COMPARATIVE STUDY:
STRUCTURES AND STATUS OF IMPLEMENTATION OF RTI LEGISLATIONS
(AFGHANISTAN, INDIA, INDONESIA, SRI LANKA, AUSTRALIA, UNITED KINGDOM)

A Report by

CENTRE FOR INDEPENDENT JOURNALISM
Advocating Media Freedom and Access to Information

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STRUCTURES AND STATUS OF IMPLEMENTATION OF RTI LEGISLATIONS

(AFGHANISTAN, INDIA, INDONESIA, SRI LANKA, AUSTRALIA, UNITED KINGDOM)

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Published by CIJ
First Edition, September 2021.
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FOREWORD

BY SONIA RANDAWA, DIRECTOR OF CIJ

The Right to Information: Building Accountability in Government

In the early years of this century, I had the privilege of visiting some tobacco farmers in Kelantan, believing that I would explain to them the importance of freedom of information. It was a humbling experience. Tobacco farmers in Kelantan already know why they needed to know the decisions being made in the corridors of power in Putrajaya – it affected their everyday livelihood, whether their fields were left fallow, the subsidies they could be entitled to and the impact of free trade agreements on their ability to pay their bills. They understood the importance and impacts far better than their representatives in either Kota Bharu or in KL. Because at root, the right to information is not about the people who can navigate the corridors of power, who have friends who can ask questions for them, people tapped into an information pipeline. It's a law for everyone – but the people it helps most are those without the time, or the connections, or the money to spend time and shoe leather trying to find answers in a labyrinthine system of favours and secrecy.

The institutionalisation of the Right to Information could not be more urgent. From the scandals that brought about change in 2018, to the environmental and social challenges of the climate crisis, the next few decades are going to be difficult. We need to ensure that our taxes are going to meet those challenges, and not into the pockets of corrupt politicians or civil servants. Civil servants and politicians also need to be able to harness the energy of public trust – which will not be possible until government is transparent, until we can see the good work that is being done behind the headlines.

The Right to Information helps us to bring all of society's intellectual, cultural and imaginative resources to bear on these and other issues – because if everyone has the information on which to base their decisions, those decisions are going to be better.

This report looks at the laws that need to be changed and those that need to be adopted. It compares the situation in Malaysia with the right to information environment in countries with both similarities and differences from Malaysia, at different stages of development and, in the cases of both Sri Lanka and Afghanistan, facing the immense trials that come from the wounds of war and ethnic violence. They remind us of our economic and social riches, that would make the implementation of a world-leading right to information regime possible in Malaysia. The report looks at the Federal-State dynamics in Australia's multiple RTI regimes; examines the decentralised movement that led to an FOI law in Japan; examines RTI in neighbouring Indonesia and in India, which shares a common legal history with Malaysia.

Overall, the report examines not whether we should have the right to information, but how that right can be implemented. But while you read this report, I urge you to keep in mind the people who will be disproportionately affected by this right – by those who know, as they work in fields or factories, how their lives are being affected by secrecy in government, and what it means to bring greater transparency into their relations with government.

INTRODUCTION

Right to information **(RTI)** or freedom of information **(FOI)** laws reflect the idea that all information held by the State and related institutions should be public; such information may only be withheld if there are legitimate reasons, such as security or privacy.

RTI laws promote transparency, accountability, and strengthen the public's ability to know about the state they live in. Creating an enabling environment that upholds and promotes the right to information allows for better informed participation in debates, improves business competitiveness, and lets the public know more about decision-making processes. Thus, RTI strengthens participatory democracy, good governance, and the rule of law.

Malaysia has seen significant development in recent years. Both the Selangor and Penang FOI Enactments seek to recognise and uphold the fundamental right to information, within the limited boundaries of each state. However, these state-level enactments are within the bounds of the federal-level Official Secrets Act 1972 **(OSA)**.

The Pakatan Harapan government (2018-2020) announced that is would repeal the OSA and replace it with a law that protected the right to information. The Legal Affairs Division (Bahagian Hal Ehwal Undang-undang – **"BHEUU"**) of the Prime Minister's Department is mandated with the task tCommittee to review the right to information under current laws and to study the feasibility of a Federal RTI Act.

> Civil society initiated a National Campaign for an FOI Act in 2005 and has drafted a model Right to Information Bill, which has undergone extensive consultations. In November 2019, a National Stakeholders Consultation was jointly convened by BHEUU and the Centre for Independent Journalism **(CIJ)** to further the then-Government's reform agenda and provide a space to discuss the principles behind and content of RTI legislation. The Consultation illustrated the need to have further deliberations on specific issues such as i) aligning new RTI legislation with national security imperatives; ii) assessing the impact of repealing the OSA, and iii) gathering further evidence on the impact of the implementation of similar laws in other countries.

The objective of this research is to compare models of RTI legislation and assess the effectiveness of the implementation of laws. The countries examined here are Sri Lanka, Indonesia, India, Afghanistan, the United Kingdom **(UK)** and Australia.

In the global RTI ratings analysing the quality of the world's access to information laws, Sri Lanka, India and Afghanistan are among the top 10 countries.[1] Sri Lanka is a good model for Malaysia, having a similar colonial history and being a multi-ethnic society. Indonesia ranked 38th on the RTI ratings, the highest ranking Southeast Asian country, and was chosen for this reason and because of shared cultural traits. Both the UK and India have OSA laws, although they have been superseded, but by including them in this study, we hope to be able to show the impact of that heritage.

[1] As of early 2020, Sri Lanka's RTI has been rated first in South Asia, and third in the world https://www.rti-rating.org/

Australia has been chosen as it has a federal structure. Although this study looks primarily at the Federal legislation, this law operates in an environment where each state has its own RTI law. The state legislation covers procedures to information owned or generated by the state and related institutions, whereas the federal legislation covers the federal government. Where reference is made to the Australian's RTI law in this paper, it refers to federal law unless stated otherwise.

The national RTI laws of each country and their abbreviations for this paper are:

a. Right to Information Act 2016 in Sri Lanka (the "Sri Lankan RTIA");
b. Public Information Disclosure Act 2008 in Indonesia (the "Indonesian PIDA");
c. Access to Information Law 2018 in Afghanistan (the "Afghan ATI law");
d. Right to Information Act 2005 in India (the "Indian RTIA");
e. Freedom of Information Act 2000 in the United Kingdom (the "UK FOIA"); and
f. Freedom of Information Act 1982 in Australia under the jurisdiction of the
g. Commonwealth Government (the "Australian FOIA").

In putting together this study, we have also had the assistance of several experts . They had shared their valuable expertise through either direct interviews and/ or during their contribution to an Expert Group Meeting on the RTI legislation, held on 23 July 2020 in Kuala Lumpur (the **"EGM"**). We would like to acknowledge and give special thanks to:

1.1 Kishali Pinto-Jayawardena **(Pinto-Jayawardena)** from Sri Lanka's RTI Commission;
1.2 Ainuddin Bahodury **(Bahodury)** from Access to Information Commission, Afghanistan;
1.3 Daren Fitzhenry **(Fitzhenry)** from the Scotland Information Commission;
1.4 John Fresly Hutahaen (Hutahaen) a former member of Indonesia's Information Committee;
1.5 Toby Mendel **(Mendel)** Executive Director of the Centre for Law and Democracy (Canada);
1.6 India's representatives: Venkatesh Nayak **(Nayak)**, Head of Access to Information Programme at Commonwealth Human Rights Initiative **(CHRI)** and Wajahat Habibullah (Habibullah), ex-chief information commissioner and Head of the CHRI Board; and
1.7 Sonia Randhawa **(Randhawa)**, CIJ Director and co-author of civil society's draft RTI bill.

[2] The Afghan ATI Law in 2018 has replaced the 2014 regime. Some of the information in this paper will about this older regime and will be stated as such.

Table of Abbreviation

Abbreviation	Definition
ACT	Australian Capital Territory
Afghan ATI Law	Access to Information Law 2018 in Afghanistan
Australian FOIA	Freedom of Information Act 1982 in Australia under the jurisdiction of the Commonwealth Government
BHEUU	Bahagian Hal Ehwal Undang-undang - Malaysian Legal Affairs Division
CHRI	Commonwealth Human Rights Initiative
CIC	Central Information Commission
CIJ	Centre for Independent Journalism
CSO	Civil society organisations
DOPT	Department of Personnel and Training (India)
EGM	Expert Group Meeting on the RTI legislation, held on 23 July 2020 in Kuala Lumpur
FOI	freedom of information
GIPA	Government Information (Public Access)
Indian RTIA	Right to Information Act 2005 in India
Indonesian PIDA	Public Information Disclosure Act 2008 in Indonesia
NSW	New South Wales
OAIC	Office of the Australian Information Commissioner
OSA	Official Secrets Act (refer to context for respective OSA in the country referred to)
PIO/ CPIO	Public Information Officer/ Central Public Information Officer
RTI	Right to information
RTIC	Right to Information Commission
Sri Lankan RTIA	Right to Information Act 2016 in Sri Lanka
UK FOIA	Freedom of Information Act 2000 in the United Kingdom
UNDP	United Nations Development Programme

EXECUTIVE SUMMARY

Access to information is a human right that should be given constitutional status. This summary highlights the best practices and features of the RTI laws and enforcement from the 6 countries studied.

1. Information should be accessible to all. To make this possible:

   i. RTI should cover all levels and branches of government, including (but not limited to) public corporations, private entities if they are carrying out public functions, and NGOs substantially funded by foreign or local governments.

   ii. Anyone can request information, without giving a reason. Fees should be kept low - at most covering the cost of providing information. Some information, such as on matters of public interest, should be available free of charge and people living below the poverty line should be exempt from fees. There should be clear timeframes for responding to requests, depending on the urgency or complexity of the request, with extensions allowed under strict conditions. Public authorities, with appointed public information officers, should be obliged to assist requestors.

   iii. A successful RTI regime relies on effective recordkeeping and good management of information,with a focus on digitisation. Laws should also include a publication scheme to ensure the proactive disclosure of the majority of information produced by the State.

2. Exemptions to the RTI should be limited in scope, and apply to the protection of national security, privacy, and international relations. Even then, exemptions:

   a. should follow a three-part test. First, the information must fall under one of the clearly and narrowly defined exemptions. Second, there must be harm done to the exemption. For example, the State would have to show that if the information was released, it would harm national security. Lastly, even if the release of the information did harm to the exemption, it has to pass the public interest test, that is that there is not an over-riding public interest in the disclosure of the information. An appropriate balance must be struck between a legitimate state interest not to disclose, and the public's right to know. Further, special allowances should be made when information is requested on allegations of corruption and human rights violations;

   b. should not be broadly categorised, but defined clearly in detail;

   c. should be subject to a time limit as the sensitivity of information declines over time;

   d. should allow partial disclosure, for example redacting information within a document that falls under a valid exemption;

   e. should be cited by the public authority upon refusal of the information request – users should know why their information request has been refused, with reference to the exact exemption.

3. The RTI law should override other laws to the extent of any conflict, in particular the Official Secrets Act (OSA). Thus, the laws that need to be repealed or amended to be more consistent with the RTI need to be identified.
4. Information Commissions should be responsible for oversight and implementation of the RTI law. Such Commissions may have the power to hear complaints and appeals; set rules regarding information management, publication and best practices; and/or enforce public authorities' compliance. The Commission must be accountable to parliament. The Commission has the power to review decisions made under the RTI law. In general, there are 3 tiers to the review process, with statutory timeframes at every tier. The Commission's decisions/outcomes from the appeals process must be legally enforceable.
    a. The Commissions must be structurally, financially and functionally independent from the government to be effective.
5. It is important that promotional measures are implemented to raise public awareness of the RTI. For effective implementation of the RTI, public officers need adequate and appropriate training. An adequate budget must also be allocated to support the effective implementation of the law and related measures.

THE SCOPE OF THE RTI LAW AND ACCESS TO INFORMATION

Constitutional Framework

1. The right to information must be recognised as a right in the constitution.

   1.1 The right to information for citizens is expressly incorporated in the Constitutions of Sri Lanka, Afghanistan, and Indonesia.

   1.2 In Australia and India, the courts have recognised that freedom of information is a necessary element of freedom of expression.

   1.3 In UK (with its uncodified constitution), the Article 10 of the Human Rights Act 1998 states that the right to freedom of expression includes the right to receive and impart information and ideas without interference by public authority and regardless of boundaries.

Scope of 'Public Authorities'

2. Generally, RTI laws apply to executive, legislative, judicative agencies, state-owned corporations, and publicly funded organisations.

Sri Lankan RTIA	• The definition of 'public authority' covers all levels and branches of government and a widespread of different types of in stitutions, for example public corporations, private educational institutions, and NGOs which substantially funded by foreign or local governments. • In particular, the scope even extends to private entities con tracted to carry out public functions (to the extent of activities covered by that public function), and companies where the state or a public corporation holds 25% or more of its share ownership or a controlling interest (section 43). • The laws do not expressly exclude any public authority from their scope and their definition of public bodies is very broad. • The Sri Lankan RTIA also covers security and intelligence bodies unlike other regional RTI laws such as in India.

UK FOIA	• Companies owned by the public sector are also included in the scope of the UK's FOIA. • However, the UK's FOIA does not extend to those who are providing public services under the contract. It is because such an extension may be burdensome and unnecessary especially on small businesses; therefore, it would be more practical to extend the coverage to only high-value contracts.[6] • The FOIA only applies to public authorities in England, Wales, and Northern Ireland, as well as UK public authorities operating in Scotland. A separate act applies to Scottish public authorities (Freedom of Information (Scotland) Act). [7]
Indonesian	• Similar to the Sri Lankan Law, the Indonesian laws do not expressly exclude any public authority from their scope and their definition of public bodies is very broad.
India	• Unlike Sri Lankan, the India regional RTI laws do not cover security and intelligence bodies. • Although the Indian legal framework does not extend likewise, its definition of 'information' includes *"information relating to any private body which can be accessed by a public authority under any other law for the time being in force" (section 2(f))*.

6 (Independent Commission on Freedom of Information Report, 2016) p.52
7 For a summary list of the differences between the regimes, see (The University of Edinburgh, 2019). This paper will focus mainly on the UK FOIA.

Scope of 'Information'

3. Article 19 (human rights NGO) established that the scope of the law information covers not only the law information created by the authority, but also the information received by the other authorities.[8] Taking this into consideration, 'information' is defined as follows:

3.1 *"public information means information in any form that is produced, stored, managed, sent and/or received by a public agency relating to the functioning of the state and other public authorities" (Article 1 (2) Indonesian PIDA);*

3.2 *"any material which is recorded in any form including records, documents, memos, emails, opinions, advice, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, videotape, machine-readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof" (Section 43 Sri Lankan RTIA).*

[8] Article 19 is a human rights organization with a specific mandate and focuses on the defence and promotion of freedom of expression and freedom of information worldwide. See Article 19 (2015) Asia Disclosed, p.14

Application Process

4. The applicant who is entitled to request information:

4.1 In Sri Lanka, Afghanistan, India and Indonesia, the right to request information is limited to only citizens and corporations (with certain membership requirements). Residents and foreigners are not provided with any rights in this regard.

