

Sri Lanka's improved, but still imperfect, Right to Information Bill

Rohan Samarajiva & Chiranthi Rajapaksa

13 April 2015

What is the underlying rationale for RTI legislation?

- ▶ Agency problems arise when the agent's incentives and those of the principal are not perfectly aligned and conflicts of interest exist
- ▶ Why can the agent get away with not acting in the best interest of the principal?
 - ▶ A first possible explanation is that the cost to the principal of removing or punishing the agent is too high relative to the benefit
 - ▶ A second, more widely applicable, explanation is the presence of information asymmetry. Information asymmetry arises when one party (the agent) is better informed than the other (the principal). Information asymmetry makes it difficult or even impossible for principals to know whether the agent acts in their best interest, especially if crucial variables (such as the agent's effort or competence) are unobservable

Government is the agent; the people are the principal

- ▶ The incentives of the people and their agents (the government officials and the politicians are not perfectly aligned
- ▶ Even though the people can turf out politicians at periodic elections, that is harder to do re officials
- ▶ In the case of both officials and politicians, the information asymmetry is vast
→ RTI seeks to reduce the information asymmetry
- ▶ It follows that RTI should apply to entities that are agents of the people
 - ▶ Government (all levels)
 - ▶ Agents of government

Let's start from operative section, but most important is Interpretation section

- ▶ S. 3: Subject to the provisions of section 5 of this Act, every person shall have a right of access to information which is in the possession, custody or control of a public authority.
 - ▶ What are exceptions specified in s. 5?
 - ▶ Who is a person?
 - ▶ What is information?
 - ▶ What is meant by possession, custody or control?
 - ▶ What is a public authority?

What is a public authority? Definition starts off aligned with common sense

- ▶ S. 46. “Public authority” means -
 - ▶ A Ministry of the Government;
 - ▶ Any body or office created or established by or under the Constitution;
 - ▶ Superior and subordinate courts of record;
 - ▶ A Government Department;
 - ▶ A public corporation;
 - ▶ A company incorporated under the Companies Act, No.07 of 2007, in which the State, or a public corporation or the State and a public corporation together holds **twenty five *per centum* or more of the shares**;
 - ▶ Any department or other authority or institution established or created by a Provincial Council;
 - ▶ A local authority;

Agent of agent, limited to the scope of the agency relationship

- ▶ S. 46(g): A private entity or organization which is carrying out a statutory or public function or a statutory or public service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or that statutory or public service;
- ▶ *Excellent correction, based on comments given during consultation*

Definitional elements not based entirely on principal-agent rationale

- ▶ A recognized political party or independent group;
 - ▶ *Not funded by the public; seeking to represent the public. Can be rationalized.*
- ▶ Non-governmental Organizations receiving funds directly or indirectly from the Government or Foreign Governments or International Organizations;
 - ▶ *Should be bounded to scope of relationship, no reason to bring in entire organization when government funding is small*
 - ▶ *Better if a threshold is set so that a small contract does not impose large costs of compliance*
 - ▶ *Assumes foreign governments/IOs are agents of the Sri Lankan public; and the NGOs are their agents*
 - ▶ *International Organization must be defined, or replaced by International Government Organizations (IGOs) which is a commonly understood category unlike IOs*
- ▶ Higher educational institutions including private universities and professional institutions;
- ▶ Private educational institutions including institutions offering vocational or technical education;
 - ▶ *Previous anomaly corrected, based on comments. But threshold may be advisable*

Insertions and deletions

- ▶ Gone from the definition of Public Authority by the 3rd revision
 - ▶ The Parliament
 - ▶ *Not good*
 - ▶ The Cabinet
 - ▶ *Good, on balance*
- ▶ Included
 - ▶ A recognized Political Party or independent group;
 - ▶ Non-governmental Organizations receiving funds directly or indirectly from the Government or Foreign Governments or International Organizations;
 - ▶ Private educational institutions including institutions offering vocational or technical education

Definitions within definitions

- ▶ S.46 “Non governmental organization” means any organization formed by a group of persons on a voluntary basis and receiving funds directly or indirectly from the Government or international organizations and is of a non governmental nature;
- ▶ *But missing is definition of “international organization”; best to define as International Government Organization: “an organization composed primarily of sovereign states, or of other intergovernmental organizations. IGOs are established by treaty or other agreement that acts as a charter creating the group.” Examples include the United Nations, the World Bank, or the European Union. -- <http://www.uia.org/faq/yb3>*

