to inquire into the following areas :

- a) the broad-basing of state-owned Lake House newspaper group;
- b) reform of laws relating to the media and to media freedom;
- c) Establishing a media training institute;
- d) improving conditions for media personnel;

All these Committees finalised their work with regard to which reports were submitted to the Government in mid 1996. However, crucial recommendations set out in these reports have not been implemented up to date.

In 1997, a Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media was set up following intense lobbying by the Editor's Guild and other media organisations in the country. The mandate of the Select Committee included the establishment of a new broadcasting authority, the repeal of the Sri Lanka Press Council Law and the creation of a new Media Council. Though the Select Committee met on several occasions thereafter, it was

unable to come to a clear consensus on the particular laws to be amended and/or repealed and the process of law reform lapsed thereby.

Consequent to a new government succeeding to power in December 2001, there was renewed attention with regard to the question of media law reform and in mid 2002, Section 479 of the Penal Code and corresponding provisions in the Press Council Law relating to criminal defamation were repealed. However, reform of other archaic laws and regulations relating to freedom of expression in the country remains imperative.

AMENDMENT OF ARTICLE 14(1)(a) OF THE CONSTITUTION

Article 14(1) (a) of Sri Lanka's Constitution of 1978 states that –

Every citizen is entitled to the freedom of speech and expression, including publication.

The Constitution Bill of August 2000 states that;

Article 16(1) Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to express opinions and to seek, receive and impart information and ideas either orally, in writing, in print, in the form of art or through any other medium.

The Constitution Bill has not yet been enacted into law. What still prevails therefore is the constitutional formulation in Article 14(1)(a) of the 1978 Constitution.

As is evident, this prevalent constitutional formulation is defective both in its substantive content. The omission of the right to hold opinions in the substantive right of freedom of speech, in that constitutional article has led to some interesting developments in fundamental rights jurisprudence in this country. This is evidenced in the interlinking of freedom to hold opinions with the right to information. Earlier pronouncements of the Supreme Court had held that a right to information existed within the right of free speech⁴

In *Fernando Vs. Sri Lanka Broadcasting Corporation*⁵ however, the Court preferred to hold that the right to hold opinions (as subsumed in the right to information, simpliciter), is a corollary of

the freedom of thought guaranteed by Article 10 of the Sri Lankan Constitution and properly belonged there, rather than within the ambit of the right to freedom of speech in Article 14(1)(a).

This reasoning intertwining the right of information with the right of thought, conscience and religion was further developed in the Determination of the Supreme Court in 1997⁶ when a bill put forward by the Government sought to set up a regulatory authority that was given the power to issue and refuse licences to private broadcasters.

The Bill was determined as unconstitutional on the basis that it held real potential for the arbitrary suppression of freedom of thought and speech in that not only did it seek to establish a body that was under executive fiat to an unacceptable degree but also gave an overly wide discretion with regard to decisions on licences.

Media activists have been urging that future constitutional reform should contemplate a further amendment of draft Article 16(1) of the Constitution Bill so that the proposed constitutional article comprises two parts, the first providing for the freedom to hold opinions while the second provides for the right to speech and information with the restrictions necessarily applying to the second only.

- 1) Everyone shall have the right to hold opinions without interference;
- 2) Everyone shall have the right to freedom of expression, including publication and this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his or her choice.

The restrictions on the right should apply to only section (2) and such restrictions may only be such as are provided by law and are necessary for the rights or reputations of others or for the protection of national security or of public order or of public health or morals.

OFFICIAL SECRETS ACT NO 32 OF 1955

This remains one of the most draconian laws yet on the Sri Lankan statute book. It is based on the British Official Secrets Act of 1911 (enacted as a consequence of government hysteria in the pre First World War period). The British Act itself has been critiqued as allowing a ‘breeding ground

of abuse”, by one eminent British jurist and condemned in even harsher language by other writers.⁷

The United Kingdom government, in July 1988 published a White Paper for the reform of particular sections of the UK Act which reforms passed into law thereafter through the Official Secrets Act of 1989.