4.1.1 In Sri Lanka, Afghanistan, India an Notwithstanding, Pinto-Jayawardena highlights that the Sri Lankan RTI Commission (RTIC) has taken a strong position in its orders that the public authorities cannot ask RTI applicants to give proof of their citizenship when they file information requests unless there are circumstances and context which makes them doubt the applicant's citizenship. d Indonesia, the right to request information is limited to only citizens and corporations (with certain membership requirements). Residents and foreigners are not provided with any rights in this regard.

4.2 On the other hand, the UK FOIA allows "any person" to apply (section 1).

4.3 The Australian FOIA defines an applicant to mean "a person who has made a request" (section 4).

5. Requirements to disclose reasons for request

UK Sri Lankan Afghanistan Australia India	No requirement to disclose reasons for requests. There should be no discrimination between requesters who want to use the information for certain campaigns or their own personal purposes. For example, in section 6(2), Indian RTIA *specifically states that "An applicant requesting for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him."*
Indonesian	Applicants in Indonesia are required to state a reason for their information request, which is a deterrent to access and against international RTI principles (Article 4(3) Indonesian PIDA).

Fees System

6. Regarding the fees system in the application or request for information, Article 19 recommends that the best practice is to:

6.1 Limit fees to a maximum of actual costs for the reproduction of the information, not for the time taken in deciding on the request itself;

6.2 Provide waivers for information of public interest; and

6.3 not charge for appeals.[9]

Sri Lankan	• The Sri Lankan RTIC is given broad powers to set fees for access to information and to direct the public authorities to reimburse fees where the information has been provided late (sections 14(c)-(e) 15(g) of the Act and Rule 12) • Fees are also waived whenever an applicant is successful in an appeal (Rule 11). • Pinto-Jayawardena commended that the affordability of the fee schedule was one of the RTIC's strong points which contributed to an easier process of gaining information.
Afghanistan (ATI Law)	The applicants must pay for the costs incurred after the first 20 pages of the requested information (Article 9)
Indonesian (PIDA)	The PIDA provides for applicant's right to obtain public information at 'low-cost', and the applicant can file an objection if an unreasonably high fee was charged (Articles 2(3) and 35(1(f)).
India	No fees are charged from persons living below the poverty line (section 7(5)).
UK	Public authority is not obliged to comply with the duty to provide information if the cost of doing so would exceed a specific cost limit (section 12).[10]
Australia	• Before the agency or Minister can decide on how much to charge for the fee, they will need to first consider: • Whether payment would cause financial hardship to the applicant, and • Whether a disclosure is in the general public interest. (section 29(5))

9 Article 19 (2015) Asia Disclosed, p.17

10 The current cost limit is set at £600 for central government departments, and £450 for other public authorities.

Best Practice Responses to Applications for Information

Reasoning and Transfers

7. One essential good practice is that the applicant must be informed in writing by the public authority if a request is refused and must also be notified of any right of review (further explained below.)

8. Where the information requested was not under the control, custody or possession of the particular public authority receiving the request, there should be provisions in place whereby:

   8.1 Such agency must notify the applicant where the information can be obtained; and/or

   8.2 The request must be transferred to the competent/relevant authority, and the applicant is to be informed of such transfer within a certain time.[11]

   - Such provision is lacking in the Indonesian PIDA and Afghan ATI Law.
   - In the Australian FOIA section 16, provision is made for such transfer and that the applicant is to be notified of such (but without a specified deadline).
   - The best example is section 6(3) of Indian RTIA, whereby such transfers must be made no later than five days from receipt of the application, and the applicant is to be informed 'immediately' about such transfer.

[11] See Article 19 (2015) Country Report, and (Study on Information Requests Submitted to Public Authorities and Responses Received under the Right to Information Act, No.12 of 2016, 2018) p.11

Clear and Efficient Timeframes

9. It is necessary to have a definite and efficient timeframe to process requests for information.

Afghanistan	Taking lead in this aspect, the Afghan ATI Law (Article 8) provides that: • The public institutions are given a maximum duration of 10 working days to respond to the requests, and • One working day to respond if the requested information is *"necessary for safety, security and freedom of an individual."* [12]
Indonesian	Another model is the Indonesian PIDA (Article 22(7)) which provides: • A duration of 10 days to respond
Sri Lankan	RTIA (Article 24 and 25) • Officers are given up to 2 weeks to respond, although they may apply for extensions of up to another two weeks if they deem fit. • Experts have criticized this extension as peculiar and unnecessary.
UK	UK FOIA provides: • A duration of 20 days to respond
Indian	Indian RTIA provides: • Response within 30 days
Australian	Australian FOIA, • gives the public authority up to 30 days to notify the applicant of the decision made regarding their request and may further extend the period another 30 days (Sections 15 through 15(AC)) • The given timeframe in the Australian FOIA is even longer than the other countries; an issue has been reported as compromising the relevance of the information obtained.[14]

[12] In India, the public authority needs to provide information within 30 days of the receipt of the request, but if the information concerns the life or liberty of a person, then within 48 hours (section 7). In the UK, the public authority is required to comply promptly and in any event within 20 days, with a power for the Secretary of State to extend this period by regulations to a maximum of 60 days in certain cases. (section 10, FOI Act).

[13] Kishali Pinto-Kayawardena ed. (2019d) Reflections on Sri Lanka's RTI Act & RTI Regime, p.92 ("2019d Reflections")

[14] (Falk, 2019)

10. Studies in the UK[15], Australia[16] and Sri Lanka[17] have found that a significant percentage of public authorities took longer than the specified timeframe in their respective laws to respond to requests. To solve delays in responses, it is recommended that:

10.1 Extensions to the time limit should only apply:

- Where the request involves information that is complex or voluminous, or
- Where consultation with third parties (who may be affected by the release of the information) is required.

There should not be an open-ended extension but should be limited to a specified number of working days (i.e. 20);[18]

10.2 The allocation of practical resources such as adequate staffing in departmental RTI teams is essential. For example, it is ideal for the officer acting as the information officer to be instituted exclusively to the task so that he/she may respond efficiently rather than be delayed due to other work responsibilities;

10.3 Agencies may help to refine requests where the initial application may have been too broad or vague; and

10.4 A course of action should be regulated to ensure compliance with the specific time frames as stipulated in the Act.[19]

- One way is to ensure that the public authorities have an internal review procedure for complaints relating to their handling of the request.
- The value of such an internal review should then be safeguarded with specific statutory time limits (i.e. the review should be completed within 20 days) to prevent potentially causing further delays.[20]
- In any event, the oversight body may decide to hear an appeal before an internal review is completed if a public authority is taking an excessive amount of time for the same.[21]

11. With reference to a key decision made by the India's Information Commission, it was held that even delays in delivering information constituted harassment. [22]

15 A study in UK 2014 found that around 60% of requests took longer than the statutory set 20 days to resolve, (Independent Commission on Freedom of Information Report, 2016 p.13)

16 (Knaus and Bassano, 2019)

17 An initial study in Sri Lanka found that many public authorities (68 out of 203 constituting 33%) took more than the specified time frame in the Act to respond as well as provide information. (Study on Information Requests Submitted to Public Authorities and Responses Received under the Right to Information Act, No.12 of 2016, 2018, p.18) 18 As recom mended by the UK's Commission in its FOI Report, (Independent Commission on Freedom of Information Report, 2016, p.11 and 14)

19 (Study on Information Requests Submitted to Public Authorities and Responses Received under the Right to Information Act, No.12 of 2016, 2018, p.20)

20 The UK's FOI Act does not create a statutory right of review, but the Code of Practice made under section 45 of the Act states that public authorities should have a complaints procedure, and this internal review to be dealt with within 'reasonable time'. (Independent Commission on Freedom of Information Report, 2016, pp.14-15)

21 Ibid

22 Johinder Dahiya v. Rajesh Khanna, Municipal Cooperation, Delhi, CIC Decision No. CIC/SG/A/2012/000557/18356

Accessibility and Assistance to Applicants

Good Practices

India	• The Indian RTIA provides for the duty to assist information requesters. The appointed officer's duties include handling requests from applicants seeking information and ensure that all reasonable assistance is provided to facilitate the process (Section 5(3)).[23] • Such duty includes offering special assistance for requestors with disabilities (section 7(4)). Also, some states in India have introduced dedicated infrastructure such as a toll-free phone line for requests for information or texting provisions for mobile phone users to follow up on their requests for information from the government.[24]
Australia	If a request does not meet a requirement set out in the FOIA, the agency to which the request was made must assist the applicant to complete or revise the request (section 15(3)).
UK	• UK FOIA provides that access shall be given in that form where the applicant has requested access in a particular form (Section 11), similar to Section 20(2) of the Australian FOIA. • In the UK, this can include a permanent form (a hard copy), another form acceptable to the applicant (such as an electronic form), an opportunity to inspect a record, or information provided in a digest or summary form. • Public authorities are required to give effect to a requestor's preference so far as reasonably practicable.
Sri Lanka	Another important area to consider is equal access to RTI, especially related to language or disability barriers. In Sri Lanka, there is a rule whereby in the context of larger requests, the information officer must inform the requester about different format options and the fees associated with them, thereby helping the requester make an informed choice about this.[25] • However, there is space for Sri Lanka to improve here. Although the Sri Lankan RTIA allows an applicant to file an information request asking for information in the 'language of preference' (section 24(5)(b)), it does not compel a public authority to give the information in that preferred language. • Instead, the duty is to give the information in the language in which the same is maintained in the official records. Consequently, for example, Tamil citizens received information in the Sinhala language.[26] In another example, the RTIC could not provide information in Braille to a visually impaired person when requested.[27]

23 "Every Central Public Information Officer or State Public Information Officer, as the case may be, shall deal with requests from persons seeking information and render reasonable assistance to the persons seeking such information".

24 (Access to Information in Afghanistan- A Preliminary Review, n.d.) p.2

25 2019d Reflections, Rule 8, p.91

26 19d Reflections, p.xvi

27 (Study on Information Requests Submitted to Public Authorities and Responses Received under the Right to Information Act, No.12 of 2016, 2018) p.19

Examples of Weak Practices in Accessibility and Assistance

13. In the Australian FOIA, requests can be refused by the agency or Minister based on a "practical refusal reason", where disclosure would "substantially and unreasonably divert the resources" of the agency or Minister from its other operations or performance of its functions.

    13.1 To this end, the use of this reason to block requests has reportedly increased by 163% in the financial year of 2017-18 alone, mostly because RTI teams having shrunk in at least 20 government departments or agencies.[28] This mechanism has been criticized for its complex nature and difficult to use.[29]

14. Accessibility and assistance to applicants appear to be weak in Indonesia. There are no clear instructions for the officers to assist the applicants.[30] In this regard, reports from Indonesia showed the following:

    14.1 Information officers were often reluctant to provide the requested information.[31] One of the main problems is that the Indonesian PIDA mandates every public body to appoint an Information and Documentation Management Official to render public information disclosure services. However, even 10 years after the Act came into force, not all public bodies did have appointed such officials. As of 2017, only 483 out of 708 public bodies (68.22%) have appointed the official.[32]

    14.2 There is a continuing delay in the establishment of the Provincial Information Commission, and mechanisms have not been put in place to publish information efficiently and upon request.[33] Some key problems reported are a lack of funds, regulations and personnel at several provincial and district governments and public agencies necessary to effectively implement the Act. Several local regulations that require local public bodies to disclose information to the public were identified, but *"so far, however, enforcement of these local regulations has been weak"*; the Act does not mandate the establishment of local regulations.[34]

    14.3 There are no effective penalties for government institutions that fail to provide information. Although the law provides penalties for both withholding information and misusing government information, however, in real life, information commissions seem reluctant to impose penalties for failure to provide information.[35]

28 (Knaus and Bassano, 2019)
29 (Prof John McMillan 2012c) p.11
30 (Article 19, 2015) Country Report.
31 (Widodo Putro and Ward Berenschot (2014))
32 (Indonesia Open Government Partnership National Action Plan 2018-2020, 2018)
33 There are 3 tiers of Commission in Indonesia, the Central, whilst the other two lower tiers being the Provincial Information Com mission and the Regional/ District Information Commission.
34 (FreedomInfo.org, 2011)
35 (Widodo Putro and Ward Berenschot (2014))

15. In the Afghan ATI law, there is an obligation on public institutions, through the information office, to provide some assistance to applicants (Article 13). Also, positive findings showed that large majorities were able to find the information they were looking for, in the language they wanted and in an up-to-date form.[36]

    15.1 The applicant shall request in writing or use the access to information form and refer to the relevant institution to request information (Article 6(1)). Applicants are provided with an Information Request Form (prepared by the Commission and to be made widely accessible to the public for free in a printed or electronic sheet) to provide details of his/her request for information (Article 3(5) and 6(2)). (Note: this contrasts with the previous regime under the 2014 Afghan ATI law, where there was no mention of how requests may be lodged; and no fee waivers for poor applicants;[37])

    15.2 Government bureaucracy in Afghanistan is, in general a major obstacle for the public to have access to information. Before an individual can obtain information from the hospitals, he/she will first need to seek permission from the relevant Ministry of Public Health section and then to present the permission letter to the health facility from which formal information is sought. This is often a time consuming and frustrating task;[38]

    15.3 Under the 2014 regime, two-thirds of the respondents in a survey in 2017 indicated that it was 'somewhat difficult' or 'very difficult' to obtain information. Most of the respondents indicated that they had not been given any reasons when they were refused information. Among those who had been provided with reasons, two-thirds did not believe that the reasons were legitimate. Further, 25% of all respondents paid a bribe to obtain information;[39]

    15.4 Journalists were not satisfied with the assistance provided to them by public institutions and also with the accuracy of the information obtained.[40] The level of access to information was disappointing especially from security institutions, public health, governor's house, women's affairs, martyrs and disabled and custom departments.[41]

36 (Integrity Watch Afghanistan 2017 p.3), and (Access to Information (2019a))
37 Unlike in India, for example. For comparison to other countries, refer back to the sub-section above on Fees System.
38 (Access to Information in Afghanistan- A Preliminary Review, n.d.) p.14
39 (Integrity Watch Afghanistan 2017, pp.3, 32, 33)
40 (Zarghona Salehai and Yousaf Zarifi (2019f))
41 (Access to Information in Afghanistan- A Preliminary Review, n.d.) p.13 and Zarghona Salehai and Yousaf Zarifi (2019f)

Records Management

16. Effective recordkeeping and management are widely recognized as a pre-requisite for a successful RTI regime. Records should be properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before their destruction to ensure that valuable information is not lost. It is impossible to disclose information if the public authorities cannot themselves find the information sought, especially when steps are not taken to implement referrals in a systematic manner. The inefficiency of the public authorities in documentation directly hinders implementation of RTI.

