Right to Information Oversight Bodies: Design Considerations[1]

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Executive Summary

Well over 110 countries have now adopted laws giving individuals a right to access information held by public authorities or right to information (RTI) laws. The enormous collective experience of these countries has demonstrated clearly the important role which is played by oversight bodies – i.e. those bodies which have the power to review the decisions of public authorities relating to requests for information – in terms of the successful implementation of these laws. Making good choices about the mandate, powers and activities of oversight bodies, including based on what we have learned from other countries, is a crucially important part of ensuring access to information in practice.

This paper reviews the experience of oversight bodies in countries around the world, with a view to providing guidance to countries that are either establishing oversight bodies or reviewing the way existing bodies, with a particular focus on the new Right to Information Commission in Sri Lanka. While the paper relies on experiences from many different countries, it focuses on the experience of oversight bodies in four key focus countries, namely Canada, India, Mexico and the United Kingdom.

The paper is divided into three parts. The first reviews a number of foundational questions regarding the mandate and structure of oversight bodies. The second addresses a role which is considered to be a core one for any body to be considered to be an oversight body, namely the processing of complaints regarding the manner in which requests have been processed. The third and final part provides input on the range of promotional/support activities that oversight bodies can undertake.

Mandate and Structure

A very basic mandate issue is whether oversight bodies are essentially limited in scope to processing complaints or they also have a wider promotional role. There are obvious benefits to having these bodies engage in promotional activities, including taking advantage of the expertise that oversight bodies inevitably develop, as well as the fact that, normally, they are strong supporters of RTI and hence able to play a positive facilitating role in terms of better practice implementation. Whether or not the oversight body is given a promotional role, it is still good practice also to task a central body inside of government, what might be termed a 'nodal body', with playing a supportive role here, given the very different relationship such a body can be expected to have with public authorities.

In terms of institutional design, the paper addresses three key issues. The first is the pros and cons of having a specialised oversight body for information versus allocating this role to an existing body, normally an ombudsman. Although there are some advantages to allocating the information oversight function to an ombudsman – including administrative efficiencies and benefiting from the outset from the

credibility and profile the body can already be expected to have – the weight of both opinion and practical experience comes down fairly clearly on the side of creating a specialised body, outside of the context of very small countries. The main advantage of this is that the body can focus exclusively on RTI (i.e. and not be distracted by other issues) and that it will be easier for it to develop the dedicated expertise that this complex issue requires. Other advantages include giving more profile to the information function, increasing the likelihood that the body will have binding order-making powers (see below), and ensuring that the body can receive complaints from all public authorities that are covered by the RTI law.

Different considerations come into play when considering whether or not to combine the information and privacy oversight functions. While there is a clear modern trend towards this, in Canada, at least, the benefits of separate bodies for each issue have been noted. More study is needed to come to a firm conclusion on this issue.

It is clear as a matter of international law and also essentially common sense that oversight bodies need to be independent of the public authorities (i.e. government bodies) they are overseeing. The two key means of protecting independence are via a robust appointments process – which does not leave final decisions up to the government, which protects tenure and which prohibits those with strong political connections from being appointed – and through a system of funding which is again protected against political interference. It is also essential that the members of oversight bodies have control over the hiring and management of their own staff.

Independence does not mean that oversight bodies are not accountable to the public, ideally formally to a multiparty body such as the parliament, including through annual reporting and respecting strict transparency standards themselves. Oversight bodies should also be accountable before the courts in terms of respecting their legal mandates.

Oversight bodies around the world are divided into those headed by a single person or commissioner and those with multiple members (commissions). Many developed and smaller countries have adopted the first approach, while developing countries tend to opt for commissions with a number of members. The latter can be more resistant to attempts by the government to control the body, with safety coming with numbers and also because it is harder to control the more complex appointment processes normally associated with this sort of body.

There has been a wide-ranging debate globally about whether or not oversight bodies should have binding decision-making powers or simply make recommendations. Over time, consensus on this has come down solidly in favour of binding powers. Perhaps the most persuasive evidence of this is a 2014 survey of oversight bodies where 55% of those with binding powers indicated that their decisions were always followed versus this being the case for none of those with only recommendation powers.