However, even though English law improved since the said enactment which reformulated Section 2 of the old Act, Section One of the old Act relating to the “publishing or communicating (inter alia) of official secrets....” (which is reproduced almost verbatim in Section 6 of the Sri Lankan Act No 32 of 1955) has been left untouched, leading to continuing protests in that country. The 1989 Act has been critiqued in other respects as well, most notably owing to the fact that it does not allow a public interest defence.⁸

The critique of the Official Secrets Act No 32 of 1955 in Sri Lanka is focussed particularly on the definition of an ‘official secret’ in the Official Secrets Act of 1955 (see interpretation section of the Act). This states that an official secret means-

- a) any secret official code, word, countersign or pass word;
- b) any particulars or information relating to a prohibited place or anything therein. (emphasis mine)

These sub-sections are inappropriately broad enough in their application. However, the remaining sub-sections are even more problematic in their substance. Thus, an official secret has also been defined to mean;

- a) any information of any description whatsoever relating to any arm of the armed forces or to any implements of war maintained for use in the service of the Republic or to any equipment, organisation or establishment intended to be or capable of being used for the purposes of the defence of Sri Lanka;
- b) any information of any description whatsoever relating directly or indirectly to the defences of Sri Lanka.

A 'secret document' is defined to mean any document containing any official secret. (vide interpretation section) which is vague and more appropriate to the times in which the Act was enacted rather than in the context of the modern interplay between freedom of speech and the right to information which demands that disclosure of information be the norm and secrecy the exception.

The obnoxious nature of this definition is even clearer when examining the sections of the Act that apply to the practical situations in which it could be utilised. Thus, Section 6 (1) of the Sri Lankan Act states that, any person "for any purpose prejudicial to the safety or interests of the State...(who) obtains, collects, records, publishes or uses or communicates to any other person, any official secret or secret document or any information which is calculated to be or might be or is directly or indirectly useful to any enemy.." is guilty of an offence under the Act and is subjected to dire penalties upon conviction. (emphasis mine)

It also provides (Section 6(2),that on a prosecution under this section, there is no necessity to show that the accused person was, in fact, guilty of any particular act tending to show any purpose prejudicial to the safety or interests of the State but would be sufficient if this is shown from his or her conduct or character or if such person was not acting under lawful authority.

The equivalent of this section in the UK Act (Section 1) has come under severe judicial scrutiny where in the ABC case in 1978, (involving a prosecution of two journalists under this section), the judges stated that charges under this section should be brought only in the clearest and most serious cases. The cases against the journalists were then withdrawn.⁹

In light of the foregoing, it has been urged by us that the Official Secrets Act should be abolished. In the minimum, it should be amended in order that;

- a) Section 6 will provide that liability for disclosure will not fall on individuals where the information is trivial and where no harm has been caused, or where the disclosure is deemed to be an embarrassment to the Government. The section will provide for a public interest defence as well as a general defence of prior publication, the latter limited to instances where the subsequent disclosure has caused no further damage;

- b) Section 6(2) will be abolished in its entirety, thus taking out the element of near strict liability attached to that provision. In the alternative, the term ‘appears’ in the first half of that section must be replaced with the term ‘the court is satisfied.’ In so far as the second half of that section is concerned, the prosecution must be required to prove (particularly in the case of journalists) that the discloser knew that harm to the public interest was likely to result. Inference to this effect merely from the fact that the ‘official secret’ interalia was obtained interalia from a person not acting under lawful authority should not be sufficient;
- c) The Act will abolish the terminology of “official secrets” (which is, in any event, outdated and archaic besides being general and vague, as evidenced particularly by the fact that (iii) and (iv) define an official secret as “any information of any description whatsoever...”), and instead, provide for the protection of particular categories of information that are on lines with the draft Freedom of Information Act that is presently being studied by the Government. As is the case in the United States, any citizen interested in the government of the country, a legal right to particular categories of information that would be restricted only to the extent strictly necessary in a democratic society. The Sri Lankan draft Freedom of Information Law presently under discussion by the Government, has a clause that its provisions “shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail”. Accordingly, if parallel reform of the Official Secrets Act is not proceeded with along with the enacting of a Freedom of Information Act in Sri Lanka, the former Act will be rendered nugatory and even more obsolete in the light of the new information regime.

THE PRESS COUNCIL LAW NO 5 OF 1973

The Press Council of Sri Lanka, set up under Law No 5 of 1973, envisages a 7-member body appointed by the President which is mandated to regulate and to tender advice on matters relating to the Press in Sri Lanka. From its inception, concerns had been voiced by civil rights groups in Sri Lanka regarding the narrow composition of the Council, the privileging of the government in terms of appointments to the Council and the semi-judicial powers of Council members all of whom do not necessarily possess legal training. The Council has authority to look into complaints of press abuse extending to ordering an errant newspaper to publish a correction.