    16.1 Pinto-Jayawardena provided an example in Sri Lanka whereby to ensure legal accountability, government officials were required to produce a legal affidavit upon claiming that documents were destroyed. She believes this proved effective in enabling the law, as in most cases, they usually returned with the document.

    16.2 In Indonesia, sanctions are prescribed for individuals who destroy or lose information that is *"protected by the state or related to the public's interest"* (Article 53).

17. In this regard, it is important to establish rules by making it clear that the oversight body can order public authorities to undertake structural measures – such as improving their records management or training their staff – to improve their performance in terms of implementation (rule 27, Sri Lanka).

18. One way forward is digitization. The Indian RTIA requires public bodies to computerize all records which can be transformed into digital formats and to make them accessible all over the country through a computerized network. Public authorities are required to *"ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated."* (Section 4 (a)).

19. In this regard, a decision by the Indian Central Information Commission (CIC) has held that record management should be improved by all public authorities. The public authorities must take all measures in pursuance of Section 4(1)(a) to implement efficient record management systems in their offices so that the requests for information can be dealt with on time and accurately.[42] However, despite the push for digitization, it has been reported that most states in India have yet to make RTI accessible online.[43]

20. In the UK FOIA, there is an obligation for the government to develop a code of practice for records management (section 46). The National Archives (the lead agency for records management in the UK) developed and maintained this code in cooperation with the Information Commissioner.[44]

[42] Paramveer Singh v. Punjab University CIC/OK/A/2006/16, 15/6/06
[43] (Praveen Shekhar (2018b)
[44] (Implementing Right to Information - A Case Study of the United Kingdom, 2012) p.11

PROACTIVE DISCLOSURE

Importance and Benefits

21. There are two ways by which the public can access information held by public authorities.

    21.1 The first is where citizens receive it via submitting a request, a **'reactive disclosure'.**

    21.2 The second way is when public bodies make information available in the public realm regardless of applications or requests from citizens through **proactive disclosure.**

22. The benefits of proactive disclosure and transparency are extensive.

    22.1 With better clarification of each organization's role and the public services, they are required to render, help public authorities raise their visibility and improve public perception of their roles.

    22.2 Proactive disclosure reduces the time and resources spent in processing individual information requests, increases service efficiency between different organizations, and ensures equality of access to information for all citizens and not just the individual requesters. It has been suggested that proactive disclosure could bring about ancillary socio-economic benefits.[45]

23. Article 19's recommended categories of information for proactive disclosure include, but are not limited to: information related to the structure and functions of the organization, budget documents, tenders and contracts, RTI procedural information, types and uses of record systems or document registers, internal laws of the structure and reports.[46]

[45] (2019d Reflections p.93)
[46] (Article 19 (2015) Asia Disclosed p.23)

Implementation

24. Proactive disclosure may be implemented by way of substantial law and by instilling it as an institutional culture and through promotional measures.

25. The **Indonesian PIDA** includes a wide range of information that is to be published proactively and distinguishes between information that is to be supplied *"immediately"*, or *"periodically"*, or *"at any time"* (Articles 9 to 11).

    25.1 *Immediate* publication of information includes information that might threaten the life of the people and public order.

    25.2 *Periodically* means, to be "conducted at least every 6 months". Periodic publication of information relates to information on the activities and performance of the related public agency, information on the financial report, and/or other information regulated in the regulations of the laws.

    25.3 Information that should be available *at any time* includes policies, working plans of an agency, including annual budget, reports on access to public information services etc. State-owned corporations are obliged to publish a vast range of information on their services, responsible persons, annual and financial reports, external evaluations, procurement mechanisms and many others.

    25.4 Despite progressive provisions in this respect, a study in Indonesia showed that information is not sufficiently available on a proactive basis largely due to inefficient information management systems and a lack of capacities and skills in the public bodies.[47]

26. The Minister (of Mass Media) under the advice of Sri Lanka RTIC, issued a regulation prescribing around 16 categories of essential information that a public authority must proactively publish as a minimum requirement.[48] In addition to the general proactive rules, authorities must disclose a wide range of information about higher value projects both to the public in general and also specifically to affected persons (Section 9). Further, regulation no.19 provides for the free reuse of information disclosed under the Act.

    26.1 In Sri Lanka, not only the head of each public authority has the responsibility to ensure that the rules are met, but also the Minister who is responsible for all public authorities falling under his or her responsibility (section 8(1)). It is said that *"This creates a more centralized and high-powered locus of responsibility which will presumably be easier to enforce."*[49] If a public authority fails to meet its proactive publication obligations, a person may complain to the head of the authority and then to the Commission, potentially resolving a common problem (namely, the lack of enforcement for proactive obligations) with RTI laws.[50]

47 (Article 19 (2015) Asia Disclosed, p.11)
48 The Gazette of the Democratic Socialist Republic of Sri Lanka No. 2004/66 (3 February 2017). Regulation No. 20
49 (2019d Reflections, p.90)
50 Regulations 20(4) Regulations and the Right to Information Rules of 2017 (Fees and Appeals Procedure)

26.2 It has been recommended that:

- This regulation be converted to a "publication scheme",
- A common template to disclose the types and format of the information and
- The ministry assigned to implement the RTI law may establish a transparency certification as an effective compliance incentive for the government entities to adhere to this scheme.[51]

27. The **UK FOIA** (Section 19) is the model requiring public authorities to have a publication scheme approved by the Information Commission.

27.1 The Information Commission provides a model scheme that specifies that central government bodies should publish information about expenditure, contracts and tenders, and senior pay and benefits. The Information Commission has the power to enforce compliance (via an enforcement notice) with the requirements of the publication scheme but is not authorized to do the same for other statutes and regulations imposing reporting obligations on public sector entities.[52]

27.2 Fitzhenry explained that proactive disclosure is a duty by the public authorities, facilitated by a publication scheme. Information on services provided, decisions made, the cost of those decisions and the facts and analyses upon which the decisions were made are examples of information that need to be published.

27.3 The standard applied is that people should be able to simply search for the information and have access to it, thereby reducing cost and increasing the standards to RTI.

27.4 Additionally, the publication scheme used by the Scottish public authorities is something that needs to be approved by the Commissioner. In practice, they have a model scheme that all public authorities are subscribed to.[53]

28. Similarly, in **Australia**, at a federal level, agencies must proactively publish the following information: Details of the structure, functions, operations and appointments of the agency's organization, as well as information held by the agency that is routinely provided to Parliament;

28.1 The exceptions are personal information and information about any person's business, commercial, financial, or professional affairs, if it would be unreasonable to publish the information (section 8 Division 2). Information is released under a disclosure log (section 23) and the Information Publication Scheme (IPS).[54]

51 (Article 19 (2015) Asia Disclosed p.80)

52 Other laws including for local authorities, the Accounts and Audit Regulations 2015, Localism Act 2011, and Companies Act 2006, Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (Independent Commis sion on Freedom of Information Report, 2016)

53 EGM report dated 23 July 2020 p.28

54 Documents that have been released by the Reserve Bank following a request under the Freedom of Information Act 1982 are available on https://www.rba.gov.au/information/foi/disclosure-log/

29. The **Indian RTI** appears to be stronger than Sri Lanka in this part [55] , having at least 16 information categories that are mandatory for public authorities to disclose (Section 4).[56] There is also a set time frame of 120 days to complete the proactive disclosure. This Section also emphasizes the need for using electronic means for record upkeep, management, and dissemination of information to make information easily accessible.

    29.1 However, there is still room for improvement in the implementation of proactive disclosure in India. A task force for strengthening compliance with provision for proactive disclosures appointed by the government of India in 2011 suggested that the weak implementation of the law (Section 4 of the Act) is partly due to fact that certain parts of this Section is less detailed. This taskforce also suggested that there should be compliance mechanism to make sure that the requirements of the law are fully satisfied.[57]

    29.2 This task force recommended holding web-based public consultations wherever any legislation is proposed or amended and when major policy decisions which directly affect the public at large are taken particularly to shape national policies on health, education, social welfare, natural resources, etc.

30. Another method is by establishing an open data system.

    30.1 India and Indonesia have started establishing their open data portals.[58] In India, there is a development of a national telephone helpline and experiments with RTI requests via text or online.

    30.2 In the UK, the FOIA has led to the development of an online portal that enables requests and responses to be published online open to all, which accounts for around 10% of all RTI requests. [59] The government has also created an "Open Government License" as a tool to enable Information Providers in the public sector to license the use and re-use of their information under a common open licence.[60]

55 (2019d Reflections p.18)

56 Public authorities are required to proactively publish 16 categories of information including details of the services provided, organisational structure, decision-making norms and rules, opportunities for public consultation, recipients of government subsidies, licenses, concessions, or permits, categories of information held, and contact details of information officers.

57 (2019d Reflections, p.72)- referring to Implementation of Recommendations of Task Force for Strengthening Compliance with Provisions for Suo Motu/Proactive Disclosures under Section 4 of the RTI Act, 2005. Note for the Committee of Secre taries from the Cabinet dated 10th July 2012.

58 (Article 19 (2015) Asia Disclosed, p.11)

59 (Worthy, 2016)

60 Under the licence, any person may a) Copy, publish, distribute and transmit the Information; b) Adapt the Information; c) Exploit the Information commercially and noncommercially (Nationalarchives.gov.uk, 2019)

EXEMPTIONS/ CLASSIFIED INFORMATION

Features of Best Practices

Harm Test/ Public Interest Test

31. Mendel said that restrictions on the right to information must be subject to a three-part test:

    - legitimate interest,
    - whether information disclosure would harm the legitimate interest, and public interest override.[61]
    - The Indonesian PIDA includes a wide range of information that is to be published proactively and distinguishes between information that is to be supplied "immediately", or "periodically", or "at any time" (Articles 9 to 11).

32. Most RTI laws adhere to this three-part test rule and require public authorities to conduct a "harm test" or "public interest test" to demonstrate that harm to any protected interests would likely occur if the information requested is disclosed. The harm test generally varies depending on the type of information that is to be protected. There should be a requirement to assess harm at the time of a request, to prevent leaving the door open to classification being used to deny access.

33. Mendel suggested instituting good procedures for classification.

    33.1 For example, having a group of senior bureaucrats engage with classification instead of an individual, bringing more than one point of view and sharing responsibility.

    33.2 Documents could have different classification levels with various lengths of time embargoed, from 2 or 3 years, up to 20 years. These should be reviewed regularly, with the list of classified documents made available although their content is classified.

    33.3 Restrictions for health emergencies may differ from national security emergencies or conflict emergencies.[62]

[61] EGM Report dated 23 July 2020
[62] EGM Report dated 23 July 2020

34. The exemption part of the Sri Lankan RTIA has been praised as a model example. Its unique feature is the lack of national security and intelligence bodies that are usually exempted from RTI laws in most other jurisdictions.

    34.1 Instead of entities being privileged, each case must be assessed on its merits to ensure that an appropriate balance is struck between legitimate state interest and the public's right to know.[63] Having such a public interest override in the law is crucial.[64]

    34.2 For example, section 5(1) sets out the types of information which shall be refused for public access. However, Section 5(4)[65] established the overriding 'public interest test' which requires the release of information if the public interest in disclosing it outweighs the benefits of non-disclosure.

35. The Indian RTI and Indonesian PIDA (Article 17) have similar provisions to this effect, making exemptions conditional. Section 8 (2) Indian RTIA states:

    "Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests".

    Therefore, when scrutinizing the exemptions to the law, the overriding principle would always be public interest.

36. In addition, the Indian RTIA provides special allowance for information when requested relating to the allegations of corruption and human rights violation (Section 24) (more on the application explained below).

    36.1 Justice K.M.Joseph highlights the significance of Section 24.[66] According to him, Section 24 promotes the principles of democracy, rule of law and constitutional morality. This section further provides that even though some information held by intelligence and security organisations generally fall outside of the open disclosure regime, but such information can still be available if relating to the allegations of corruption and human rights violations.[67]

63 (2019d Reflections, p.15)

64 This is missing in Afghan ATI Law.

65 "Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure."

66 Yashwant Sinha & Ors v CBI India April 2019 REVIEW PETITION (CRIMINAL) NO. 46 OF 2019 in WRIT PETITION(CRIMIdi NAL) No.298 of 2018 ("Rafale Case")

67 "…The first proviso to Section 24 indeed marks a paradigm shift, in the perspective of the body polity through its elected representatives that corruption and human rights violations are completely incompatible and hence anathema to the very basic principles of democracy, the rule of law and constitutional morality. The proviso declares that even though the infor mation available with intelligence and security organizations are generally outside the purview of the open disclosure regime contemplated under the Act if the information pertains to allegations of corruption or human rights violations such informa tion is very much available to be sought for under the Act…"

37. A good practice is that the harm test is applied to all exemptions, although some RTI laws narrow the application of this test to a few selected exemptions. Such is the case in the UK, where exemptions are divided into 'absolute' and 'qualified'.

    37.1 Qualified exemptions, as opposed to the 'absolute', are subject to the public interest test, meaning the authority withholding information would have to demonstrate that disclosure would damage public or third-party interests. The public interest test for the qualified categories has generally been commended as a valuable part of the FOIA scheme.[68]

    - Qualified exemptions include information that would likely prejudice defence, international relations, the economy, law enforcement, audit functions, commercial interest, health and safety etc.

    - It also includes information that relates to the formulation of government policy, Ministerial communications, the provision of advice by the Law Officers, or the operation of any Ministerial private office are also exempted.[69]

    37.2 Absolute exemptions include information in relation to security matters, special forces and intelligence services, communications with the royal family, certain court or tribunal records, information whose disclosure would undermine parliamentary privilege or breach confidence etc.

    37.3 It has been noted the UK has a larger number of exemptions in comparison to other jurisdictions. Notwithstanding, it has also been recognized that each exemption is listed in a very detailed manner, and thus the law's specificity in this regard works to limit the tendency of officials to exploit ambiguities in the law and circumvent its spirit.[70]

38. Most of the exemptions described above are consistent with the other countries studied in this report.

39. While national security, privacy, and international relations tend to get the highest level of protection, even for allegedly protecting those interests, an embarrassment to the government or an official should never be an excuse to withhold information.[71] Some exemptions listed in the Afghan ATI Law in this regard are too broad and unwarranted. Among such broad prohibitions include where a person's *"life and properties"* is endangered, or where the information is harmful to *"commercial interests, private properties and bank accounts"* which is also not harm tested (Article 16 (3) and (8)).

68 (Independent Commission on Freedom of Information Report, 2016 p.23)
69 In relation to this section 35, the 2016 Independent Commission on Freedom of Information Report made recommendations, amongst others, to harmonise and marginally liberalise requests for information on government policy formulation, Cabinet material and inter-ministerial communications. (Independent Commission on Freedom of Information Report, 2016, p.11)
70 (Implementing Right to Information - A Case Study of the United Kingdom, 2012, p.5)
71 (Article 19 (2015) Asia Disclosed)

Time Limits on Exemptions

40. Mendel confirmed there should be an overall time limit on exemptions. Exemptions to the RTI law should be subject to a time limit, for example, 20 to 30 years. This is because the sensitivity of information declines rapidly, especially if related to national security, defence strategies, and weapons capabilities.