Complaints

In terms of complaints, it makes sense to provide for initial eligibility screening, essentially on technical grounds. This includes whether the formal conditions for making a complaint have been met – including, where relevant, whether any internal complaints procedure has been completed – and the complaint is proper on its face (i.e. provides the requisite information).

The procedure for processing complaints may depend on whether it is a single- or multiple-person body. In the former, processing is often delegated to staff, while in the latter some bodies have complaints processed by individual commissioners, some by the whole commission and some use a triage system based on how complex the complaint is, which makes sense. Most oversight bodies process complaints via an investigation procedure (i.e. without a hearing), although some normally or always hold a hearing and yet others have hearings for more complex requests. The latter seems ideal where the law allows for this.

Basic due process guarantees need to be respected, for example by allowing both parties (and, where relevant, third parties) to make representations. At the same time, there are limits to this and oversight bodies are not supposed to operate like courts. Furthermore, strict time limits need to be respected, whether because they are formally set out in law or to preserve the usefulness of making a complaint in the first place. As part of the decision-making process, especially for complaints about refusals to provide information (as opposed to about time limits or fees), most oversight bodies order the concerned public authority to provide them with the relevant information.

Oversight bodies also need to arrange for a fair system for complaints regarding their own refusals to provide information (i.e. complaints about their own processing of requests). Furthermore, as part of their systems of accountability, oversight bodies should engage in robust reporting about complaints, including by making their decisions available online.

Most oversight bodies engage in informal resolution of complaints (i.e. informal mediation). This can be a quick and easy way to resolve especially simpler complaints and can be used even where the law does not specifically provide for it (as long as both parties agree). Where such procedures are employed, the oversight body should make sure that the rights of the complainant, who is almost always in a much weaker position, are protected, including by making sure that any agreement reached is respected.

To process complaints effectively, oversight bodies need appropriate powers both to investigate the complaint and to order remedies. Better practice regarding the former is to give oversight bodies the powers to order the production of documents, to compel witnesses to appear and give evidence under oath, and to inspect the

premises of public authorities. In terms of remedies, oversight bodies need to be able to order (or recommend) the disclosure of information but better practice is also to give them the power to order compensation, to punish or recommend punishment for those who wilfully breach the law, and to order public authorities with structural problems relating to implementation to undertake general remedial measures, such as to train their staff or organise their records better.

Promotional and Support Mandate

Oversight bodies in almost every country undertake some promotional/support activities regarding the right to information, even if it is limited to participating in conferences and training activities. In many countries, these bodies have a formal (i.e. legal) mandate to undertake these sorts of activities. This makes a lot of sense, given the expertise these bodies are almost certain to accumulate regarding the right to information. In most cases, the main limitation here is funding rather than anything else.

A first promotional activity is raising public awareness. This is also the most ubiquitous promotional activity for oversight bodies, and it is often undertaken in collaboration with other public authorities, civil society and/or the media. There is a wide variety of possible options here, with one of the most popular being the celebration of International Right to Know Day, which takes place on 28 September.

Providing support for officials is a second important promotional/support activity. Where oversight bodies provide *ad hoc* advice to public authorities, they need to make sure this function is clearly separated from their complaints activities, so as to avoid either real or perceived conflicts of interest. Otherwise, providing central guidance and implementation models for public authorities is both an enormous efficiency – since it can really alleviate the burden on public authorities regarding the common tasks they all need to undertake (i.e. it avoids reinventing the wheel) – and promotes consistent, coherent implementation across all public authorities. Examples of areas where guidance can be especially useful include preparing a template for annual reports, developing model protocols for processing requests, providing a sample action plan for implementation, publishing training tools online, offering guidance on interpreting exceptions and developing a central online system for making and processing requests (and complaints).

Some specific areas where oversight bodies tend to be quite engaged are assisting with proactive disclosure, providing training and setting standards for records management. Some oversight bodies are given, pursuant to the right to information law, a regulatory role, for example to set the fees which may be charged, to approve extensions to the time limit for processing requests or to set minimum standards for records management.