The law itself is undemocratic in several of its provisions affecting the right to know. Sections 14 and 15 of the Law were repealed in 2002 when the Government presented Press Council Amendment Act No 13 of 2002 which repealed paragraph (b) of subsection (1) of Section 15 of the Press Council Law No 5 of 1973.

This amendment Act was passed along with Penal Code Amendment Act No 12 of 2002 in Parliament, repealing Chapter 19 of the Penal Code and making consequential procedural amendments to Section 135 (f) of the Criminal Procedure Code.

In addition, the House repealed Section 118 of the Penal Code, which had penalised attempts by contumacious or insulting words or signs, to bring the President into contempt. The amending legislation, passed unanimously by the House mid year, effectively removed provisions relating to criminal defamation from the country's statute book.

Section 16(1) & (2)

Other provisions remain in need of outright repeal. These include Section 16(1) and (2) of the Law which prohibits the publication of Cabinet decisions and Cabinet documents, the latter being permitted only under very restrictive circumstances. These provisions are demonstrably arbitrary, restrictive and contrary to the public right to know.

These provisions have their origins in the old notion that held sacred the need to guard against the disclosure of information that may damage the government or its organs in any way. However, this notion has long been displaced and has, in fact, been replaced by the modern standard of the right to know that prescribes that government or decision making within government should not be hidden from the public except where there is an immediate and obvious danger to the security of the State. This has been borne out by the numerous Freedom of Information legislation which makes disclosure of information the norm and secrecy the exception. It is in this context that the repeal of Section 16(1) and (2) is mooted.

The Government attempted three years back, to amend the Official Secrets Act in order to "prohibit the leakage of Cabinet news." A three member committee comprising senior public servants and lawyers was given two weeks to examine the provisions of the Official Secrets Act and other "regulations" and report back to the Cabinet in this respect. However, after strong public protests in this regard, these proposals were abandoned.

Section 16(3)

In addition, Section 16(3) makes it an offence for any newspaper to publish an official secret as defined in the Official Secrets Act of 1955. It has been elsewhere pointed out in this paper that the Official Secrets Act ought to be amended in order that the terminology of “official secrets” (which is, in any event, outdated and archaic) be replaced with the protection of particular categories of information that are on lines with the draft Freedom of Information Act that is presently being studied by the Government.

This is based on the contention that the definition of an ‘official secret’ in the Official Secrets Act of 1955 (see interpretation section of the Act) is vague and more appropriate to the times in which it was enacted rather than in the context of the modern interplay between freedom of speech and the right to information which demands that disclosure of information be the norm and secrecy the exception. In line with this reasoning, it is necessary that Section 16(3) of the Press Council Law also be repealed.

CENSORSHIP AND THE RIGHT TO KNOW - The Public Security Ordinance (PSO) No 25 of 1947 (as amended) and the Prevention of Terrorism Act (PTA) No 48 of 1979 (as amended).

Sri Lankans and particularly the Sri Lankan media have had harsh experiences of the arbitrary operation of censorship laws in the past several decades.

We have witnessed a number of occasions on which the PSO has been used to bring into effect regulations that confer unguided and unfettered discretion upon an executive authority without narrow objectives and definite standards to guide such authority.

Such regulations, by broadly defining categories of issues to be subjected to restrictions on freedom of expression and information with no requirement that these even relate to the protection of national security let alone that they be necessary to achieve these ends, have commonly been over broad, making no distinction between matters threatening national security and matters that ought legitimately be placed in the public domain.