Hanging definition at end of s. 46

- ▶ “Public funds” means “any funds provided by any organ of the government or a foreign government or an international organization or agency, directly or indirectly to any person or entity with or without any conditions regarding their manner of use.
- ▶ *The phrase “public funds” is not used anywhere in the text. Thus it is superfluous*
- ▶ *It is a definition that is poorly crafted because*
 - ▶ *It refers to “an international organization or agency” without defining the terms*
 - ▶ *An international organization may be understood as including a foreign company which would cause confusion for goods or services exporters*

Rather unusual new provision on projects introduced in latest revision

- ▶ S.9(1) It shall be the duty of the President or the Minister as the case may be, to whom the subject pertaining to any project has been assigned, to communicate three months prior to the commencement of any work or activity relating to the initiation of such project to the public generally, and to any particular persons who are likely to be affected by such project, in such manner as specified in guidelines issued for that purpose by the Commission, all information relating to the project that is available with the President or the Minister, as on the date of such communication.
 - ▶ For the purpose of this section, “project” means any project the value of the subject matter of which exceeds :-
 - ▶ in the case of foreign funded projects, one million United States dollars; and
 - ▶ in the case of locally funded projects, five million rupees.
- ▶ S.9(2) The President or a Minister, shall be required on written request made in that behalf by a member of the public, to make available updated information about a project referred to in subsection (1), throughout the period of its development and implementation. The information shall be made available on the payment of such fee, as shall be determined by the Commission for the purpose.

Possible explanations

- ▶ Could there be projects outside Ministries, Departments and other government structures?
- ▶ S.9 is not about rights, but about duties
 - ▶ Here the President/Minister is bound by an additional duty

Obligations of Public Authorities: 1. Duty to keep records cataloged & indexed for 10 years

- ▶ S7(1) It shall be the duty of every public authority to maintain all its records in such manner and in such form as is consistent with its operational requirements, duly catalogued and indexed.
- ▶ S7(2) All records being maintained by every public authority shall be preserved-
 - ▶ 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.
 - ▶ in the case of new records **which are created** after the coming into operation of this Act, for a period of not less than twelve years from the date on which such record is created
- ▶ *Should apply only to public authorities outside government above a stated threshold; should specify that obligation extends only to commencement of principal-agent relationship with government*

Obligations of Public Authorities: 2. Duty to submit reports annually

- ▶ S. 10. It shall be the duty of every public authority to submit to the Commission annually, a report containing the following information -
 - ▶ the number of requests for information received;
 - ▶ the number of requests for information which were granted or refused in full or in part;
 - ▶ the reasons for refusal, in part or in full, of requests received;
 - ▶ the number of appeals submitted against refusals to grant in part or in full, requests for information received; and
 - ▶ the total amount received as fees for granting requests for information.
- ▶ *Should be applicable only to subset of government agencies among public authorities to reduce cost of compliance and workload of RTI Commission*

Obligations of public authorities: 3. Duty to appoint Information Officer, or CEO to serve as Info Officer himself

- ▶ S. 23(1) Every public authority shall for the purpose of giving effect to the provisions of this Act, appoint, within three months of the coming into operation of this Act, one or more officers as Information Officers of such public authority and an officer designated to hear appeals :
 - ▶ Provided that until such time that an Information Officer is appointed under this subsection, the Head or Chief Executive Officer of a public authority shall be deemed to be the Information Officer of such public authority, for the purposes of this Act.
- ▶ *This is likely to be the most unpopular job in government service so making the Head of Public Authority the default IO is a good move*
- ▶ *Perhaps non-governmental Public Authorities can be exempted from appointing officer for hearing appeals*

Obligations of public authorities: 4. Duty to display notice re Info Officer and fees

- ▶ S26. A public authority shall be required to display in a conspicuous place within its official premises, a notice specifying the name, designation and contact details of the information officer and the name of the officer designated to entertain appeals under section 23 and such officers contact details, fees being charged for obtaining any information from such public authority and the contact details of the Commission. The fees so specified shall be as determined in accordance with the fee Schedule determined by the Commission under section 14.
- ▶ *Non-governmental public authorities should be exempted from this obligation*

Laws must take into account costs of compliance; costs < benefits

- ▶ What is a negligible cost to a government department with excess employees can cripple a small business or a small NGO
- ▶ This will lead to disputes that may overload RTI Commission and make it incapable of attending to core business

- ▶ Solutions
 - ▶ *One set of duties for large organizations above a defined threshold*
 - ▶ *But threshold difficult to set, especially with regard to organizations that fall with the scope based on “agent of agent” rationale*
 - ▶ *More practical to divide “public authorities” into two categories as is done in South Africa and impose the onerous duties only on the government “public authorities”*
 - ▶ *Or leave room for RTI Commission to formulate rules to lessen cost of compliance*