Some oversight bodies are given a general mandate to monitor compliance by public authorities with their obligations under the right to information law (over and

above via individual complaints). This is useful but can also be very time consuming and hence expensive. Finally, most oversight bodies are required to report annually on both what they have done (as an accountability function) and on the overall state of play regarding implementation of the law (as an information function). For them to be able to do this properly, it is important that all public authorities also be required to report annually on what they have done, to provide a base of information for the central, overview report.

Introduction

The number of countries with right to information laws, or laws which give individuals a right to access information held by public authorities, has now risen to well above 110.[2] Sri Lanka joined this group in August 2016 with the adoption of its Right to Information Act. In line with better international practice, a key feature of the Sri Lankan legislation was the creation of an independent oversight body, the Right to Information Commission.

In countries around the world, these bodies have proven to be key players in ensuring strong implementation of right to information laws. This can be observed in the important practical roles they play in terms of implementation, and it is also widely reflected in the literature. A key role of these bodies is to provide an independent review of decisions relating to information requests, based on complaints from requesters. For purposes of this paper, that role is treated as a core element of the definition of an oversight body. In other words, references herein to an oversight body are references to bodies which, among other things, review complaints from requesters.

Where the right to information is enshrined in law, requesters can almost always resort to the courts where they feel the law has not been applied properly or fairly. However, as many authors have pointed out, although this is ultimately an important remedy, for the vast majority of requesters, in the vast majority of countries, the courts are not sufficiently timely, affordable or accessible to be useful in the context of information requests.[3] In many cases, time is of the essence, and courts take too long to resolve disputes. Equally importantly, very few people globally can afford to pay lawyers' and court fees simply to obtain access to information.

There are other problems with the court process. Courts in most countries operate on adversarial principles, with two opposing parties competing to convince the

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[2] See the RTI Rating, a respected international methodology for measuring the strength of the legal framework for the right to information, which has assessed all of the national right to information laws globally. Available at: www.RTI-Rating.org.

[3] See, for example, Laura Neuman (2009), *Enforcement Models: Content and Context* (Washington, World Bank), pp. 6-7, available at: http://siteresources.worldbank.org/EXTGOVACC/Resources/LNEumanATI.pdf; John McMillan (2007), "Designing an effective FOI oversight body - Ombudsman or independent Commissioner?", Paper for the 5th International Conference of Information Commissioners, Wellington, New Zealand, p. 1, available at: http://www.ombudsman.gov.au/__data/assets/pdf_file/0013/34501/27-November-2007-Designing-an-effective-FOI-oversight-body-Ombudsman-or-independent-Commissioner.pdf; and Sarah Holsen and Martial Pasquier (2012), "Insight on Oversight: The Role of Information Commissioners in the Implementation of Access to Information Policies" 2 *Journal of Information Policy* 214, p. 222, available at: https://serval.unil.ch/resource/serval:BIB_E80D971719D0.P001/REF.

decision maker – whether this is a judge or a jury – of the justness of their case. But in information disputes, the playing field is anything but level, because the requester has little or no idea what actually constitutes the information in question, because they have not seen the documents.[4] In many countries, these problems are exacerbated by the fact that many citizens do not trust the courts.[5] Independent oversight bodies are a key part of the solution to this.

In most countries where oversight bodies have been established, their role goes beyond simply deciding complaints and includes a more promotional/support role. In this guise, oversight bodies take advantage of the expertise they have developed on the right to information to play various other roles, such as raising public awareness about this right, supporting public authorities in implementing the law and making sure that other systems envisaged in the law are working properly.

This paper reviews the experience of oversight bodies in countries around the world. The immediate aim is to provide support and guidance to the new Right to Information Commission in Sri Lanka, but the paper will be of use to oversight bodies around the world that are either establishing themselves or reviewing the way they function. While the paper relies on experiences from different countries, it focuses on the experience of oversight bodies in four key focus countries, namely Canada, India, Mexico and the United Kingdom.