41. Where sections of the information remain sensitive even after the time limit, the law can provide for exceptional procedures to continue the secrecy of certain documents, or sections of the document, if necessary. For information to be restricted, a specific reason in the interest of national security must be provided; for example, obstruction of an ongoing military operation.[72]

42. According to the Sri Lankan RTIA, certain exceptions no longer apply after only 10 years, although better practice in this area is to apply overall time limits to all of the exceptions which protect public interests. (Section 5(2))[73]

Severability

43. The law should enable partial access or a severability clause where an exception covers only part of a record and the remaining part must be disclosed.[74]

    43.1 For example, the Indonesian PIDA Article 22(7)(e)[75] provides that if a document contains classified material as referred to in Article 17, it may be redacted.

    43.2 Another example is section 10, Indian RTIA, *"Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information".*

    43.3 Similar language is found in section 6, Sri Lankan RTIA.

    43.4 Where information has been redacted or edited, the applicant should be duly notified in writing that an edited copy has been prepared and the grounds for the deletions should be provided as well. (section 22, Australian FOIA).

72 Toby Mendel in the EGM Report, 23 July 2020
73 (2019d Reflections, p.93)
74 This is lacking in Afghan ATI law.
75 "in the event that a document contains classified material as referred to in Article 17, such classified information may be blackened…"

Decision Justification

44. In the event of a refusal to provide information, or if the information request is unclear, there should be a requirement for the public authority to provide a clear explanation of the grounds of the decision in reference to the particular provision in the Act, and to inform the applicant about their rights of appeal. [76] In this regard, for example:

    44.1 The Indonesian PIDA stipulate that *"a Public Agency is obliged to write down its reasoning for every policy that it takes to comply with the right of every person to get Public Information" and that the reasoning shall take into account "political, economic, social, cultural considerations and/or state defence and security."* (Articles 7(4) and (5))

    44.2 In the case of a decision to refuse to give access to a conditionally exempt document, such notice shall include in those reasons that the public interest factors are considered in making the decision; and where the decision relates to a document of an agency, the name and designation of the person giving the decision should be provided as well. (section 26, Australian FOIA). The notice must also include information on how an application for internal review or review with the Information Commissioner may be made.

    44.3 Similar language is found in section 17, UK FOIA and section 7(8) Indian RTIA.

45. In case of dispute, the public authority should be the one (owes the burden of proof) to provide evidence that the information falls within the scope of an exception set out in the law (see Article 45 Indonesian PIDA, section 32(4) Sri Lankan RTIA).

[76] This is lacking in Afghan ATI law.

Weaknesses in the Legislation and Implementation on Exemptions

Scope of the public interest test and exclusion of certain bodies

46.

Sri Lankan RTIA	• As there is no statutory definition of 'larger public interest', such will depend on the circumstances of each case. • As a result, the burden of proving this may fall on both the requester of the information and the Information Officer. • A few categories of exempted information in the Sri Lankan RTIA such as third-party information, contempt of court and cabinet memos are not harm tested, though they should be.
Indian RTIA	• Similar to the Sri Lankan RTIA, in the Indian RTIA, there are broad exceptions in Schedule 2 for various security, intelligence, research, and economic institutes. Instead of such broad and sweeping exclusions, these interests should also be protected by individual and harm tested exceptions. • The problem with excluding bodies is that while some of the information that the body might hold can be quite sensitive, exempting all aspects of its activities constitutes a vacuum in the accountability system to prevent corruption or the misuse of power.[77] • The better approach is to include the body and to use specific exemptions to ensure that sensitive information is protected where necessary. • Anyway, this issue is partially remedied by requiring that information relating to an allegation of corruption or human rights violations must be disclosed (section 24).[78]
Australian FOIA	• The scope of exempted documents is wide (see Section 38, 47A to 47J). Notably, privacy and personal information are especially protected. • Section 41(1), where a document is exempted if it involves *"the unreasonable disclosure of personal information about any person",* is a provision that has drawn much criticism and commentary.[79] • There are corresponding heavy protection measures of personal information within publication-related provisions (section 8 and 12). • For instance, where access to personal information is sought, section 27A lays out a thorough process involving consultations, submissions from relevant parties. That access must not be given until all opportunities for review or appeal have run out before the disclosure decision is executed. • Unsurprisingly, one of the most common issues in the review applications received by the Commissioner is regarding the personal privacy exemption.

[77] (Article 19 (2015) Asia Disclosed, p.13)
[78] The Madras High Court in Superintendant of Police Central Range Office of the Directorate of Vigilance and Anti–corruption, 79 (Australian Law Reform Commission, 2010a)

Misinterpretation and Lack of Clarity

47. Exemptions should be clearly defined. One of the common obstacles impeding the full potential of the RTI law is a lack of full comprehension and appreciation in the public sector of the fundamental norm of RTI – namely that the rule is to disclose, while exclusion from disclosure is the exception.

    47.1 This includes examples in Sri Lanka where officers would misinterpret the nature of the requested information as within the parameters of the exempted categories *"to justify refusal of disclosure or evade disclosure by seeking unwarranted extensions."*[80]

48. Studies and reports in Indonesia have found that a large number of officials were either referring to other laws when deciding whether the information was exempt or simply maintaining the pre-legislation stance of 'confidentiality', non-disclosure and secrecy.[81] Exceptions are understood differently by different public authorities.[82]

49. Such failures (in reference to Indonesia and Afghanistan (mostly under the 2014 regime)) may be largely attributed to the following:[83]

    49.1 national security and foreign relations exemptions being defined too broadly in the law, which could lead to a significant amount of information being withheld;[84]

    49.2 prevailing political will and/or past practices and prejudices relating to confidentiality and secrecy;[85]

    49.3 limited opportunities for oversight bodies to develop a detailed jurisprudence interpreting the exceptions;[86]

    49.4 lack of clarity regarding information classification, especially on how to assess whether information falls within the exemptions;[87]

    49.5 although it is stated within the statute that officials are to apply consequential harm or public interest test to assess whether there was a causal relationship between the release of information and the risk of harm, there are no specific regulations or guidelines that clarify how to apply the test; and

    49.6 Lack of penalties or sanctions (or clarity thereof) on the officials for non-compliance.[88]

80 (2019d Reflections, pp.xi, xii and 15)
81 (Dessy Eko Prayitno et al (2012b)), and (Arditya, A.D. (2012a))
82 (Ho Yi Jian (2019c) p.17)
83 (Dessy Eko Prayitno et al (2012b))
84 (Article 19 (2015) Asia Disclosed, p.10)
85 Ainuddin Bahodury, EGM Report dated 23 July 2020, p.21
86 (Ho Yi Jian (2019c))
87 Ainuddin Bahodury, EGM report dated 23 July 2020 pp.21-23
88 Ainuddin Bahodury, EGM report dated 23 July 2020, pp.21-23

Notable Decisions by the Commission and or Courts (Exemptions on Grounds of National Security, Defence, and/or International Relations)

General Observations

50.

Australia	• Studies showed that the number of exemptions claimed from around 2012 to 2017 has increased by 68.4%, noting that an individual RTI claim can be subject to multiple categories of exemption. • The use of the vague labels such as 'certain operations' and 'national security' exemptions has also increased by 318% and 247% respectively.[89]
UK	• Where the Information Commission and/or Tribunals have overturned public authority decisions, this has generally been considering the age of the material, or that release of the same was unlikely to cause harm (because, for example, it is essentially factual). • Occasionally the deciding factor appears to have been the high profile or controversy of the subject area.[90]
India	• Justice K.M. Joseph's comments in the Rafale case offer appropriate guidance on this subject: • "20...The RTI Act through Section 8(2) has conferred upon the citizens a priceless right by clothing them with the right to demand information even in respect of such matters as security of the country and matters relating to relationships with a foreign state. No doubt, information is not be given for the mere asking. The applicant must establish that withholding such information produces greater harm than disclosing it. • 21. It may be necessary also to consider what could be the premise for disclosure in a matter relating to security and relationship with a foreign state. The answer is contained in Section 8(2) and that is public interest. The right to justice is immutable. It is inalienable. The demands it has made over other interests have been so overwhelming that it forms the foundation of all civilized nations. The evolution of law itself is founded upon the recognition of the right to justice as an indispensable hallmark of a fully evolved nation." (emphasis added)

51. Mendel notes that overall, most of the exceptions in the Indian RTIA do include a form of harm test and a strong public interest override, inclusive of anything in their OSA. He also notes that in practice, the standard of harm is very high, with most cases requiring that the harm would occur as a result of disclosure.[91]

89 (www.anao.gov.au, 2017)
90 (Independent Commission on Freedom of Information Report, 2016) p.23
91 (Ho Yi Jian, 2019c)

52. Decisions create important jurisprudence and guidance as to how to apply and enforce these exemptions. The following focuses on cases involving exemptions on grounds of national security, defence, and international relations.

Exemptions Must Be Specific

53. The grounds of exemption should be limited and specific.

UK	An appeal decision in the UK made clear that in advancing public interest arguments, both sides should try to identify the specific harms that would occur if the information was released, and the specific benefits (in so far as is possible) of the information being released, rather than making generic class arguments.[92]
India	• Similar to the UK, a leading decision by India's CIC held that a mere statement by the public information officer (PIO) saying that the disclosure of the information is exempted under section 8(1)(a) is insufficient. • The CIC held that the PIO must explain which part of the information is likely to prejudicially affect India's relationship with the foreign country in question (Pakistan).[9]
Sri Lanka	The following statement in a leading decision by the Sri Lankan RTIC provides useful guidance in this regard: • *"It is important to note that the reliance on an international agreement to deny information pertains* **strictly** *to instances where the requested information was given or obtained in confidence and further, where the provision of the same is assessed as being 'seriously prejudicial to Sri Lanka's relations with any State, or in relation to international agreements or obligations under international law.' As such it is manifest that this exemption cannot be applied in a vague or generalized manner as to include all information relating to any international agreement.* • *The Public Authority is directed to clarify as to first, what international agreement or obligation under international law is at issue here; secondly, the precise terms of the serious prejudice that can be caused thereby; and thirdly, what information was given or obtained in confidence. This is for the Commission to assess the legitimacy of the applicability of the exemption that is cited in the first instance, as well as the relevance of the public interest override contained in Section 5(4) of the Act…"* [94]

[92] Department of Health v IC and Lewis [2015] UKUT 0159 (AAC), p.27 and (Independent Commission on Freedom of Information Report, 2016)
[93] Shri Nusli Wadia vs Ministry of External Affairs [CIC/OK/A/2007/001392]
[94] G.Dileep Amuthan v. Ministry of Defence Sri Lankan RTIC Appeal/ (In person) 70/ 2018

Protecting National Security

54. The UK All Party Parliamentary Group On Extraordinary Rendition filed a case against the Ministry Of Defense,[95] regarding an application of information relating to the memoranda of understanding (MOU) between the UK and other countries in respect of the treatment of detainees in the conflicts in Iraq and Afghanistan.

54.1 The issue for the tribunal to determine was whether disclosure of the information is likely to undermine the international relations (under section 27). If so, whether the public interest in maintaining the exemption outweighs the public interest in disclosing it.

54.2 Unless cogent evidence was adduced by the executive branch of government about the prejudice likely to be caused to particular relations from disclosure, the Tribunal would conclude that no case of prejudice was made out.

54.3 Despite giving "appropriate weight" to the executive branch's concerns, the Tribunal expressed scepticism that an agreement intended to ensure human rights and legal compliance in detainee transfers *"could be perceived as confidential in nature or something the existence of which embarrasses foreign states."* [96]

54.4 In the same case, information for the policy on capture and statistics concerning Iraqi operations was also requested. Unlike the above information request which fell under a qualified exemption, this information by the very nature of how it was defined in the request, related (in so far as it existed) to the UK Special Forces, which fell under an absolute exemption (section 23).

54.5 Thus, the Tribunal upheld the government's assertions regarding secrecy of information concerning Special Forces implicated in the requests.[97] It was held that the government was entitled to respond by neither confirming nor denying its existence and to refuse to supply any information that was held. The Tribunals' reasons for its conclusions were further explained in a closed annexe to the decision judgment.

[96] Paras. 56, 59, 64-66 of the judgment
[97] Paras 87, 101 of the judgment

55. There was a challenge mounted against the Union of India & Ors by S. Vijayalakshmi.[98] In this case, the court will need to consider whether the Government of India was justified for including the Central Bureau of Investigation (CBI) within the blanket exemptions of the RTIA subject to the provisos contained in Section 24(1).

55.1 The government's decision was challenged on the basis that the CBI already enjoyed the exemptions provided for under section 8.

55.2 The court extensively examined the CBI's functions and decided it was appropriately deemed an intelligence and security organization and thus could be included in the Second Schedule without being *ultra vires* (acting illegally beyond) section 24 RTIA or the Constitution.

55.3 In its decision, the court stated that Section 8 (exemptions from disclosure of information) is also an important provision to protect other public interest vital for democracy, and it should not be considered to be a restriction on the right to information.[99]

98 S. Vijayalakshmi v Union of India & Ors, High Court of Madras, W.P. No. 14788 of 2011 and M.P. No. 1 of 2011, 9.9.2011

99 "Section 8 should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interest essential for the fulfilment and preservation of democratic ideals."

Upholding Public Interest and Striking a Balance

56. At times, a compromise could be made in relation to the extent of information disclosed.

56.1 In a case in the UK, the Information Tribunal decided that disclosure of information relating to arms trade between the UK and Saudi Arabia could cause real and substantial prejudice to UK's international relations, the harm caused is greater than any public interest in favour of disclosure. However, information relating specifically to the role of UK government officials in accepting bribes was subject to disclosure.[100]

56.2 Pinto-Jayawardena highlighted the case of *T. Nadesan v Office of the Cabinet of Ministers*[101] where the national security exemption was relied on by the Cabinet of Ministers to deny an information request for a report regarding

- irregular payments made towards a new defence headquarters building, and
- annexures to a cabinet sub-committee report investigating that alleged financial irregularity.

After inspecting the information (as authorized under section 15(c), RTIA), the Commission decided to order disclosure of the report. This was mainly on grounds that the matter was found to be concerning financial irregularity (relating to corruption in procurement) rather than national security.

56.2 The Commission then queried the attorney general on the aspects related to national security and found that national security was too narrowly defined. As the attorney general could not justify the withholding of the information, the report was released. However, because the annexures contained plans of the building, the particular page that would have disclosed how many troops could have been accommodated in the building was ordered to be redacted.[102]

Thus, this is one example of where a fair balance could be struck between the opposing public interests at hand.

