**Personal Data Privacy and Personal Data Protection Strategy Workshop –**

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1. **Introductory Remarks**

The most visible impact of Sri Lanka’s Right to Information Act (RTI Act) during the past three years is the empowerment of citizens who were once voiceless, to ask questions from state and non-state agencies and to be empowered in their public interactions.

After more than sixty years of independence from British colonial rule, decades of civil and ethnic conflict have stretched Sri Lanka’s once admired progressive constitutional and Rule of Law institutions and systems to near breaking point.

The country endured through ethnic conflict between the Tamil minority liberation movement of the Liberation Tigers of Tamil Eelam and the (largely majoritarian Sinhala) State which was militarily brought to an end in May 2019 but with no reconciliation process between affected communities thereafter. We have also undergone two lesser known but equally serious civil conflicts between radical Sinhalese youth and the State in the seventies and later, in the eighties.

In a tiny country with a population of close to 22 million people, this has had grave impact on the legal system and the Rule of Law. At one point, Sri Lanka had the second highest number of enforced disappearances in the world, next only to Iraq. Sri Lanka suffered the horrific Easter Sunday attacks in April 2019 by local jihadists influenced by the Islamist State ideology targeting churches and top end hotels as a result of which more than 250 people died, most of them while praying in church or having their Easter Sunday breakfast.

In 2022, the Sri Lankan Government made a formal announcement of bankruptcy, citing the devastating effects of the global covid-19 pandemic and successive hits on the principal sources of income which includes the tourist industry. What was not cited was the decades old endemic culture of gross political corruption and family rule which had crippled the country’s economic and fiscal discipline.

In this context, enacting a well framed Right to Information law and making sure that it is being implemented properly remained a formidable challenge. In 2015, after near fourteen years of struggle by dedicated public interest lawyers, journalists and civil society actors, the Right to Information was brought as a constitutional right into Sri Lanka’s 1978 Constitution. In 2016, the Sri Lanka Parliament unanimously passed the RTI Act. Its working through the past years has been a triumphant endorsement that, even in the most challenging of times, good efforts can work miracles!

1. **Important features of Sri Lanka’s RTI Act**

The RTI Act applies the principle of equity to state and non-state bodies in securing transparency. So the Act extends its reach not only to state entities and constitutional entities downwards from the office of the President to the lowest office of the municipality but also to corporates that function with government backing, private entities contracting with the government and non-governmental organisations substantially funded by government, foreign governments or international organisations to the extent of their ‘rendering a service to the public’.

The Act also covers security and intelligence bodies unlike other regional RTI laws, in India and Bangladesh for example. Though the Ministry of Defence argued for the Act to exempt itself from covering the Ministry, there was a stern and uncompromising refusal on the part of the drafters to sacrifice best practice norms for expediency.

Also in the face of considerable pressure that Sri Lanka’s law should have national security agencies and the department of the Attorney General exempted from its reach, our insistence was that no agency can be deemed to be above the law.

This was an important development. For decades, Sri Lanka’s civil and ethnic conflict had resulted in information being officially denied by the law. Non-disclosure of information was the norm while disclosure was the exemption. Departing from this thinking, the basic principle was that, where exceptions apply, these must be by subject matter not by the privileging of certain institutions.

All of these are subjected to the public interest override. Crucially, Section 4 of the RTI Act (the priority clause) states that the RTI Act overrides other enacted law. This includes the Official Secrets Act.

The RTI Act also emphasizes in its overall thrust that that the information right should not be seen as the enemy of the public service. The Act protects the information officer (as well as other officers) from any consequences of carrying out his duties under the Act (Sections 30 and 40). It also makes it an offence if any other officer refuses without reasonable cause to render assistance to the information officer when that assistance is sought.

The other important feature of the RTI Act is the establishing of an independent Commission which would act as a pro-transparency arbiter between the state and the citizen, given that the scale of power in this regard is often unbalanced.

In most countries in Asia, sole reliance on the judiciary is impractical in that enormous costs are incurred, there are debilitating delays in the legal process and sometimes, the independence of judges are politically compromised. So it was felt that an intermediary was needed.

Sri Lanka’s Commission comprises of members who are nominated by independent bodies such as the bar council, the editors and civil society organisations. The appointment process is not left solely to politicians. A special distinguishing factor is that it is the Commission, rather than the police or the state prosecutor, which initiates criminal action on offences being committed under the Act. Prosecutorial powers (of those who commit offences under the RTI Act) are in the hands of the RTI Commission which is also given the authority to determine fees for the release of information.

The Government, for its part, has complied with the orders of the Commission and the public authorities have responded to requests, generally speaking with a few exceptions.

1. **The Right to Information and Personal Data Protection – Assessing the Balance**

A crucial factor in the working of the RTI regime through the past eight years is the public naming and shaming factor. Citizens have asked for information in their thousands to ‘name and shame’ corrupt politicians, public officials etc. In that process, the disclosure of names becomes an integral part of the information releasing process. This has been recognised by the Commission which has ordered the release of information in thousands of cases that have come to us on appea.