The first part of the paper reviews a number of foundational questions regarding the mandate and structure of oversight bodies. These include the way the mandate of the body is defined, a number of institutional design features, and ways to protect the independence of the body while maintaining its accountability to the people. The following two parts of the paper address the two main roles of oversight bodies described above, namely processing complaints and undertaking promotional/support activities.

Part I: Mandate and Structure

The first part of this paper looks at issues regarding the mandate and structure of oversight bodies. All of the issues addressed in this paper require careful tailoring to local political, economic, social and to some extent other cultural realities, but the question of the structure of oversight bodies requires particular attention to the local situation. In this area, simply importing an approach that works well in another country can lead to unfortunate results.

A second, even more difficult, issue here is that of political support. Even an oversight body that benefits from the most robust and carefully tailored design can

[4] McMillan, note 3, p. 1

[5] Neuman (2009), note 3, pp. 7 and 18.

start to wither in terms of independence and effectiveness in the face of determined political opposition from the government or other nucleuses of power. Political attacks can take many forms – including limiting funding, refusing to cooperate or undermining the reputation of or trust in the body – and, particularly over time, this can very seriously undermine the ability of an oversight body to operate effectively and/or its independence.

One of the core issues for oversight bodies is the scope of their mandates, and this is addressed in the first section of this part of the paper. As noted above, to qualify as an oversight body the entity at least needs to have a mandate to review the way requests for information have been dealt with via complaints (or appeals). The specifics of dealing with complaints is addressed in Part II of this paper. In many cases, oversight bodies also have a much broader role to facilitate the proper implementation of a right to information law, described in this paper as a promotional/support role and addressed in Part III. The first section of this part of the paper looks at some general issues which arise in relation to the development of the mandate of the body.

The second section of this part of the paper focuses on three institutional or macro-design issues relating to oversight bodies. In her piece for the World Bank, *Enforcement Models: Content and Context*, Neuman looks at the issue exclusively through the lens of dealing with complaints. She highlights six key qualities that a complaints body should have:

- independent from political influence,
- accessible to requesters without the need for legal representation,
- absent overly formalistic requisites,
- affordable,
- timely, and
- preferably specialist, as [access to information] laws are complex, necessitating delicate public interest balancing tests.[6]

Several of these qualities focus on the complaints function *per se*, but the first and the last are core general design considerations. The last quality – namely the pros and cons of establishing a specialist (dedicated) oversight body versus allocating the oversight role to a pre-existing body, normally an ombudsman or human rights institution – is the first institutional issue addressed in this section.

Two other institutional issues are then addressed. The first is the question of whether it is better to follow the single member ('commissioner') approach or to have a multi-member ('commission') body. The second is whether or not the body should, at least in relation to its complaints function, have the power to issue legally binding orders or just to make recommendations.

[6] Neuman (2009), note 3, p. 2.

Neuman's first quality – independence – is the subject of the next section of this part of the paper. This is universally recognised to be key to the success of oversight bodies, for reasons which are fairly obvious, and it is now enshrined as a principle of international law. This section looks at the issue of independence through two key lenses, namely the system for appointing members and how funding is provided to the body.

In many countries, the idea of independent public bodies is relatively new and there are often concerns about the extent to which these bodies will be accountable. Oversight bodies are clearly required to follow the law, including as to their mandate, the exercise of their power and any decisions they may make. In practice, in democracies, a number of mechanisms ensure that they are in fact accountable, and this is the subject of the last section of this part of the paper.

I.1 Core Mandate Issues

An initial and very important design consideration for oversight bodies is whether, in legal terms, the body should focus exclusively on complaints, as a formal system of oversight, or also take on a range of promotional/support functions. The latter may include regulatory functions – such as setting standards for proactive disclosure of information or approving extensions to time limits – support for the authorities which are subject to the law – such as providing guidance or tools for them to use – and/or public awareness raising. Within these broad categories, a wide range of options is possible and can be found in different countries.