[100] Gilby v. Information Commissioner and the Foreign and Commonwealth Office, 22.10.2008, EA/2007/0071, EA/2007/007, EA/2007/0079

[101] RTIC Appeal/216/2018

[102] Kishali noted that this part of the decision was an addendum to her Order at the Commission and as such, is not fully captured in the main Order.

57. Disclosure should be allowed where:

    i. similar information had been released by the public authority in relation to an earlier period, and

    ii. there is otherwise "little logical connection" between the requested information and national security.[103]

58. Bahodury provided a few examples where public interest overrode exemptions allowed under Article 16, Afghan ATI.[104]

    58.1 Bahodury cited a case involving the Minister of Defence, which was a serious issue that usually would have been exempted. While defence issues are usually classified, they considered this matter to be outside those classified as it concerned roads and workmen. As it may have been a corruption issue, the information was ordered to be released as corruption overrode potential harm to national security.

    58.2 Additionally, in cases involving soldiers or teachers in schools where the information was previously restricted, the Commission ordered disclosure of the documents as enough time had passed to warrant it.

    58.3 In summary, where national interest may be a concern, an independent investigation is necessary to entertain the request, especially where there are different agencies involved. As long as they are satisfied that the information does not involve harm to a national security issue, the parties must disclose the information. Additional examples include instances of requests on the cost of business trips.

[103] Tharindu Jayawardena v Bureau of the Commissioner-General of Rehabilitation Sri Lankan RTIC Appeal (In-Person)/119/2017
[104] EGM dd 23 July 2020, pg. 25

OVERRIDING THE OSA-RTI RELATIONSHIP WITH OTHER LEGISLATION

59. To prevent RTI laws from being undermined by other potentially conflicting laws, one approach is by adding a provision for the RTI law to have precedence over the same, i.e. an "overriding" effect. To further safeguard the RTI law, it may be wise to include another provision for public authorities to use only the exemptions within the RTI law as the sole reason for withholding information.

60. Mendel explained that under international standards, once the three-part test is set out in the RTI law and the information meets the test, the RTI law should override the other laws, even if there is a conflict with other older legislation like the OSA.

61.

Sri Lanka (RTIA)	The Sri Lankan RTIA appropriately overrides other laws to the extent of any conflict. Section 4 states 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."* • Therefore, the government cannot claim indemnity via the OSA (refer to the section below on exemplary decisions on the same). In this matter, Pinto- Jayawardena confirmed that the OSA is now irrelevant to the application of the RTIA. • Notwithstanding the forward-thinking objective of such a provision, one critique is that *"with all such provisions, this only applies in a backward-looking fashion. In other words, it only overrides laws passed before the RTI Act, since parliament is clearly free, in future, to pass other laws which in turn override the RTI Act, subject to the Constitution."* [105]
India (RTIA)	Similar to the Sri Lankan RTIA, the India RTIA specifically states that its provisions *"shall have affect anything inconsistent therewith contained in the [OSA]" and any other law (section 22). Notwithstanding the OSA, "a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests"* (section 8(2)).
Australia (FOIA)	On the other hand, unlike the other countries, the Australian FOIA is much more reserved on this part. There is no provision expressly overriding secrecy provisions. Access to information is subject to Schedule 3, a long list of laws (wide-ranging in topics and numbering over 30) containing secrecy provisions that are itemized in detail.[106]

[105] (2019d Reflections, p.91)- Toby Mendel notes that this has already happened, example: the Sri Lankan National Audit Act
[106] Section 38, Australian FOIA and Schedule 3

62. Effectively in India (and the UK) any information that has been labelled as Secret or Top Secret under the OSA is still reviewed and can be released if it does not fall under one of the exemptions for protecting national security or other interests.[107]

62.1 In 2017, a report was submitted to Cabinet Secretariat to amend the OSA to be more compatible with the RTIA, but no action has been taken since then (as of March 2019).[108] To this end, Nayak and Habibullah commented that the OSA is a colonial construct, has no place in modern democracy and should be altogether repealed.[109]

62.2 In 2006, India's Second Administrative Reforms Commission recommended that the OSA should be repealed; to categorize the information covered by the exemptions in the RTIA afresh and move the espionage-related provisions and punishment in the OSA to the National Security Act.[110] Nayak confirmed this has yet been undertaken.

63. Nayak recommended that a harmonization exercise (to identify all potentially conflicting laws) should be performed, as was conducted in the UK when its FOIA was passed. One such example is where the United Nations Development Programme **(UNDP)** in Sri Lanka identified a series of laws that potentially affected the implementation of the RTI regime, that either conflicted or potentially conflicted with the RTIA.[111]

64. In this regard, the UNDP recommended a review and prioritization of the legislation that represents the most significant challenges, followed by these options for reform (not mutually exclusive):[112]

64.1 Amend each law expressly stating that such laws would be subject to the RTI Act;

64.2 Enact a special provision act that includes all laws included in this category, clearly stating that such laws will be subject to the RTI Act;

64.3 Amend the RTI Act to include a provision which states that *"Where any information which is prohibited by any written law from being disclosed is disclosed in compliance with a requirement made under this act, such disclosure shall not be deemed to be a contravention of such written law."*

[107] Article 19(2015) Asia Disclosed, p.18
[108] (FP Staff (2019b))
[109] Interview dated 19 Nov 2020
[110] (Nayak, 2015)
[111] Among these are: the OSA, Public Security Ordinance, National Archives Law, Declaration of Assets and Liabilities Law etc. Pg 11, UNDP review . Note also that as of the date of this study, there are no specific privacy or data protection legislation in Sri Lanka
[112] Review of Legislation for consistency with the RTI Legal Regime, p.17

Decisions Involving the Overriding Effect Provision (Sri Lanka and India)

RTI Upheld Over OSA

65. In a 2019 landmark Supreme Court decision, the Indian government tried to prevent access to Rafale jets' pricing details to protect national security, international relations, and privilege under the OSA. In his celebrated judgment, Justice K.M.Joseph expressed that neither the Indian Evidence Act nor the OSA prevented the Court from placing the documents in question on record for the Court to determine if public interest justified disclosure.[113] Most importantly, His Lordship emphasized the supremacy of the RTIA over the OSA. It is worth reproducing the following extract on the same:

"19. Reverting to Section (8) it is clear that Parliament has indeed intended to strengthen democracy and has sought to introduce the highest levels of transparency and openness. With the passing of the Right to Information Act, the citizens fundamental right of expression under Article 19(1)(a) of the Constitution of India, which itself has been recognized as encompassing, a basket of rights has been given fruitful meaning. Section 8(2) of the Act manifests a legal revolution that has been introduced in that, none of the exemptions declared under sub-section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access to information if the public interest in disclosure overshadows, the harm to the protected interests.

20. It is true that under Section 8(1)(a), information the disclosure of which will prejudicially affect the sovereignty and integrity of India, the security and strategic security and strategic scientific or economic interests of the State, relation with foreign State or information leading to incitement of an offence are ordinarily exempt from the obligation of disclosure but even in respect of such matters Parliament has advanced the law in a manner which can only be described as dramatic by giving recognition to the principle that disclosure of information could be refused only on the foundation of public interest being jeopardized.

What interestingly Section 8(2) recognizes is that there cannot be absolutism even in the matter of certain values which were formerly considered to provide unquestionable foundations for the power to withhold information. Most significantly, Parliament has appreciated that it may be necessary to pit one interest against another and to compare the relative harm and then decide either to disclose or to decline information...

... if higher public interest is established, it is the will of Parliament that the greater good should prevail though at the cost of lesser harm being still occasioned... " [114] *(emphasis added)*

[113] Referred to Section 8(2), 22 and 24 of the RTIA
[114] Manohar Lal Sharma vs Narendra Damodardas Modi on 10 April, 2019 (Supreme Court of India)

66. In relation to laws that conflict with the Indian RTIA, one famous CIC decision[115] established that the RTIA should prevail. Section 22 of the RTIA can be used to safeguard the citizen's fundamental rights to information. If anyone apply for information under the RTIA, the information should be provided as per the provisions of the RTIA, and any refusal must be in accordance with the Section 8 and 9 of the RTIA only.

67. The Sri Lankan RTIC upheld the overriding effect of section 4, RTIA when the information requested by Transparency International Sri Lanka fell under the scope of the Declaration of Assets and Liabilities Law.[116]

67.1 *In particular, it was noted that "allowing the existing range of special laws to supersede provisions of the RTI Act would ultimately render the RTI Act futile... Applying Section 4 to its fullest extent is important because of what the RTI Act undertakes to achieve through fostering 'a culture of transparency and accountability' (Vide preamble to the Act). If Parliament had intended to keep asset declarations out of the purview of the RTI regime, it could have explicitly mentioned it or included the same as an exemption under Section 5 of the RTI Act. That was not evidenced. In such circumstances, the Commission is duty-bound to take into due account, the legislative intention in that regard."*

[115] The CIC case of Mr. M. R. Misra v. the Supreme Court of India (CIC/SM/A/2011/000237/SG) provided: "where there is any inconsistency in law as regards the furnishing of information, such law shall be superseded by the RTI Act. Insertion of a non-obstante clause in Section 22 of the RTI Act was a conscious choice of Parliament to safeguard the citizens' fundamental right to information…If the PIO has received a request for information under the RTI Act, the information shall be provided to the applicant as per the provisions of the RTI Act and any denial of the same must be in accordance with Sections 8 and 9 of the RTI Act only." (emphasis added)

[116] Sri Lankan RTIC's decision Transparency International Sri Lanka v. Presidential Secretariat (Sri Lankan RTIC Appeal (06/2017) pg 95)

RTI Conflict with other Non-OSA Laws

68. Apart from the cases discussed above, there were still instances where the Indian courts relied on constitution-based grounds for preventing disclosure.

68.1 In the case of *Union of India v Central Information Commission*[117] the Central Public Information Officer (CPIO) made request to claim privilege in the Evidence Act (section 123 and 124) read with the Constitution (Article 74(2), 78 and 361), and also rely on national security grounds (section 8(1)(a) of the RTIA) to prevent disclosure of certain correspondences between the former President and Prime Minister relating to the 'Gujarat riots'.

68.2 The CIC had allowed the correspondence to be examined as to whether its disclosure would serve or harm public interest and stated that the CPIO cannot rely on any exemptions other than that laid down in the RTIA.

68.3 However, the Delhi High Court set aside the CIC's decision and further decided that even if the RTI Act overrides the OSA and the Indian Evidence Act under section 22, it cannot be construed in a manner superior to the provisions of the Constitution of India due to Constitutional supremacy.

68.4 The court pointed out that only judges of the Supreme Court and high courts were empowered to peruse such material (under Articles 32 and 226 of the Constitution), and that the CIC is not an authority to decide whether the bar under Article 74(2) of the Constitution would apply.

69. It appears that with the exception of the Constitution as the supreme law, RTI laws should not be undermined by any other laws or what may be regarded as subordinate legislation, subject to where a clear inconsistency or conflict is shown. The following decisions illustrate the same.

70. In a Delhi High Court decision involving the both the Companies Act and RTI Act:

70.1 The public authority in this case, the Registrar of Companies (ROC) argued that the information which could be accessed by any person under Section 610 of the Companies Act is information that is already placed in the public domain, and thus cannot be said to be under the control of the ROC.[118]

70.2 Therefore, it was argued that the information did not fall within the scope of the RTIA and a citizen cannot bypass the procedure already established with the ROC and avoid paying the charges prescribed for accessing the information placed in the public domain by resorting to the RTIA (which would incidentally also mean a lower fee system).

[117] (Delhi High Court) 11 July 2012, W.P.(C) No.13090 of 2006, judgment by Anil Kumar, J.

70.4 The opposing submission was based on the overriding-effect provision (section 22) and thus, a citizen has an option to resort to either statute to seek the information.

The court held that:

70.5 *"[35] The said rules being statutory in nature and specific in their application, do not get overridden by the rules framed under the RTI Act with regard to prescription of fee for supply of information, which is general in nature, and apply to all kinds of applications made under the RTI Act to seek information. It would also be a complete waste of public funds to require the creation and maintenance of two parallel types of machineries by the ROC – one under Section 610 of the Companies Act, and the other under the RTI Act to provide the same information to an applicant. It would lead to unnecessary and avoidable duplication of work and consequent expenditure.*

[42] Merely because a different charge is collected for providing information under Section 610 of the Companies Act than that prescribed as the fee for providing information under the RTI Act does not lead to an inconsistency in the provisions of these two enactments. Even otherwise, the provisions of the RTI Act would not override the provision contained in Section 610 of the Companies Act..."

The court stated that *"the later general law cannot be read or understood to have abrogated the earlier special law"* relying on the interpretation that, where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one.

70.6 Note: the above issue of documents accessible under the 2 different statutes may be resolved by referring to the Australian FOIA (sections 12 and 13) where it established that the FOIA does not cover documents that are otherwise accessible to the public. This includes documents available for access under the Archives Act 1983, documents open to public access subject to a fee or charge, documents from the national archives, library, historical and museum collections.

[118] The expression "held by" or "under the control of any public authority", in relation to "information", means that information which is held by the public authority under its control to the exclusion of others- Registrar Of Companies & Ors Vs Dharmendra Kumar Garg & Anr (Delhi High Court), 1.06.2012, W.P.(C.) No. 11271/2009, para 34

71. In another case, the issue to be determined by the Indian Commission was whether the file notings and the opinion of the Judge Advocate General (JAG) branch fell within an exemption (Section 8(1)(e) of the RTIA).[119]

    71.1 The learned judge rejected the public authority's argument that information could be withheld under the Army Rule or the Department of Personnel and Training **(DOPT)** 's instructions dated 23.06.2009 in view of the over-riding effect of section 22, RTIA.

    71.2 The reasoning given was that the Rule and DOPT instructions were in existence when the RTIA was enacted by the Parliament and the legislature is presumed to know existing legislation including subordinate legislation. The Rule and the instruction can, in this case, at best have the flavour of subordinate legislation. The said subordinate legislation could not be taken recourse to nullify the provisions of the RTIA.

72. In another later significant decision, which overturned previous orders on the same subject, the CIC held that the Supreme Court cannot deny information under the RTIA even if an applicant has other methods available under the apex court rules to get it. In deciding so, the Information Commissioner Shailesh Gandhi mentioned that, in summary, it is the right of a citizen to decide under which mechanism (method prescribed by the public authority or the RTI act) he/ she would like to obtain the information. He also highlighted that similar to the superiority of the Supreme Court Rules, the RTIA passed by the Parliament also cannot be undermined by the other court rules.[120]

[119] Union of India & Ors v Col.V.K.Shad (WP(C) 499, 1138 & 1144/2012) New Delhi High Court
[120] (Supreme Court cannot deny information under RTI Act: CIC, 2011)

OVERSIGHT BODY- THE INFORMATION COMMISSION

Powers and Functions

73. Most of the RTI laws establish an independent oversight body such as Commission/ Committee to implement the Act and its regulations, equipped with prosecutorial powers and function like a court of law to settle RTI related disputes.

