Comments on Draft Sri Lankan FOI Law

By ARTICLE 19

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Section 1
12 months seems a long time for the law to come into force. Perhaps there could be provision for it to come into force more quickly and then a further period to allow for institutional arrangements to be made.

Section 2
The scope of the right is presently restricted to citizens, defined to also include groups of people (it is not clear whether these must also comprise only citizens). It would be preferable for the law to apply to everyone.

Section 3
The second paragraph of this section effectively undermines the first one and runs counter to our consistent recommendations, albeit accepted in only a few FOI laws (but including those of India and Pakistan) that FOI laws should override secrecy legislation. The limits on the override, namely that it applies only to bodies established by law where the limits are in their establishing law would at least rule out generic secrecy laws like the Official Secrets Act.

Section 4
Predictably, ARTICLE 19 has a number of concerns with this section, dealing with exceptions. Section 4(1)(a) is extremely broad, and would include, for example, purely factual studies that formed part of the background material for a policy decision. Also, it does not include a harm test. Finally, outside of the 10 year limit imposed by section 4(2), it would effectively cover in secrecy all information relating to policy decisions which had not actually been taken.

The test set out in section 4(b)(ii), which is repeated at various places in the law is, in our view, the wrong test. Disclosure should not need to be vital in the public interest; rather, the public interest in disclosure should just outweigh the interest in secrecy. Furthermore, this override should apply to all exceptions.

The exception set out in section 4(d) is not found in most FOI laws and it is not clear why it should be necessary, over and above various other exceptions which might apply to this information. In any case, it is framed in extremely broad terms and effectively excludes an entire governmental function from the ambit of the law.

The information exempted by section 4(f) should be entirely covered by section 4(b). It is unclear why an additional exception relating to personal medical information should be necessary.

The exception found in section 4(j) is rarely found in other FOI laws and we question its necessity. It may be noted that one of the most important disclosures under the new

Thai FOI law was in a case where a mother managed to expose serious corruption in placements at special State schools by finding out test scores.

Section 4(2) is an important element in an FOI law but it probably needs to be broader than presently stated. It should at least apply to section 4(b) as well, and there will be cases where it is necessary to extend time limits beyond 10 years for security information as referred to in section 4(c). It may be more realistic to provide for a strong presumption in favour of disclosure after 10 years, but allow for continued secrecy where a need for this can be demonstrated beyond this point.

ARTICLE 19 questions whether section 4(3) is necessary. This provision effectively turns the FOI law into a secrecy law as well. It may be noted that this has the effect of adding to existing secrecy laws, rather than addressing a new potential concern raised by the FOI law, something that should not be done unless there are currently problems with illegitimate disclosures by public officials. However, the protection provided by the second part of this section is important in helping to address the culture of secrecy that currently prevails within public bodies.

Section 6
Consideration should be given to providing for the establishment of central standards relating to record maintenance and destruction. This is a complex area and standardised procedures would be helpful. These could be adopted, for example, by the Minister of Justice or of State and be binding on the civil service as a whole.

Section 6(2) provides for the retention of all records for 10 years. We question whether this is realistic or useful. Public bodies generate and collect enormous quantities of information, most of which is actually destroyed over time. Strong central standards regarding procedures for record destruction may be a more productive way of ensuring that this is done properly than a blanket requirement that all records be kept for 10 years.

Section 9
It should be clear that the report referred to in this section is a public report. Consideration should be given to requiring public bodies to publish and disseminate this report, including via the Internet.

Section 24
Consideration should be given to expanding the scope of information that must be provided with the rejection of a request to also include the various grounds for appealing a decision. These should include the right to challenge the fee charged, any undue delays in providing information and any refusal to provide information in the form requested.

Section 27
It is unclear why requesters are limited to 30 days to appeal any refusal to grant them access to information. This section should, as with section 24 (outlined above), list the various grounds upon which an appeal may be preferred.

Section 28
This section requires the Commission to set the time within which an Information Officer must "make a decision" on a request. Given the binding nature of the Commission's determination, it is unclear what further decision-making power the Information Office would have. Normally, he or she would simply be required to implement the decision of the Commission.

Section 31
Section 31(2) requires the report to which this section refers to be made available for public inspection. Given the importance of the information contained in this report, public bodies should be required to publish and actively to disseminate these reports, including over the Internet.

Section 32
This section provides for fines to be imposed on officials for various failures in relation to the law. It should be clear that individual sanctions of this sort may be imposed only in the context of an intention to commit the relevant wrong.

Section 33
This section purports to provide protection for whistleblowers but the test set out is not the right one and does not actually make sense. Given that the scope of protection is limited to information which it is permitted to disclose, there is, in fact no need for this protection. This is readily seen when one considers that officials, like all citizens, could themselves request this information, and then go on to further disclose it. Whistleblower protection should not be conditioned on the information being subject to disclosure. Rather, the assumption is that where the information in question discloses wrongdoing, the public interest in exposing that wrongdoing will normally outweigh any harm done through disclosure. As a result, the public interest is served by creating a situation where officials who become aware of wrongdoing are protected when they expose this, regardless of whether or not the information is otherwise subject to disclosure.

Section 35
Consideration should be given to making it clear that the definition of official information applies regardless of the date of production of the information, and of its source or status.

The definition of a public authority excludes Parliament and the Cabinet. Consideration should be given to including these bodies, particularly in light of the broad regime exceptions, particularly in relation to policy making. Consideration should also be given to including bodies substantially funded by government within the definition of public body. Otherwise, government could avoid its obligations under the law in respect of certain functions simply by contracting them out to private corporations.

Section 31