From among the four focus countries for this paper, three – namely Canada, India and the United Kingdom – are formally (i.e. legally) largely limited to processing complaints, although all do have some additional functions. For example, the Information Commissions in India[7] have the power to impose sanctions on individuals who wilfully obstruct access, which can be seen as integral to their main complaints role inasmuch as these sanctions are designed to promote compliance with the law, which should reduce the caseload of the Commissions.

The national oversight body in the other country – i.e. Mexico, the National Institute of Transparency, Access to Information and Data Protection (INAI) – has a much wider promotional role. Indeed, it has a responsibility to "lead and coordinate the National Transparency System"[8] which involves, in addition to INAI, the oversight bodies of the states, the Superior Audit Office, the General Archive of the Nation and the National Institute of Statistics and Geography.[9] The National Transparency System, in turn, has a long list of functions including raising public awareness,

[7] India has a system of both a Central Information Commission and State Information Commissions in each state.
[8] Article 41(V) of the General Act of Transparency and Access to Public Information.
[9] Article 30 of the General Act of Transparency and Access to Public Information.

undertaking research, adopting guidelines and policies, training and so on.[10] This is also the case for the Right to Information Commission (Commission) under the Sri Lankan legislation.[11]

At one level, there seems to be obvious merit, from the perspective of promoting a robust right to information system, in having the oversight body conduct a wider range of promotional and support activities. Undertaking the complaints function means, by definition, that the body is likely to have an enormous amount of expertise on how the law works and does not work. Anecdotal evidence strongly suggests that, in many countries, there is more expertise on implementing the law within the oversight body than anywhere else. Limiting the use of this valuable human resource to the complaints function would seem to be a serious inefficiency.

Furthermore, and again based on their core function, oversight bodies tend to be strong supporters of proper implementation of the right to information law, again an important potential contributing factor to success. This is, for example, less likely to be present inside of government, where some degree of hostility towards the right to information – commonly referred to as the "culture of secrecy" – is almost always present. John McMillan, former Commonwealth Ombudsman of Australia, has noted the important role an oversight body can play as a champion of transparency, adding: "Unless there is an FOI champion, open government will dwindle in importance."[12]

The need for a broad mandate for oversight bodies finds some support in the literature. For example, a major review of the work of the Mexican oversight body in 2006 noted:

> The federal Transparency Law represents a vital element of Mexico's democratic transition. The pervasive sentiment regarding IFAI [the oversight body] and the Transparency Law itself is that the legislature has enacted machinery that works.[13]

At the same time, there are also benefits to having a central body inside of government – what might be called a 'nodal agency' for the right to information – play a promotional role. At least for those public authorities which form part of the executive, such a nodal agency is likely to benefit from a greater degree of trust and cooperation, given that they are all in the same boat, as it were, on this issue. In addition, depending on where it is situated, such an agency may have at its disposal a wider range of both informal and formal powers. In Tunisia, for example, in the

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[10] Article 31 of the General Act of Transparency and Access to Public Information.
[11] Right to Information Act, No. 12 of 2016. See, among others, section 14.
[12] John McMillan (2007), note 3.
[13] Sobel, David, Bethany Noll, Benjamin Bogado, TCC Group and Monroe Price (2006), *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania), p. 7. Available at: http://www.global.asc.upenn.edu/publications/the-federal-institute-for-access-to-information-in-mexico-and-a-culture-of-transparency/.

early days of implementing the 2011 right to information law,[14] a pilot committee (comité de pilotage) was created within the Prime Minister's office, which meant that it had some sway over the civil service. In Canada, the Treasury Board Secretariat – which is responsible for general management and policy for the civil service and which, as a result, exercises some leadership role over that service – also conducts central information related activities.

This issue would no doubt benefit from greater study but there would seem to be benefits in having both systems in play. In some countries, for example, the right to information law formally gives the oversight body the power to participate in training programmes for officials. Thus, section 56(c) of the Maldivian Right to Information Act (2013) grants the oversight body the power to "participate, run and cooperate in providing training programs for Government employees, for the purpose of administering this Act".[15] In other countries, oversight bodies do this as a matter of practice. But it is normally a government agency which is mainly responsible for providing training to the civil service. Engaging both in the area of the right to information seems a clear benefit.