India Indonesia Australia	In these countries, independent commissions operate both at the national/ federal level and also at the state/ provincial level. These oversight body are granted regulatory powers and a broad mandate to conduct a range of activities in addition to hearing appeals. In summary: a. The Commission may appoint information officers, who may seek advice from the Commission regarding the application of exceptions. b. The Commission may set rules regarding information/records management standards, and publication of proactive disclosure of information. c. The Commission may set the fee schedule for access to information, and may even direct public authorities to reimburse fees where information has not been provided in time. d. The Commission may refer disciplinary matters to the appropriate authorities, who must then inform the Commission of any action taken. e. The Commission may institute a prosecution for criminal offences under the Act (instead of the police or state prosecutor, for example). f. The Commission may order penalties for failures to provide requested information, for the authorities to provide the information sought, and for training on right to information to be conducted for officials. g. Complaints may be filed before the Commission in certain circumstances of procedural non-compliance.[122]

[121] For example, Fitzhenry explained that the Scottish Commission has the power to get a warrant of entry and inspection. Should an authority fail to comply with the Act, and the Commission has evidence of such actions they may have a warrant to search, enter, seize, inspect, operate, and test any material, such as computers. While the Commission has never had to utilise this power, Fitzhenry opined that it is important that provisions to support this are in force in case the power needs to be used. See Schedule 3 UK FOIA Powers of Entry and Inspection. See also the Information Commission's informa tion-gathering powers in Division 8 Australian FOIA, Sections 55U,55V, and 55W. No such similar provision is specified in India, Sri Lanka, Indonesia and Afghanistan.

[122] In India, for reasons such as (i) where the Public Authority has not appointed a Central Public Information Officer (CPIO) or (ii) the CPIO has refused to accept an RTI application, or (iii) the CPIO has not given a response within the specified time limit or (iv) the CPIO has given incomplete, misleading or false information or (v) where unreasonable fee has been demanded by CPIO, etc (section 18) Other examples provided by the Australian FOI Guidelines include: where an agency did not provide adequate assistance to an FOI applicant to frame a request, allegations of conflict of interest by the deci sion maker, and/or third parties not being consulted where the information involves them.

Appointment Process

India	• The Information Commissioners are to be "persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance". • They should not hold any office or profit or relate to any political party (section 12). • They are appointed by the President upon the recommendation of a committee consisting of the Prime Minister, Leader of the Opposition and a Cabinet Minister appointed by the Prime Minister. • However, it has been reported that 60% of the IC and 87% of CICs were former civil servants, mostly soft and sympathetic to the government of the day.[123] • The independence of the commissioners is in serious question. • The new 2019 Rules are also an utmost concern in this regard (explained further below under this Part, "Funding and Independence")
Sri Lanka	• A select few institutions, like the Bar Council, are allowed to nominate commissioners based on a few criteria (i.e. being eminent in their field of work). • A council of three eminent people and two judicial commissioners will then review the nominations. • They are allowed to reject the nominations, but only if they can give reasons for their decision. • The final step is for the President to appoint the person. • Appointed commissioners also had the security of tenure of five years, although they can be expelled for misconduct. • Pinto-Jayawardena noted that the formation of the Sri Lankan RTIC is a protective element that differs from its South Asian counterparts. It is not based purely on a governmental or presidential appointment but gives several civil-society groups the power to make nominations.[124] • Regarding implementation, Pinto-Jayawardena shared that one of the main concerns they had faced was the delay in appointing information officers. • However, it is mandated that the head or leader of the organization would automatically become the lead information officer if a public authority does not appoint an information officer, which helped solve the problem. • This mechanism could address a common problem around South Asia, i.e. public authorities often do not appoint an information officer, and a citizen has no other means to obtain relevant information.[125]

[123] (Praveen Shekhar (2018b))
[124] (Sunday Observer, 2018)
[125] Ibid.

Indonesia	• Members of the Central Information Committee are recruited openly, nominated by the President through the Ministry of Telecommunication and Informatics. • They are elected by Parliament and subsequently appointed by the President whom the Committee reports to (Articles 28(1), 31). • Hutahean observed that from 2009-2013, most of the elected members have no prior experience in handling litigation as they were either journalists or CSOs.[126] • Another problem reported is that the Committee has no liberty to appoint and recruit its own administrative officers. Its staff members are employees of the ministry. This has been reported as a disadvantage that would "adversely impact on the performance of the commission's employees" and that "due to the lack of independence on budgetary and employment matters, the commission is prone to influence and pressure from the executive."[127]
UK	• As for the Scottish Commissioner, the appointment is by the head of the State (the Queen) upon parliamentary recommendation. • Fitzhenry believed that the appointment process was not a political one. • He explains that there is an open application process, similar to a normal job application. • A five-member Scottish Parliamentary body that includes the non-partisan head of parliament will recommend parliament after reviewing the candidates. • Parliament then needs to decide whether to go ahead with the suggestion, although it is rare that they do not. • The nature of the appointment ensures the independence of the Commission.[128]
Australian	• The Australian Information Commissioner is appointed by the Governor-General. • He/she must have a law degree from a university, or an educational qualification of a similar standing (section 14 Australian Information Commissioner Act 2010).
Afghanistan	• The Afghan Commission members are selected by a selection committee from various backgrounds outside of the political and judiciary, including from the Bar association journalist union and the human rights commission (Article 20). • Membership criteria of the commission are fairly simple- i.e., citizenship, non-partisan, bachelor's degree and 5 years work experience. • The appointment process appears to be fairly independent.

126 (Praveen Shekhar (2018b))
127 (Sunday Observer, 2018)
128 EGM report dated 23 July 2020, p.31

Appeal System/Dispute Resolution Process

74. Generally, there is a three-tier system of enforcement.

74.1 Starting with an internal appeal or review at the first tier, an RTI applicant may address his/her first appeal to a "designated officer" or an officer senior in rank to the Information Officer of the public authority[129], if the applicant does not get the required information within the specified time or is aggrieved by the decision of the Information Officer

74.2 If the applicant is unsatisfied with the decision at the first tier, the applicant may file a second appeal before the Commission against the said decision.

74.3 Finally, if the dispute remains unresolved, an appeal may be brought to the courts or tribunal.[130]

75. Some best practices in respect of the appeals process include:

75.1 having wide grounds for lodging an appeal (i.e., section 31, Sri Lankan RTIA);

75.2 the burden should be lied on the public authority to show that it acted in accordance with the Act (as opposed to the burden on the applicant (i.e., section 32(4), Sri Lankan RTIA);

75.3 having a statutory timeframe for every "tier" of the review process to be completed.

76. Almost every country's RTI law studied in this paper has its unique features in relation to the appeals system or the Commission's decision-making process.

129 In Sri Lanka, the internal review is with a 'designated officer' whereas India and Indonesia provides for a more senior officer.

130 For instance, as the Indian RTIA already establishes a decision-making and appeal mechanism, section 23 effectively bars the of Jurisdiction of Courts: "No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act."

Different Ways to Process an Appeal

77.

Sri Lanka	• The RTIC may dismiss an appeal summarily after giving the parties a chance to show cause as to why this should not be done.[131] • Appeals may be processed in "documentary proceedings" or via an "in-person hearing" at the discretion of the RTIC, the procedures for which are comprehensively set out in the rules).[132] • Mendel commented that this approach makes sense, that "while the vast majority of appeals can be dealt with through the leaner documentary process, some require in-person hearings and oversight bodies should be able to choose which route they wish to take."[133]
India	• The Commission offers the facility of hearing through Video Conferencing at almost all district headquarters of the National Informatics Centre. • This enables applicants and Public Authorities from across the country to attend case hearings at the NIC studio in a nearby district headquarters instead of coming to Delhi.[134]

131 Rule 18(1) First Part of the Regulations and the Right to Information Rules of 2017 (Fees and Appeals Procedure)
132 Ibid, Rules 18(3)- 20).
133 (2019d Reflections, p.90)
134 (Annual Report 2018- 19, 2019) p.26

Mediation and/or Non-Litigation Adjudication Indonesia

78. In Indonesia, the Commission settles disputes through mediation and/or non-litigation adjudication (Articles 1(4), 23).

78.1 Mediation is a voluntary option and may only be conducted for specific subject matters. A member of the Committee acts as the mediator.

78.2 Non-judicial adjudication dispute settlement is used when one or both parties to the dispute file a written notice declaring that the dispute cannot be settled by mediation or when one or both parties to the dispute withdraws from the mediation (Article 42).

78.3 Hutahaen mentioned that this two-step process culminated in 90% of the decisions involving the government going on appeal.[135]

78.4 The decision of the Information Committee that originates from a consensus by Mediation is supposed to be final and binding (Article 39).

78.5 However, the strength or finality of the decision as prescribed by law is questionable in practice. It has been reported that "any ruling of an information commission is not final, as its verdict can be ignored or appealed to the administrative court, which leads to endless delays and basically prevents enforcement of the law."[136]

78.6 A fundamental weakness is that the Committee's decisions are not legally enforceable.[137] The Indonesian Commissioner himself has cited a lack of authority as affecting the Commission's ability to regulate institutions and officials.[138]

[135] National Stakeholders Consultation on the Right to Information Legislation (27-28 November 2019) by Centre for Independent Journalism & Coalition of CSOs on Freedom of Expression, p.35 132 Ibid, Rules 18(3)- 20).
[136] (Widodo Putro (2014))
[137] (Ho Yi Jian (2019c) p.17)
[138] (The Jakarta Post (2011))

Cabinet's 'Veto' Power (UK)

79. The UK FOIA appeals system features a special provision, referred to simple terms as the Cabinet's 'veto' power.

79.1 A Cabinet Minister has the power to overrule a decision issued by the Information Commission or a reviewing court or tribunal (at which stage a decision could be 'overruled' remains unclear) (section 53).

79.2 This power of 'veto' may be challenged in court by judicial review. On one such occasion where the power was used to overturn a decision of the Upper Tribunal, the decision was successfully challenged in the Supreme Court.[139]

79.3 The Cabinet veto was part of the parliamentary bargain for the concession by the then Government that the Information Commission would have significantly expanded powers to determine appeals.[140]

79.4 During the passage of the Bill, the Minister has promised that any power to exercise the veto would be used rarely, used only in respect of public interest disputes, and should be the subject of collective Cabinet agreement.[141]

79.5 It appears that these undertakings have been upheld as the veto has only been exercised on limited occasions (less than ten times as of the date of this paper).[142]

79.6 Including such a provision is inadvisable. A study by the World Bank noted, "while on paper, the veto appears to weaken the law substantially, the very rarity of its use suggests that its effects may not be quite as serious as feared. The veto is politically costly since its use amounts to an open admission by the cabinet as a whole that the law is being temporarily suspended, leaving the cabinet open to accusations of resisting democratic accountability for political gain."[143]

80. The same provision exists in Scottish law. The legislation allows the first minister to state that there is no non-compliance with the law. Yet, Fitzhenry confirmed that this provision remains unused in Scotland, is thus redundant and should be removed in the next iteration of the law.[144]

[139] R (Evans) v Attorney General [2015] UKSC 21
[140] (Independent Commission on Freedom of Information Report, 2016)
[141] Ibid
[142] Previous occasions include to prevent the release of information covering Cabinet discussions over the war in Iraq and correspondence between Prince Charles and the government
[143] (Implementing Right to Information - A Case Study of the United Kingdom, 2012)
[144] EGM Report dated 23 July 2020, p.32

Australia

81. The function of the oversight body in Australia has several differences.

81.1 Firstly, the Office of the Australian Information Commissioner (OAIC) was established by a separate statute, the Australian Information Commissioner Act 2010.

81.2 It is supported by two other statutory officers: the FOI Commissioner and the Privacy Commissioner. Thus, both functions of information policy and independent oversight of privacy protection and RTI are combined into one agency

82. The Information Commissioner may handle the RTI complaints. However, if the Commonwealth Ombudsman decides that they may more effectively or appropriately deal with the complaint, the matter may be transferred to them.[145] The Commonwealth Ombudsman can investigate a complaint about action taken by an agency under the FOIA.

82.1 Two examples are helpfully given for when the appropriate situation to transfer arises:

"Example 1: A complaint about how the Information Commissioner has dealt with an IC review.

Example 2: A complaint relates to an action under this Act, but is part of a complaint that relates to other matters that can be more appropriately dealt with by the Ombudsman."

82.2 This transfer occurs after the two bodies consult each other to avoid inquiries being conducted into that matter by both bodies. If either party decides not to investigate, the complaint may be transferred back.

82.3 Section 6C, Ombudsman Act 1976, provides the mirroring power to transfer complaints vice versa from the Ombudsman to the Information Commissioner.

[145] (section 74, Australian FOIA)

83. Unlike most of the oversight bodies discussed in this paper, the Information Commissioner also has uniquely extensive information-gathering powers for a review.[146]

83.1 It has powers to obtain documents, question persons and enters premises.[147]

83.2 It may undertake its own motion investigation (OMI) into an agency's actions in performing its functions or exercising its powers under the FOIA (but not for ministers).

84. The review is to be conducted *"with as little formality and as little technicality as is possible",* in a timely manner, and each review party is given a reasonable opportunity to present his or her case (section 55(4) Australian FOIA). (The informal approach is similar to that of the Sri Lankan RTIC).

85. In certain circumstances (i.e., where security, defence and international relations of the Commonwealth may be affected), the Inspector General of Intelligence and Security must be called to give evidence.[148] However, the Commissioner is not bound by their opinion.[149]

[146] (Part VII, Division 8, Australian FOIA)
[147] (see Subdivision D of Division 2, Australian FOIA)
[148] (Part VII, Division 9, Australian FOIA)
[149] (s.55ZB (4), Australian FOIA)

Implementation of the Oversight Body - Key Strengths

86. The Information Commissions in countries such as Sri Lanka, India, Australia and the UK have established a body of emerging and standard-setting jurisprudence in the context of RTI related decisions, which have led to greater clarity in respect of the provisions of the Act and contributed to the development of RTI culture in the country. Principles emanating from these decisions, if followed by the State, would definitely contribute towards good governance.

86.1 For example, the Sri Lankan RTIC has promoted a global best practice of presenting draft laws before the public to obtain public feedback on its contents, which is a beneficial process leading to public consensus around the framing of legislation. [150]

87. An additional factor to highlight about the RTIC's decision-making is the beneficial role and value of the Preamble to the RTI Act as an aid to statutory interpretation.[151]

87.1 For instance, the Sri Lankan RTIC held in one of its key decisions[152] that the Regulation in question is to be read together with the preamble, which clearly identifies the promotion of *"a culture of transparency and accountability in public authorities"* in the objective of public participation in "good governance."

87.2 This approach is evidently welcomed as a form of promotional measure in forming the correct understanding and attitude towards applying the law for all stakeholders.

[150] (2019d Reflections p.3)

88. Fitzhenry highlighted that one of the Scottish Commission's essential function is to assess whether an authority adheres to best practices. This is a role that Fitzhenry is particularly keen on and wanted to expand on it. He believes that the proactive enforcement of duties must be maintained.