The Sri Lankan media community had been agitating for the following;

- a) amendment of Section 5 of the PSO (under which, in the past, arbitrary censorship regulations have been made) to stipulate that all regulations made under the PSO satisfy the tests of necessity and/or expediency and/or proportionality;
- b) Stipulate that censorship regulations made under the PSO should be implemented by a collective body (including a person with military knowledge as well as a senior journalist and/or representative of the Editors Guild and /or representative of the Newspaper Society and/or representative of the Sri Lanka Press Institute, that is appointed independently of the government/ Regulations should be immediately published (upon promulgation) in the newspapers and further, a preamble in each regulation should explain the reason for its promulgation;
- c) Amendment of Section 14 of the PTA. This section confers authority to the Minister to make order in relation to the prohibition of publications. This section prohibits any publication without the approval of a competent authority, of any matter relating to the commission of any act which constitutes an offence under the Act or constitutes inter alia, an incitement to violence. Rigorous punishments are stipulated for contravention of this prohibition, including the sealing of the printing presses of the newspaper concerned. Amendment of this section is therefore necessary so that the ministerial power will be subjected to the tests of necessity and/or expediency and/or proportionality. The said section should also confer a right of appeal from a decision of a competent authority in this regard to an independent body, which could be similar to a collective body consisting of a person with military knowledge as well as a senior journalist and/or representative of the Editors Guild and /or representative of the Newspaper Society and/or representative of the Sri Lanka Press Institute, that is recommended to be appointed in respect of the Prevention of Terrorism Act to which regulations enforcing censorship could be submitted. This would minimize the necessity for journalists and editors aggrieved by a decision of a competent authority to appeal to court, which is not always possible due to the prohibitively high costs of litigation.

FREEDOM OF INFORMATION

I propose to discuss the draft FOI law in some detail in this segment of this paper.

This draft FOI law has been under discussion by the government for the past several months following an extensive process of drafting last year which had the input of media practitioners, academics as well as other sectors of society.

Provisions of the Draft Act

The draft Act represents an advance on the current vacuum though some of its provisions were necessarily a compromise between fervent free expression advocates and public officials, both categories of which were involved in the drafting process.

Salient features of the draft Act are as follows;

Clause 2 - Subject to the provisions of subsection (2) of section 3 and section 4 of this Act, every citizen shall have a right of access to official information which is in the possession, custody or control of a public authority.

The interpretation clause of the draft Act provides that that “public authority” means –

- a) a Ministry of the Government; any body or Office established by or under the Constitution other than the Parliament and the Cabinet of Ministers;
- b) Government Department;
- c) a public corporation;
- d) a company incorporated under the Companies Act, No. 17 of 1982, in which the State is a shareholder;
- e) a local authority;
- f) and any department or other authority or institution established or created by a Provincial Council.

* Clause 3. (1) The provisions of this Act shall have affect notwithstanding anything to the contrary in any other written law, and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.

(2) Notwithstanding the provisions of subsection (1) the provisions of this Act shall not apply in respect of any official information in the possession, custody or control of any public authority established by any written law where the members, officers or servants of such public authority are prohibited under such written law from disclosing or releasing any information received by them or which came to their knowledge in the performance and discharge of their duties and function under such written law.

Denial of Access to Official Information

* Section 4. (1) A request under this Act for access to official information shall be denied, where –

- a) the information relates to any matter in respect of which a decision by the Government is pending; the disclosure of such information would constitute an invasion of personal privacy of any person, unless – the person has consented in writing to such disclosure; or the disclosure of such information is considered to be vital in the public interest;
- b) the disclosure of such information would cause serious harm to the defence of the State or its territorial integrity or national security;
- c) would cause danger to life or safety of any person; or
- d) would be or is likely be seriously prejudicial to Sri Lanka's relations with any State or international organisation, where the information was given to or to or obtained from such State or international organisation in confidence unless the disclosure of such information is considered to be vital in the public interest;
- e) the information relates to the assessment or collection of revenue by the Inland Revenue Department;
- f) the disclosure of such information would reveal any trade secrets or harm the commercial interests of any person, unless –
 - (i) the person has consented in writing to such disclosure; or
 - (ii) the disclosure of such information is considered to be vital in the public interest;
- g) the information could lead to the disclosure of any medical secrets or medical records relating such person, unless that person has consented to such disclosure;

- h) the information is subject to professional privilege;
- i) the information is required to be kept confidential by reason of the existence of a fiduciary relationship;
- j) the disclosure of such information could cause grave prejudice to—
 - (i) the prevention or detection of any crime; or
 - (ii) the apprehension or prosecution of offenders; or
- k) the information relates to an examination conducted by the Department of Examination or a Higher Educational Institution which is required to be kept confidential, including any information relating to the results of any qualifying examination held by such Department or Institution.