Even where the law does not specifically sanction promotional work, oversight bodies will still generally be free, within their allocated resources, to do this sort of work. Thus, the oversight bodies in all three of the limited mandate focus countries engage in public speaking and participate in training programmes on the right to information. In Canada, the oversight body, the Office of the Information Commissioner (OIC), produces special reports to Parliament on various issues, hosts conferences on the right to information and has issued Report Cards on various public authorities' performance under the law. In the United Kingdom, the Information Commissioners Office (ICO) issues a lot of guidance documents to help public authorities implement the law more effectively and provides a helpline for people to call for advice. In India, the Central Information Commission (CIC) has received funding to produce promotional videos about the law and hosts an annual conference for information commissions and activists across the country.[16]

Not having a legal mandate to undertake these sorts of activities does, however, have its disadvantages. First, it leaves the body open to criticism that it is exceeding its mandate.[17] Even if this comes from private citizens or the media, it can, especially over time, undermine the body. And if the criticism comes from official actors, such as the government or members of Parliament, it can be seen as a sort of warning with further action being possible if the activities do not stop.

[14] Decree Law No. 41 of 2011 on Access to Administrative Documents held by Public Authorities.
[15] See also section 32(2)(c) of the Sierra Leonean Right to Access Information Act, 2013.
[16] Interview with Shailesh Gandhi, former Commissioner of the Indian Central Commission, 7 April 2017.
[17] In an interview on 10 April 2017, Suzanne Legault, Information Commissioner of Canada, indicated that her office had sometimes been criticised publicly for undertaking promotional activities.

Second, the absence of a formal mandate to conduct promotional activities makes it less likely that the body will receive the sort of funding support that is needed to undertake them. Or, put differently, oversight bodies can only make strong claims for the funding they need to undertake the activities which the law entrusts to them.

This issue has, as noted above, already essentially been decided in Sri Lanka, in favour of a broad mandate for the Commission. Time will tell but it seems likely that this will ultimately prove to be a net benefit.

I.2 Institutional Design

a. Specialised vs. Multi-purpose Body

There are a variety of options for providing oversight of a right to information law. In the original South African arrangement, for example, a number of promotional roles relating to the right to information were entrusted to the South African Human Rights Commission, although it was not given any complaints function (and so, for purposes of this paper, is not considered to be an oversight body).[18]

However, a more common alternative to a dedicated oversight body is to entrust the complaints function to a general purpose ombudsman office. According to Holsen and Pasquier, Canada was the first country to establish a body known as an Information Commissioner and: "[N]early all of the ATI policies passed before the Canadian law gave responsibility for resolving requesters' complaints to an already established ombudsman".[19]

In 2007, McMillan, the Australian Ombudsman at the time, outlined a number of pros and cons associated with having a specialised oversight body (information commissioner) as compared to giving the complaints function to an ombudsman. Some of the pros associated with a commissioner include giving more profile to the right to information, the possibility of allocating binding order-making powers to the office, insulating the ombudsman from the political heat that is often associated with the contentious right to information function, and extending the jurisdiction of the office to ministerial decisions, which is not normally done with ombudsmen. In support of using the ombudsman for information disputes, McMillan points to the (normally) established nature of ombudsman offices, efficiencies of scale, especially in terms of administrative functions, and the benefits of integrating information into the wider ombudsman function, given that many 'regular' ombudsman complaints have an informational element.[20] He does not, ultimately, take a clear position on the issue, but his concluding remarks do seem to favour the commissioner model, at least for larger jurisdictions.

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[18] Promotion of Access to Information Act, 2000, sections 83-85.
[19] Sarah Holsen and Martial Pasquier (2012), note 3, p. 224.
[20] McMillan (2007), note 3.