88.1 One method at the Commission's disposal is the ability to have an intervention. Through this, they may scrutinise the RTI practices of an authority, usually upon receipt of a tip-off concerning non-compliance. This allows the Commission to tackle systemic issues that do not only involve one case. This could range from phone calls to the relevant body to understand what is happening, to full-blown investigations into the public authority's practices.

88.2 To support this process, they regularly monitor the authority's performance and require it to submit details of information requests every three months, so they can determine if the authority responded on time if they did not provide information or reasons for refusal. From there, the Commissioner can draw up a good picture of the information disclosure process of the public authority.[154]

89. In Afghanistan, Sayed Ikram Afzali, the Chief of the Commission has reported that in the past few years the Commission has developed the National Strategy on Access to Information and made important achievements in dealing with registered complaints, public awareness campaigns, creation and monitoring of information offices and capacity building programmes, whereby thousands individuals on access to information have been trained.[155]

[151] Ibid, p.36
[152] (Air Line Pilots Guild of Sri Lanka v. Sri Lankan Airlines) on Regulation 20 (1) (ii) (2) and (2019d Reflections p.33)
[153] The Preamble to the Sri Lankan RTI Act states: "WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance."
[154] EGM report dated 23 July 2020 p.28
[155] Government Media & Information Center, 30.12.2018 (Afghanistan)

Implementation of the Oversight Body - Key Weaknesses

90.

Lack of Power	Sri Lanka	• Overall, the Sri Lankan RTIC has been commended as innovative and amongst the most powerful globally, given its strong prosecutorial powers and ability to decide on the fees schedule applicable to the release of information. • However, one weakness identified is that the RTIC does not have sufficient power to conduct inspections of public authorities.[156] • India's Information Commissions also lack an important power. • If a public authority does not conform with the provisions or intention of the Act, the Commission can only issue recommendations to the public authority to promote conformity in accordance to the law[157] as opposed to taking stronger action or issuing sanctions (Section 25(5) Indian RTIA).[158]
	India	• India's Information Commissions also lack an important power. • If a public authority does not conform with the provisions or intention of the Act, the Commission can only issue recommendations to the public authority to promote conformity in accordance to the law as opposed to taking stronger action or issuing sanctions (Section 25(5) Indian RTIA).

156 (2019d Reflections, p.xviii)
157 "the practice of a public authority in relation to the exercise of its functions under this Act does not conform with the provisions or spirit of this Act", it can only "recommend steps to the public authorities to promote conformity with the law"
158 (Hassan M Kamal, 2018) and (Article 19 (2015) Asia Disclosed p.32)
159 (Deshpande, 2018)
160 (Article 19 (2015) Asia Disclosed p.11, ref 46)
161 Implementing Right to Information - A Case Study of the United Kingdom, 2012)

Lengthy Processes	India	• While the system of appeal in India has primarily been celebrated on account of establishing central and state information commissions, the RTIA has a significant flaw in that it does not establish a timeline in which the Information Commission ought to decide on an appeal. • There are many reports of a huge backlog.[159] It has been estimated that an average waiting time for the CIC to decide on a case is 6 to 13 months, and there were over 40,000 cases were pending at one point in 2018.[160]
	Indonesia	• For Indonesia, the lengthy time required for the process of inquiry appears to be an area for improvement. • Upon receiving an objection/appeal from an applicant, the supervisor of the information officer has up to 30 working days to respond (Article 36). • If the applicant is unsatisfied with the response, an attempt to settle the dispute is to be started within 14 working days from the receipt of that response. • The dispute is to be settled within 100 working days (Article 38).
	UK	• Similar to India, lengthy delays in examining complaints and issuing decision notices has also been reported in the UK.[161] • In the UK, after the appeal at the Commission's level, the next appeal is to the First-tier Tribunal, then to the Upper Tribunal, and then onward appeals to the Court of Appeal and Supreme Court. • In this regard, the Independent Commission expressed concerns that having two independent bodies (the 2 tribunals) conducting a full-merits review creates additional uncertainty. • The process is more complex and lengthier than in other jurisdictions. • It was considered that removing the right of appeal to the First-tier Tribunal would serve to enhance and strengthen the role of the Information Commission, whereas an appeal would still lie to the Upper Tribunal limited to points of law.[162]

[162] (Independent Commission on Freedom of Information Report, 2016) p.43

Funding and Independence

Sri Lanka (RTIA)	• According to Pinto-Jayawardena,[163] the fact that the Sri Lankan RTI Law provides for the commission's budget to be taken from the Ministry of Finance is extremely problematic. • In their case, the government had tried to cripple them via funding. • In fact, for the first eight months, the RTIC had to function without funds. • During that period, they had received external funding, and after a year the Ministry began to commission their budget.[164]
Afghanistan	• In Afghanistan, the budget and administrative functions of the Commission are provided by Ministries. • Bahodury stated that as an independent organisation, the Commission is awarded around 1 million dollars and their expenditure must be reported to the Ministry of Finance. • They record their expenses and currently, they have over 100 staff members. • He further explained that they are currently working on different ways to set up offices in the provinces as they are a national-level organisation, not a state-level one.[165] • Some problems reported in Afghanistan is that the government has not given adequate budget to the Commission so far, as well as the information and media units. • Accoding to Sayed Ikram Afzali,[166] the reasons why the commission is being taken lightly are because of the lack of budget financial and technical facilities from the government's side. He further indicated that the commission is facing a lot of problems.
Indonesia	• In Indonesia, the Commission also lacks structural independence. • Although it is laid down in law that the Commission is an 'independent body, its funds are derived from the Ministry of Communication and Information's allocations. • In practice, the commission is depending upon the ministry because it can only propose a budget through the Ministry's secretariat general.[167]

163 National Stakeholders Consultation on the Right to Information Legislation (27-28 November 2019) by Centre for Independent Journalism & Coalition of CSOs on Freedom of Expression
164 National Stakeholders Consultation on the Right to Information Legislation (27-28 November 2019) by Centre for Independent Journalism & Coalition of CSOs on Freedom of Expression
165 EGM report dd 23 July 2020, p.25
166 (TOLOnews, 2016)
167 (Mohamad Mova Al'afghani, 2013)

India	• There is no financial autonomy to the Information Commissioners in India as they depend upon the government for day-to-day expenditure. To this end, India's global RTI ratings have recently dropped. A key factor is due to the introduction of the Right to Information (Amendment) Act 2019. • Before the amendment, the Information Commissioners' terms and service conditions (tenure and salaries) were statutorily protected and at par with those of election commissioners. However, the amendment, published in August 2019 now provided that the Central Government shall be the one who prescribes their appointment, salaries, allowances and other terms of service. • Activists fear that the amendments undermine the independent interpretation of the RTIA. In fact, the independence and autonomy of the commissioners are now compromised as they are effectively subordinated to the government.[168] • Following the amendments, the new rules in 2019 were also not received positively, whereby: • the central government has the power "to relax the provisions of any of [the] rules in respect of any class or category of persons"(rule 22); and • "If any question arises relating to the interpretation of any of the provisions of these rules, it shall be referred to the Central Government for decision"(rule 23). • The Indian government has been criticised for ignoring public consultation policy in framing such rules, as the draft was not available in the public domain, and no consultations were held with members of the public. • Habibullah commented that a successful RTIA must be totally independent of the government. By this amendment, the autonomy of the information commissioners is undermined because their term of service has now come under the government's discretion. He likened this to other functions such as election commissions or judiciaries, which must be independent to be effective.[169]
UK	(Please refer to the paragraphs below.)

[168] (Prasanna Mohanty, 2019e)
[169] Interview dated 19 Nov 2020

92. The following are a few suggestions to address the issues highlighted above:

92.1 Pinto-Jayawardena suggested that the law must instead clearly provide for the allocation of funds in the National Budget itself rather than a mandate for Parliament to provide funding.[170]

92.2 The issue may be resolved by granting constitutional status to the Information Commission, like the Election Commission, Comptroller and Auditor General, because Information Commissions are also playing a significant role in society by bringing transparency and accountability to the governance system.

92.3 The Scottish Information Commission may be a role model here. Fitzhenry verified that the Commissioner has complete functional independence as they face no interference in decisions, interventions or use of powers. In terms of their budget, the Commissioner is awarded a sum from parliament. Here, Fitzhenry opined that there is great importance to having a properly funded oversight body and that international conventions and Information Commissioners recognise this. Additionally, in Scotland, the approval of the Scottish Parliamentary Corporate Body (SPCB) is required for some issues such as staff recruitment, sale of property or change of office. To uphold accountability, the Commission's financial reports must be audited, and the Commissioner may be called to Parliament to give evidence should he need to.[171]

92.4 The Commission's independence must be balanced with accountability. Fitzhenry confirmed that the Scottish Commission must produce an annual report on the exercise of its functions. All annual reports are audited and reported to parliament. Furthermore, the Commission must always be available to be called to parliament to give evidence.[172]

170 National Stakeholders Consultation on the Right to Information Legislation (27-28 November 2019) by Centre for Independent Journalism & Coalition of CSOs on Freedom of Expression

171 EGM report p. 26 - 30

172 Ibid

Reporting Obligations by the Public Authorities to the Oversight Body

93. The lack of appropriate statistics from across the wider public sector regarding the use and implementation of RTI makes the Commission's job of monitoring and enforcing compliance with the Act significantly harder.

93.1 This was acknowledged as an issue in Indonesia and the UK.

93.2 For example, it was reported in 2014 that there was a lack of hard data in relation to the implementation of RTI in Indonesia. None of the responsible government institutions (such as the Central Information Commission) seem to collect systematic data on the amounts and types of requests for information brought to information officers.[173]

93.3 This issue is largely attributed to the fact that most of Indonesia's 500-odd districts did not even have an information officer or commission set up, thus affecting the number of requests that could have been made compared to other countries.[174]

94. The UK Independent Commission, which reviewed the FOIA, recommends imposing a requirement on public authorities to publish performance statistics on their compliance under the Act and/or submit these statistics to a central body for compilation and analysis. To avoid imposing additional burdens on small public authorities that may not have the resources to process such statistics, this requirement should only apply to those public authorities who employ 100 or more full time to equivalent staff.[175]

95. India appears to be leading in this part (see section 25, RTIA). To fulfil its mandate of preparing and submitting the Annual Report, the Commission invites online quarterly and annual returns to be submitted by public authorities in prescribed Pro-forma. All public authorities are required to register with the Commission for this purpose.[176] To this end, it is commendable that 100% of public authorities submitted returns during the reporting year 2018-19.[177] The Commission then analyses and presents data in its Report.[178]

173 (Widodo Putro and Ward Berenschot, 2014)
174 (Widodo Putro and Ward Berenschot, 2014) and Article 19 (2015) Country Report
175 (Independent Commission on Freedom of Information Report, 2016) p.17
176 (Annual Report 2018- 19, 2019) p.5-6
177 The data includes number of applications, rejections from which authorities, on which grounds/ which sections of RTI Act were invoked, the number of appeals and disposals. For 2018-2019, the total number of RTI requests were 1,630,048. Out of that, 186,084 were transferred to another public authority. Out of the total appeals received being 151,481, 99,618 were disposed. The overall rejection rate of an RTI application is 4.7%. (Annual Report 2018- 19, 2019), p. 7-8
178 All statistics at summary p. 22, (Annual Report 2018- 19, 2019)

ALIGNMENT BETWEEN FEDERAL AND STATE LAWS

India

96. The experts from India support the implementation of a federal-level, national RTIA. Before the RTIA (Central law) was enacted, a few states had already passed their own access to information laws. After the RTIA was in place, some states repealed their acts, and those that remained in force were no longer used by requestors.[179]

96.1 As India is a federal country, while the state governments implement the Act at the national level, they also adopted their own respective RTI rules on fee schedules, the scope of information and appeal procedures (over 80 different rules exist as of 2014).

96.2 Nayak gave the example of where up until August 2019, Jammu and Kashmir (J&K) had its own law applicable to the State government agencies. There was hardly any clash with the Central law. That state law was repealed when the Central Government pushed Parliament to approve significant changes to the constitutional position of J&K. Now, appeal and complaint cases pending under the repealed law are being heard by the CIC set up under the Central law.

96.3 Delhi is the only other jurisdiction that continues to have a separate RTI law, but it is no longer in use as the Central law is preferred for its comprehensiveness and penalty regime.

96.4 Civil society organisations noted confusion when attempting to access information related to inconsistent fee structures, restrictive formats, and varying procedures for accessing information. The nodal agency DOPT has also been criticised for some problematic interpretations of the RTIA.

96.5 Nayak and Habibullah confirmed that the national RTIA superseded the state law. This is ensured by the constitutional mandate allowing for Parliament to legislate on issues falling in the Concurrent List of the Constitution as distinct from the Union List and the State List.

97. Habibullah confirmed the necessity and advantages of a uniform implementation, in that there is equality before the law for all citizens irrespective of location. The authority make rules to allows the State governments to make necessary adjustments in keeping with their administrative environment. It might be noted that India's constitution allows for a unitary government with a federal bias. Until the recent confusion arising from the Amendment Act mentioned above, this level of centralisation sat well with this principle. The Indian government is thus currently engaged in working on evolving relationships in light of the said amendments.

[179] (Article19 (2015) Asia Disclosed, p.33)

Australia

98. The scope of the Australian FOIA applies only to the Commonwealth Government ministers and most public agencies. The other state jurisdictions have their own equivalent RTI legislation.

99. The exemptions in most of the state RTI laws are consistent with the Australian FOIA particularly where the Commonwealth's security is concerned.

    99.1 For instance in Western Australia's FOI Act 1992, a matter is exempt "if it originated with, or was received from, a Commonwealth intelligence or security agency" (section 5(3)).

    99.2 See also the ACT's FOIA 2016 Schedule 1, Clause 1.13 on information of which disclosure is against public interest involves that "which would, or could reasonably be expected to damage the security of the Commonwealth, the Territory or a State", in addition to provisions prohibiting disclosure where "notice has been received from the relevant Government or council that the information would be protected from disclosure under a corresponding law of the Commonwealth or another State." [181]

100. The separation of jurisdiction also seems clear on the law. For example, in the Glossary of terms in Western Australia FOIA 1992, in relation to what is considered "document of the agency" for the purpose of the Act, clause 4(3) states:

    "A document in the possession or under the control of an agency on behalf of or as an agent for —
    (a) the Commonwealth, another State or a Territory; or
    (b) an agency or instrumentality of the Commonwealth, another State or a Territory, is not a document of the agency."

180 See in (Article 19 (2015) Asia Disclosed), Trapnell E. Stephanie (ed.), Right to Information: Case Studies on Implementation: India, World Bank Group, 2014, p. 74.