Due to citizens and trade unions filing information requests from key national entities like the national carrier Sri Lankan Airlines and several other prominent state sector enterprises including banks regarding their gross mismanagement, RTI has resulted in major public focus on corruption, wastage of public funds resulting in dramatic changes in management, initiation of disciplinary procedures against alleged corruptors and imposition of internal financial controls in these bodies.

At a more general level, parents have filed RTI requests asking for information on admission of children to schools in a background where the admission process is governed by corruption (ie bribing of principals and political influence to prefer one child over another more meritorious child). Teachers have filed RTIs to check on recruitments, promotions and dismissals in the context of unfairness in the procedures; citizens have filed requests in regard to information on disbursements of school funds etc. leading to more stringent controls.

Privacy is expressly recognised in the Constitution (Article 14A, (2)) as well as in the RTI Act itself (Section 5(1)(a)) as a ground on which the right to information can be restricted. Section 5(1) (a) reads as follows;

Section 5 (1) (a) of the RTI Act is as follows;

*Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where… (a) the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure;*

In applying this Section to deny information release, the ‘public interest override’ in Section 5(4) has been of pivotal importance in balancing the right to information vis a vis personal data protection in the factual circumstances of each case.

Section 5 (4) of the RTI Act is as follows;

*‘notwithstanding the provisions of Section 5 (1), a request for information shall not be refused where the public interest in disclosing the information outweighs whatever harm that may result from the disclosure thereof.’*

In applying this section to the appeals that have come before us, we have proceeded on the basis that use of the term ‘*shall’* in the legislative language signifies a mandatory duty thereof.

I will cite three instances where we determined that there must be release of the information, all of which decisions were upheld by the Sri Lankan Court of Appeal recently.

In the first, a journalist had petitioned the Commission against the Sri Lanka Parliament requesting that the names of Members of Parliament who had submitted their Declarations of Assets and Liabilities to the Speaker be released under the RTI Act. The Parliament refused, citing privacy of the MPs and ground of parliamentary privilege. The Commission dismissed both these objections citing the public interest disclosure ground and also pointing out that this was disclosure of names to indicate which MPs had conformed to the law in submitting their Declarations; as such, that was a legal requirement and the disclosure of information thereto was perfectly in line with the RTI Act. In 2023, the Court of Appeal upheld the decision of the Commission, ruling that the information could not be refused on grounds of privacy and also dismissing the ground of parliamentary privilege. The relevant information was thereafter released by Parliament.

The next example concerns an appeal filed by a citizen against the largest supplier of cooking gas to Sri Lanka (Litro Gas Pvt Ltd) which was a private company but where the shareholding was largely from Government corporations. The information request asked for the monthly salary and monthly allowances of top management including its Chairman, Managing Director, Finance Director and others. This also included information on the amount of loans given to each, the amount of loans to be paid back and relevant interest on the same.

The Commission decided that, Litro Gas’s utilisation of public money was evident as the ‘amount of loans to each, amount of loan to be paid back, and the interest rate for the amount to be paid back’ were not through personal funds of individuals but through public funds; the public interest is attracted thereto. Agreeing with this stand, the Court of Appeal held that even though the information in question came within the definition of ‘personal information’, the public interest override applied to release the information. The Court also affirmed that the private compmany is a Public Authority covered by the RTI Act; ies, the State owns 99.7% shares of SL Insurance Corporation (SLIC) and SLIC holds 99.3% of Litro Gas. Accordingly, there is ‘no doubt’ that both are companies incorporated under the Companies Act in which the State has a ‘controlling interest,’ the Court held.

The third instance concerned a citizen who had applied to be recruited as Trainee Staff Assistant of the Bank of Ceylon who had asked for details of the other candidates who had passed an island wide competitive examination conducted by the Department of Examinations and had been selected (she had not been selected even though she had passed the examination). The Court elaborated the importance of the RTI and balancing that of the larger public with the right to privacy. Quoting Jeremy Bentham, the Court stated that “communities can play an active role in promoting good governance, because public opinion provides some of the incentives needed to make egotistical politicians serve our collective interest”. Further, the Court determined that the particulars of an examination containing individual marks and merit list are considered to be a public document. As such the Court dismissed the objection of the Bank to provide the requested information and directed its release.

1. **Conclusion**

In closing, it is imperative to stress that there is no ‘one size fits all’ approach in these matters; instead, each and every case is evaluated on the question whether 1) the information asks for amounts to personal information 2) even if it does, then the elements of Section 5(1)(a) and Section 5 (4) are applied.

Essentially, the determining issue is if the information in issue has any relationship to any public activity or interest, if there is unwarranted invasion of the privacy of the individual and if the ‘harm test’ in Section 5(4) of the RTI Act applies.

Thank you.