Holsen and Pasquier identify two additional benefits to having a specialised body, both flowing from the fact that staff will focus exclusively on the right to information, namely that staff will build greater expertise on this issue and that staff will be able to focus exclusively on it.[21] In practice, a lack of both focus and expertise has been a problem in at least some countries which have used the ombudsman approach.[22] They also recognise, however, that giving oversight to an established ombudsman is cheaper and also means that the system benefits from the credibility and profile which that office may already have built.[23] Although the authors claim that they are not comparing commissions with ombudsmen, they do conclude that, "the information commissioner is a good option in comparison to the courts and ombudsman simply because the commissioner's office focuses only on information-related cases."[24]

Neuman also does not take a firm position on the issue but seems to militate somewhat against the ombudsman approach, among other things because ombudsmen tend not to have binding order-making powers (see below for a focused discussion on this).[25]

Other authors have taken a clearer position in support of specialised bodies. For example, Edison Lanza, Organization of American States Special Rapporteur for Freedom of Expression, has written:

> To develop these objectives and attain the effective satisfaction of this right, the Office of the Special Rapporteur has recognized that it is essential to create an autonomous and specialized supervisory body responsible for promoting the implementation of the laws on access to public information and for reviewing and adjudicating government denials of requests for information.[26]

Similarly, Gilbert Sendugwa, writing about the African experience, directly recommends the creation of a specialised body, noting: "Experience has shown that in cases where RTI oversight function was added as auxiliary to the institution's existing functions, ATI oversight has not been given serious attention."[27] Another

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[21] Holsen and Pasquier (2012), note 3, p. 223.
[22] Pakistan is a good example of this. See Toby Mendel (2012), *Whither the Right to Information in Pakistan: Challenges and Opportunities Regarding the Law and its Implementation*. Unpublished paper on file with the author.
[23] Holsen and Pasquier (2012), note 3, p. 232.
[24] Holsen and Pasquier (2012), note 3, p. 231.
[25] Neuman (2009), note 3, pp. 8-9.
[26] Edison Lanza (2015), The Right to Access to Public Information in the Americas: Specialized Supervisory and Enforcement Bodies: Thematic report included in the 2014 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (Washington: Organization of American States), para. 10. Available at: http://www.oas.org/en/iachr/expression/docs/reports/access/thematic%20report%20access%20to%20public%20information%202014.pdf.
[27] Gilbert Sendugwa (2013), *Ensuring Effective Oversight Mechanisms and Processes in Freedom of Information Laws: A Comparative Analysis of Oversight Mechanisms in Africa: A paper presented at the Africa Regional Conference on Access to Information, Abuja 18-19, 2013*. Available at:

author wrote: "There are several reasons for deciding that an Information Commissioner should be the independent review and appeals mechanism under an Access to Information Act." The main reason he cites for this is the need for the body to develop specialised expertise on the right to information.[28]

Overall, despite caution in making clear statements on this issue, the weight of both opinion and practical experience comes down heavily in favour of specialised bodies. While there may be some question about the practicality of this for very small population countries, this is a clear preference for those countries where the volume of complaints is likely to be more significant. All of the four focus countries for this paper have specialised information commission(er)s, as does Sri Lanka.

A slightly different set of considerations comes into play in relation to the question of whether privacy or data protection functions should be combined with those of the information commission. In this area, global practice is divided. From among the four focus countries, the oversight bodies in Mexico and the United Kingdom combine data protection and right to information functions, while those of Canada and India focus only on information (although there is no comprehensive privacy or data protection law in India as of yet).

In Canada, the advantages of having separate advocates for two very different, and potentially conflicting, types of interests have often been raised informally. On the other hand, considerations of efficiency and significant overlap of functions seem to argue in favour of combining these functions. In 2009, Neuman wrote that more studies were needed on this issue,[29] and that remains the case today.

What can be noted is that the trend seems to be towards combining these functions. In the United Kingdom, oversight of the right to information was added to the functions of the Data Protection Commissioner from the beginning of the right to information regime and the name of the body was changed to the Information Commissioner's Office.[30] In Mexico, the data protection function was added to the roles of the information oversight body when the data protection law was first adopted in 2010.[31] In South Africa, the oversight body for both functions was created only with the adoption of a data protection law in 2013, 13 years after the right to information law was first adopted, and following years of advocacy to this end by civil society and other stakeholders.[32]

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http://www.africafoicentre.org/index.php/reports-publications/119-analysis-on-ati-oversight-mechanisms-in-africa-gilbert-march-18-2014/file.