RTI is meant for government; not for those who do not use tax-payers' money

- ▶ Government organizations have a principal-agent relationship with the citizens who created them and who they act on behalf of
 - ▶ Therefore, it is acceptable (even necessary, in the context of the P-A relationship) to impose RTI on government organizations, though even here, all RTI statutes provide exception clauses
- ▶ Most, if not all, government organizations are monopolies (or they should be) and will not be harmed by disclosure of information
 - ▶ It is commonly understood that information is a critical element in competition
 - ▶ An RTI Act should not provide the tools to gain access to internal information that has competitive implications

In other countries, efforts to seek competitor information dominate

- ▶ On the UK experience: “Mr. [Tony] Blair and Lord [David] Clark envisioned ordinary citizens primarily using the act. But according to Ms. Park, a substantial proportion of requests come from corporations “asking about subcontracting opportunities and so on.” That is not unusual. **In the United States and Canada, the largest single user group is companies seeking information about their competitors or regulators, and the pattern is similar in other countries with F.O.I. laws.**” (Clarke, B. (2015 April 11), “From A to Z (Asteroids to Zombies), the British Just Want the Facts,” *International New York Times*)

The safeguard against competitive prying does not extend to foreign companies

- ▶ S.5(d): “the disclosure of such information would reveal any trade secrets or harm the legitimate commercial interests or the competitive position of any person, unless that person has consented in writing to such disclosure” is only safeguard for competitively sensitive information
- ▶ But a “person” protected is defined as “a person or any body of persons, whether corporate or unincorporated or registered in Sri Lanka”
 - ▶ *A foreign company whose information is in the custody of a public authority will not be able to use this exception*
- ▶ *Need to extend protection to foreign entities if we are to engage in international trade in goods and services and attract investment*

Offences

- ▶ S.42(1). Every person who willfully
 - ▶ (a) denies to provide information required under the provisions of this Act; deliberately slow down the provision of information or intentionally provide incorrect, incomplete or inaccurate information;
 - ▶ (b) destroy, invalidate, alter or totally or partially conceal information under his or her custody, or to which he or she has access to or knowledge of due to the exercise of his or her position, job or public function;
- ▶ shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding twenty five thousand rupees or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

Some help with the worst job in government

- ▶ S. 42(3) Any officer whose assistance was sought for by an Information Officer under subsection (3) of section 23 and who fails without reasonable cause to provide such assistance, shall be guilty of an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not less than ten thousand rupees.
- ▶ S. 42(4) A fine imposed for the commission of an offence referred to in subsection (1), (2) or (3) of this section, shall be in addition and not in derogation of any disciplinary action that may be taken against such officer by the relevant authority empowered to do so, for the failure to carry out a duty imposed under this Act.

Experience of other countries: South Africa

- ▶ Promotion of Access to Information Act 2 of 2000 (PAIA) of South Africa applies to 'private bodies' as well as 'public bodies'
 - ▶ Section 1; 'Private body' means-
 - a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
 - (b) a partnership which carries or has carried on any trade, business or profession; or
 - (c) any former or existing juristic person, but excludes a public body
- ▶ But rights of access to records of public and private bodies differ:
 - ▶ S.50. Right of access to records of private bodies (1) A requester must be given access to any record of a private body if- (a) that record is required **for the exercise or protection of any rights**

How has 'protection of any rights' been interpreted?

- ▶ To establish that requester is entitled to records from a private body, the requester must
 - ▶ state what right they wish to exercise or protect,
 - ▶ the record required,
 - ▶ and why that record is required to exercise or protect that right
- ▶ E.g.- Financial records of a company that would allow the requester to calculate the value of his 50 percent interest in the company were recognized as being required to exercise or protect a contractual right (Fortuin v Cobra Promotions CC)

What rights of access apply to public bodies?

- ▶ Requester does not have to justify why the document is required
- ▶ Entitlement to the document is presumed
- ▶ Definition of public bodies (section 1) includes ‘any other functionary or institution when- ‘(ii) exercising a public power or performing a public function in terms of any legislation’
- ▶ E-g; Mittalsteel South Africa (formerly ISCOR limited) a steel producer in South Africa was found to be a public body because, among other things, it
 - ▶ Was established by proclamation;
 - ▶ Could not amend its memorandum of association without an act of parliament;
- ▶ Mittalsteel’s MoA stated that
 - ▶ Shares in the body could only be issued with presidential approval
 - ▶ Government exercised a controlling shareholding in the body