The public interest override is a particular factor re some of these clauses. In addition, an important proviso is that notwithstanding the provisions of subsection (1), a request for information shall not be denied on any of the grounds referred to therein, other than the grounds specified in paragraphs (e), (f) and (g) of that subsection, if the information requested for is over ten years old.

It is also provided that a disclosure by any public authority of any information which is prohibited from being disclosed under subsection (1) shall be an offence under this Act and the officer in such public authority who was responsible for such disclosure shall on conviction be liable to a fine not exceeding five thousand rupees and in addition to any disciplinary action that may be taken against such officer by such public authority. No action shall however be instituted against such officer where the officer discloses such information in good faith.

Where a request for information is denied on any of the grounds referred to in clause 4 access may nevertheless be given to that part of any record or document which contains any information that is not prevented from being disclosed under that section and which can reasonably be severed from any part that contains information denied from being disclosed.

Clause 6 puts Ministers and public authorities under a duty to maintain and preserve its records as follows;—

- (a) in the case of new records which are opened after the coming into operation of this Act for a period of not less than ten years from the date on which such record is opened; and

- (b) in the case of those records already in existence on the date of the coming into operation of this Act for a period of not less than ten years from the date of the coming into operation of this Act.

* Clause 7.

(1) It shall be the duty of –

- (a) the President and of every Minister to whom any subject has been assigned under paragraph (1)(a) of Article 44 of the Constitutions and
- (b) the President in respect of any subject or function of which the President remains in charge, under paragraph (2) of Article 44 of the Constitution.

to publish once in every two years and in such manner as may be determined by him/her, a report containing particulars relating to the organization, functions, activities and duties of the Ministry of such Minister, and of all the public authorities falling within the functions assigned to such Minister, the powers, duties and functions of officers and employees of the Ministry and the public authorities referred to in paragraph (a), and the procedure followed by them in their decision making process.

This report should also include the norms set for the Ministry and the public authorities referred to in paragraph (a), in the discharge of their functions, performance of their duties and exercise of their powers, rules, regulations, instructions, manuals and any other categories of records under the control of the Ministry and of the public authorities referred to in paragraph (a), which are used by its officers and employees in the discharge of their functions, performance of their duties and exercise of their powers.

The name, designation and other particulars of the Information Officer or Officers appointed to the Ministry and to the public authorities referred to in paragraph (a) shall be included in the report.

Clause 8 imposes a duty on the Minister to inform public about the initiation of projects where the value of the subject matter exceeds (a) in the case of foreign funded projects, one million united states dollars; and (b) in the case of locally funded projects, five million rupees.

Clause 10 establishes a Freedom of Information Commission who will consist of three persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party and who at the time of appointment and while functioning as a member of the Commission do not hold any public or judicial office. The member of the

Commissioner shall be appointed by the President on the recommendations of the Constitutional Council, and subject to the provisions of subsection (3) of this section shall hold office for a period of five years. The President shall nominate one of the member of the Commission to be its Chairman. Security of tenure is also provided for.

The Commission has various duties and functions, including the monitoring of the performance and ensure the due compliance by public authorities of the duties cast on them under the draft Act, making recommendations for reform both of a general nature and directed at any specific public authority and hearing and determining any appeals made to it by any aggrieved person under section 28 of the draft Act. It also has its own Fund to which shall be credited all sums of money as may be voted upon from time to time by Parliament for the use of the Commission and any money that may be received by the Commission by way of donations, gifts or grants from any source whatsoever, whether in or outside Sri Lanka.

Clause 19 provides for the Appointment of **Information Officers from each** public authority whose duty it shall be to deal with requests for information made to the public authority of which he has been appointed its Information Officer and render all necessary assistance to any citizen making such request to obtain the information being request for.

Procedures for obtaining official information are specified in Clause 20. When a request is made, an Information Officer shall as expeditiously as possible and in any case within fourteen working days of the receipt of a request under section 20, make a decision either to provide the information requested for on the payment of a fee, or to reject the request on any one or more grounds as specified in section 4 of this Act. (vide clause 21)

The decision arrived at by the Information Officer shall forthwith be communicated to the person who made the request. Where the decision has been taken to provide the information requested for, access to such information shall be granted as soon as practicable. Where a request for information is rejected by an Information Officer, it shall be the duty of such Officer to specify the following information in the Communication sent to the person who made the request under subsection (1) of section 21, the following;

(a) the ground or grounds on which such request is being rejected; and

(b) the period within which and the person to whom an appeal against such rejection may be preferred.