181 Schedule 1 para 3 and section 25 of South Australian's FOIA 1991, and similar provisions in NSW's Government Information (Public Access) (GIPA) 2009 section 4 Table Clause 7 and section 56, section 9 of Queensland's RTI Act 2009

101. The Australian FOIA provides for a formal consultation process with certain third parties whose information is contained in documents held by the agency. In particular:

101.1 Where access to a document that originated with, or was received from, the State or an authority of the State is requested, it appears to the agency or Minister that the State may reasonably wish to contend that the document is conditionally exempt (i.e. due to Commonwealth-State relations, public interest etc), access to the document is prohibited unless consultations between the Commonwealth and the State has taken place. (Section 26A, Australian FOIA)

101.2 Similar requirements to consult are applied to information regarding an organisation or a person's business or professional affairs and documents affecting personal privacy (sections 27 and 27A).

101.3 In comparison, there is a stricter requirement for consultation in relation to documents affecting Commonwealth-State relations, irrespective of whether or not the consulted party has submitted in support of the exemption; access must not be given until review of appeal opportunities have run out.

102. However, the Australian system may not be directly comparable or compatible with Malaysia. It is submitted that the benefits of centralisation of RTI law include building up of experience, enabling decision-makers to develop expertise and consistency in RTI decision making.

103. Conversely, having different state RTI laws compromises the national consistency in RTI standards and approaches, and invites jurisdictional enquiries. A few examples of such issues and inconsistencies are highlighted as follows.

103.1 For example, the Commissioner in Queensland reported having to assign jurisdictional enquiries to be dealt with by an Enquiries Service.[182]

103.2 Unlike the oversight body in some other jurisdictions in Australia (for example, Victoria, ACT[183] and the Commonwealth), the Commissioner in Western Australia and the Ombudsman in New South Wales (NSW) are not empowered to deal with or investigate complaints about the actions taken by an agency under the FOI Act or how an agency handles or deals with an RTI request, access application.[184]

103.3 The OAIC as a 'prescribed authority is subject to the FOIA (for example thereby allowing applicants to seek information about an Information Commission review matter), but certain Offices of the Information Commissioners in other jurisdictions such as Queensland, Western Australia and NSW are not.[185]

103.4 All other Australian jurisdictions have legislated publication scheme requirements that outline the types of information that must be published, except for Tasmania, which has guidelines only.

103.5 Except for the RTIA in Queensland which requires the applicant to apply on a form, the applicant from the other jurisdictions within Australia can apply by letter.

103.6 There are applications of different versions of privacy principles across the state jurisdictions. Many stakeholders identified that state and territory legislation regulating the handling of personal information in the private sector (especially related to health) is a major cause of inconsistency, complexity, and costs.[186]

182 (Annual Report 2017-18, n.d.) Queensland
183 Part 6 and 7 FOIA 2016
184 NSW's GIPA 2009 section 124 and (Annual Report 2018/2019, n.d.) W.A. p.35
185 For example, the NSW approach is a partial exemption for documents relating to its investigative, complaint handling and reporting functions (Schedule 2, part 2 GIPA2009)
186 (Australian Law Reform Commission, 2010b) and (Report on the review of the Right to Information Act 2009 and Informa tion Privacy Act 2009, 2017) p.35

SANCTIONS

104. Generally, in RTI laws, fines and disciplinary proceedings can be ordered for a range of offences, for example:
- refusing to provide access,
- for not respecting statutory deadlines,
- for releasing false, misleading, or incomplete information, and
- for obstructing information officials.

105. It is important for the public to use RTI laws responsibly and not misuse it. If there are too many frivolous or vexatious requests, the law may be amended to the extent that it becomes an issue. In this regard:

Provisions: √ Public Authorities are not obliged to deal with frivolous, vexatious, or disproportionately burdensome 187	UK (s14 FOIA)	India (RTIA)	Indonesian (PIPD)	Afghan (ATI law)
	√	√	X	X

105.1 In the **Australian** FOIA, the Commissioner may hold a preliminary inquiry prior to the review application to determine whether the application is

- frivolous,
- vexatious,
- misconceived,
- lacking in substance, or
- not made in good faith (sections 54V and 54W).

The Commissioner is also entitled to declare a person to be a vexatious applicant (section 89K).

105.2 The UK's Upper Tribunal's decision identified four key non-exhaustive factors in determining if a request is vexatious in the case of *Information Commissioner v Dransfield* [188]:

- the burden (on the public authority and its staff);
- the motive (of the requester);
- the value or serious purpose (of the request); and
- any harassment or distress (of and to staff).

187 See section 7(9), Indian RTI Act and section 14 UK FOI Act. The Sri Lankan RTI Act fails to address this issue and does not provide for some recourse, such as a penalty against those who make vexatious applications

188 [2012] UKUT 440 (AAC) (28 January 2013) p. 49 and Section 14, UK FOIA

106. There should be protections for good faith disclosures either pursuant to the law or to expose wrongdoing i.e. whistleblowing.[189]

Australian (FOIA)	Australia's FOIA has a model example. • Sections 90 and 92 provide the public agency/officers protection against civil and criminal liability for publishing a document in good faith, in the belief that the publication is required or permitted by the IPS, and/or that access to the information was required or permitted in response to a request.
India (RTIA)	On the other hand, India performed worse in ratings under this part. • With reference to the report, one problem observed is that it offers no protection to officials (from sanctions) who release information that shows wrongdoing, thus keeping them open to punitive actions for upholding the Act.[190] • This is so despite Section 21 providing that no legal proceeding shall lie against any person acting under the RTIA in good faith.
Indonesian (PIDA)	One obvious limitation of the RTI principles in Indonesian is that • Harsh penalties in the form of imprisonment and/or fines are prescribed for, amongst others, anyone who misuses the information (Article 51) and anyone who unrightfully acquires or supplies classified information (Articles 54- both imprisonment and fines).

188 [2012] UKUT 440 (AAC) (28 January 2013) p. 49 and Section 14, UK FOIA

189 Such protection is absent from the Afghan ATI Law, Sri Lankan RTIA and the UK FOIA. However in the UK, protection is available under the Public Interest Disclosure Act 1998 for whistleblowers (specifically workers) who make certain disclo sures of information in the public interest. This is a different matter.

190 (Hassan M Kamal (2018a))

ADDITIONAL CONSIDERATIONS

Reflections and Recommendations

107. In summary, the general recommendations for a successful implementation are as follows.

Substance of the law

108. Within the objective of the law, exemptions should be detailed specifically and 'qualified' by a public interest test override. The scope of public authorities and information should be wide enough to even cover private entities that meet certain conditions.

109. The conflict between the OSA and RTI laws must be addressed with specific provisions on RTI law. Necessary powers must be given to override other existing laws. There should also have some specific requirements for any new legislations not to undermine the provisions within the RTI law;

110. The divergence and alignment between federal and state level legislations should be addressed. Randhawa believes that RTI laws at the state and federal levels could generate beneficial competition.[191]

110.1 Comparing the cases of Australia and Japan, she highlighted the differences in their systems and noted that in both countries, state RTI laws paved the way for federal RTI laws.

110.2 She proposed in Malaysia, the federal RTI law could be drafted to meet the minimum standards of RTI laws, while the states can then improve upon the law within their jurisdictions independently. The federal legislation should encourage and not prevent the right to information.

[191] EGM report dated 23 July 2020

111. On the topic of solutions for federal-state conflicts, Randhawa further explained as follows: [192]

111.1 If there is conflict between the state and federal governments, questions would arise on:

- whether the information is with the federal or state government, and
- whether the federal government has the authority to instruct states to release the information.
- The federal RTI law can require states that do not have RTI legislation to release information to the public as a right.

111.2 The proposed regime in the Malaysian draft RTI Bill covers both state and federal governments, which are intertwined in functions, duties, and finances, without clear delineation.

- There is merit in allowing innovation by states, similar to Australia and Japan, so they can push for information to be proactively published.
- The federal law must meet minimum standards of the right to information, while state enactments can improve on that law.

111.3 What happens when states release information that are classified as federal exemptions? The minutes of state executive committee meetings, for example, are considered secret under the Malaysian OSA. The draft RTI law does not specify types of information, but taking this as an example, if a state chooses to release its minutes, this is still permissible under section 2(c) of the OSA.

111.4 However, the chief minister would need to declassify the classified material via a positive action. Whether this could become an automatic process should be explored.

111.5 Instead of having rules that orders all such information to be automatically classified unless stated otherwise, under the RTI law, the information should not be taken out of the public realm. The federal legislation provides the

[192] EGM report dated 23 July 2020

111.6 minimum standards, but if states go further and provide more information, the federal legislation should encourage this.
The relationship between the federal and state governments in Malaysia is not decentralised but intertwined like Japan, with less well-defined jurisdictions compared to Australia or the United States.

- This will impact both federal and state RTI laws.
- But the laws can co-exist, and federal law can have provisions that allow the states some freedom.
- States can trial legislative innovation, serve as a training ground for civil servants and the public, and strengthen the preparation of the federal government.

111.7 Randhawa supported diversity in terms of 'how laws could be harmonised if each state has its own RTI enactment'. She explained that the federal government should indeed set a minimum standard.
- In Penang and Selangor, a key difference lies in the cost of access to information.
- The draft federal RTI law states that this could be standardised.
- However, if states want to make information available for free for certain groups, there is a provision in the federal law for that.
- The state could even expand the number of groups entitled to fee waivers. States could also decrease the costs of translation. They could make a certain number of pages available for free.
- Randhawa suggests that the state laws need not be the same. This way, there can be innovation which will push the federal government to improve.

Implementation Structures

112. Implementation structures and mechanisms are also crucial, regarding:
appointment and independence of the Commission;
- ensuring access;
- budget and resource allocations; and
- training of officials.

113. Reporting and responding to people must be one of the most essential affairs in managing any agencies' leadership. High officials in different agencies must see access to information as a primary responsibility/ importance.

114. The agencies' leadership must report to the people in a timely manner based on reliable evidence and respond to questions raised by the media which reflects the people concerns.

Promotional Measures

115. Attacks, intimidation and harassment of RTI applicants is a problem faced by many jurisdictions, including Afghanistan, Sri Lanka and India.[193] Journalists, information officers and even whole communities have also been targeted.

115.1 Further, it has been reported that "persistent practices of state impunity, hostility of officials, delays and obstructions coupled with lack of awareness of RTI in the government sector pose formidable problems to marginalised communities who attempt to use the law. Public officials use familiar "delay and deny" tactics to deprive RTI of force."[194]

115.2 There are instances of public authorities responding to information requests in a hostile manner, and of information being withheld under the grounds of confidentiality and privacy even though they do not fall within the exemptions of the RTI law.[195]

116. Another related common problem is the relatively low awareness of the right to information especially among rural populations (as reported in India, Afghanistan).[196] Negative responses and poor implementation of RTI laws are also commonly attributed to lack of awareness among public authorities.[197]

117. Resources need to be allocated for promotional measures, effective records management, and disposal of the appeal process. The government should provide its information and media units with sufficient resources, to invest on institutional, social, physical, and technological infrastructures, and for facilitating access to information.

193 (2019d Reflections, p.61-62) and (Express News Service, 2017)
194 (2019d Reflections, p.xvii)
195 (Praveen Shekhar (2018b)) and (Study on Information Requests Submitted to Public Authorities and Responses Received under the Right to Information Act, No.12 of 2016, 2018) p.14.
196 A survey by Integrity Watch Afghanistan in 2017 found that half of the respondents across the country were not aware of the existence of the ATI law, using a total sample size of 3510 respondents across all provinces (Integrity Watch Afghani stan, 2017) p.20. This may be contrasted to Australis where a research reported that 87% of citizens were aware of the right to access. Of course, the FOIA has been in existence much longer (Falk,2019).
197 (Zarghona Salehai and Yousaf Zarifi, 2019)

118. The following are a compilation of recommendations, mostly promotional measures, to address these concerns; to safeguard citizen's rights and pave the way to an attitudinal change in public authorities:

118.1 There should be provisions in the law on awareness-raising activities or conducting promotional measures;[198]

118.2 With reference to the Central Government DOPT in India, the designation of a "nodal agency" with a responsibility to oversee and assist with the implementation of the Act, has been regarded as a distinctively good practice. The DOPT has led many mass public awareness campaigns, issued clarifications and specific orders on implementation of the Act (such as to appoint the PIOs, proactively disclose information, improve record management);[119]

118.3 A systematic programme must be created,

- to conduct regular training and workshops for public officers and/or staff of public authorities; and
- to train and educate them on the
- importance of the right to information,
- the nature of their responsibilities and duties in securing the right, including but not limited to how they should interact with citizens in discharging the same; [200]

118.4 Training must be conducted at all institutional levels. It must not only be confined to information officers, but also be extended to designated officers and senior level public officers. [201] In this regard, experts emphasize the importance of involving all stakeholders in the process, especially at the "stage of infancy of the system because much of a202 mature system is instilled at the early stages of its evolution"; [203]

118.5 There must be a collective media campaign to promote the RTI law.

- Ministers, the judiciary, and in particular the Attorney General as the chief legal advisor to the state sector must play a crucial role in sensitizing the public sector of its fundamental RTI obligations. [204]
- Wide publicity campaigns should be conducted especially among women and self-help groups in rural areas through newspapers, distribution of pamphlets/booklets and to educate through radio, and in some extent door to door publicity with the help of NGOs;

198 This is absent from Indonesia.
199 (Article 19 (2015) Asia Disclosed, p.32)
200 (Study on Information Requests Submitted to Public Authorities and Responses Received under the Right to Information Act, No.12 of 2016, 2018)
201 (2019d Reflections, p.5)
202 (2019d Reflections, p.xi – xii)
203 Ibid, p.5
204 Ibid p.4, and (Implementing Right to Information - A Case Study of the United Kingdom, 2012) p.11

118.6 Officials should be protected (granted legal immunity) for acts undertaken in good faith to implement the RTI Law, including the disclosure of information i.e. whistle-blower protections laws; and

118.7 The law enforcement agencies need to closely work with the Information Commission and punish those guilty of attacking journalists, activists and/or related civil society groups.

- As provided in Article 52, Indonesian PIDA sanctions may be ordered for public officials that "deliberately ignores to supply, give and/or publish" information to be made periodically, immediately, at any time or based on request that results in a loss to others; and

118.8 Strong civil-society groups should mobilise around the RTI applicants and their communities.

119. It is evident that RTI laws give the right and opportunity for the public to participate in and strengthen governance.

- To this end, Habibullah observed that governments normally feel resistant to RTI laws as it may feel like it exposes them to prying eye.
- However having served for years even from within governmental positions, he confidently vouches the benefits of the RTIA even to the government.
- Habibullah maintains that if properly implemented, it becomes a win-win situation where RTI would equally benefit the government and citizenry, and is the key to a strong nation. [205]

120. In the case of Malaysia, Randhawa commented that for there to be political will, the push must come from the people to put pressure on politicians. Civil servants play important roles in understanding the concept and acting as advocates for the right to information, to improve governance in Malaysia.[206]

[205] Interview dated 19 Nov 2020
[206] EGM report dated 23 July 2020

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