Any citizen whose request for official information is rejected by an Information Officer may within thirty days of receipt of the decision relating to such rejection prefer an appeal to the public authority and from thereon to the Commission. A person aggrieved by the decision of the Commission shall have a right of appeal to the Supreme Court against the decision of the Commission.

The draft Act also makes it an offence for any Information Officer to;

- (a) reject a request made for information without giving reasons for such rejection;
- (b) reject a request made on any ground other than a ground specified in section 4 of the Act; or
- (c) fail without any reasonable cause to make a decision on a request made within the time specified under this Act for making such decision.

All those officers found guilty shall on conviction be liable to a fine not less than five thousand rupees.

Importantly, Clause 34 provides for a limited whistleblower protection by stipulating that notwithstanding any legal or other obligation to which a person may be subject to by virtue of being an employee of any public authority no employee of a public authority shall, be subjected to any punishment disciplinary or otherwise for releasing disclosing any official information which is permitted to be released or disclosed on a request submitted under this Act so long and so long only as such employee acted in good faith and in the reasonable belief that the information was substantially true and such information disclosed evidence of any wrong doing or a serious threat to the health or safety of any citizen or to the environment.

Free expression advocates are of the view that the provisions of the draft Act should be further finetuned. For example, the coverage of the Act should be extended 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.

It has urged that the definition of "public authority" 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. In addition, proposed section 34 which is intended to protect whistleblowers 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;
- b) and 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”.

It is hoped that if the political will to enact the FOI becomes more apparent in the months to come, further finetuning of the draft Act may be urged.

CONCLUSION

In examining some of Sri Lanka’s prevalent laws from the context of the right to know, the foregoing analysis took into account ‘the public interest factor’ or in other words, the degree to which the exercise of a given right serves a function in general public life. If this interest overrides the other competing considerations, then that particular form of exercise of that right should receive the protection of the Constitution as well as of ordinary statute.

Substantive legal reform in this regard, incorporating as it should, significant discussion and debate in the public arena in regard to the nature of the rights discussed and their relevance to the laws examined in this analysis should be forthcoming

End Notes

¹ Lord Wright in James vs Commonwealth [1936] A.C. 578, at 672.

² Hector v. Attorney-General of Antigua and Barbuda [1990] 2 AC 312 (PC), p. 318.

³ Ratnasara Thero v Udugampola [1983] 1 Sri L.R. 461, Ekanayake v Herath Banda SC Application 25/91, S.C. Minutes 30 October, 1996, Amaratunga v Sirimal and Others [1993] 1 Sri.L.R. 264, Fernando v The S.L.B.C. and Others [1996] 1 Sri. L.R. 157, Karunatileka and Another v Dayananda and Others, Commissioner of Elections and Others [1999 1Sr.L.R. 157], Deshapriya and Another v Municipal Council, Nuwara Eliya and Others [1995] 1 Sri. L.R. 362, Sumith Jayantha Dias v Reggie Ranatunge, Deputy Minister of Transport and Others [1999] 2 Sri. L.R. 8, Determination Re The Broadcasting Authority Bill, S.D. No 1/97 – 15/97, delivered on 5 May, 1997, also Fernando v The S.L.B.C. and Others [1996] 1 Sri. L.R. 157, Sunila Abeysekera v The Competent Authority and Others, SC Application No 994/99, decided on 15.5.2000, Victor Ivan Vs Sarath Silva, Attorney General, [1998] 1 Sri LR, 340, SC Application No

89/98 decided on 3rd April, 1998, Wickremesinghe vs Edmund Jayasinghe, 1995, 1 Sri L.R. 300),
Wickremebandu V Herath and Others, 1990, 2 Sri L.R. 348

⁴Visuvalingam v Liyanage

⁵[1996] 1 Sri LR 157,

⁶In Re The Broadcasting Authority Bill, S.D. No 1/97 – 15/97, delivered on 5 May, 1997

⁷see Media Law, Geoffrey Robertson, Penguin, 1992

⁸S. Palmer ‘Tightening Secrecy Law; The Official Secrets Act, 1989 (1990) PL 243

⁹Crone, Tom. Law and the Media, Focal Press, 1995, at page 178)

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