[28] Andrew Ecclestone (2007), *Information Commissioners – A Background Paper by Andrew Ecclestone*. Unpublished paper on file with the author.

[29] Neuman (2009), note 3, p. 29.

[30] Freedom of Information Act, 2000, s. 18.

[31] Federal Law on the Protection of Personal Data Possessed by Private Persons, 2010, Articles 38 and 39.

[32] Protection of Personal Information Act, No. 4 of 2013, section 39.

As with mandate, this has already been decided in Sri Lanka, in favour of a dedicated or specialised body. This accords with better practice and, given the country's population, will no doubt prove to have been the right approach. Sri Lanka does not yet have a fully developed legal regime for data protection. If and when a law on this is adopted, careful thought will need to be given to whether or not to allocate the oversight role for this function to the existing Commission.

b. Commission vs. Commissioner

Globally, for specialised bodies, there are two main models, namely a body headed by a single person – a commissioner – and a body with a larger number of members – a commission. It is also the case that in most cases where this function is dealt with by an ombudsman, that is also a single individual. Around the world, the commission approach is far more common, but among the four focus countries for this study one-half – namely Canada and the United Kingdom – follow the commissioner approach and the other one-half – namely Mexico and India – follow the commission approach (Mexico has seven commissioners[33] and the CIC in India has up to eleven commissioners).[34]

There is very little in the literature that addresses the pros and cons of each approach. However, some of these were mentioned in discussions with representatives of the oversight bodies of the focus countries[35] and others can be extrapolated from the experiences of these bodies so far.

In practice, the more established democracies are those which tend to have commissioners (or ombudsmen), while more recent or transitional democracies are more likely to have multiple-member commissions. Cross-cutting this is the experience of smaller States, which also tend to have individual commissioners.[36] This distribution is probably no coincidence. For smaller States, the logic is clear: the caseload is low and can easily be handled by one person, the cost of multiple commissioners is prohibitive and it is in any case difficult to find multiple qualified candidates.

For larger States, the issues are a bit different. As is discussed in more detail later, in Western democracies it is rare for commissioners to get involved in the processing of complaints, which is instead handled through delegation of powers to working level staff. In stark contrast to this is the approach in most developing democracies where cases are, at least at the final stage, normally handled directly by

[33] See http://inicio.ifai.org.mx/SitePages/Estructura%20Ifai.aspx.
[34] See http://cic.gov.in.
[35] See notes 16, 17, 70 and 71.
[36] Examples of this include the Cook Islands, which relies on the Ombudsman model (see section 30 of the Official Information Act, 2009), the Maldives (see section 44 of the Right to Information Act, 2014) and Antigua and Barbuda (see section 35(1) of the Freedom of Information Act, 2004).

commissioners. This alone explains the need for a multiple-member body, namely to be able to handle all of the caseload.

There are other factors. Threats to independence tend to be less common in established democracies, while a multiple-member body can present greater resistance to such threats in various ways. First, it is harder to appoint a full roster of individuals who are not fully independent than it is to do this with just one appointment. Second, there is safety in numbers and a collective body can to more to stand up to pressure than an individual. Finally, and importantly, one of the most important supports for independence is the quality of decision-making on complaints. Multiple-member bodies can refer difficult cases – whether this arises from their inherently complex nature or from the politics of the case – to panels or even a full bench of commissioners, thereby promoting a more sound final decision.

A slightly different issue is whether commissioners should serve full-time or part-time. To some extent this would be dictated by the workload. It seems clear that if this is one of the drivers to have a multiple-member body in the first place, they would naturally need to be full-time and most, but not all, of these bodies do in fact have full-time members. Neuman highlights another issue here, noting that in Jamaica the five-member commission only meets periodically and that, over time, the meetings have become less frequent, resulting in a situation where "their authority and confidence wanes".[37] This might suggest that, in a relatively small country like Jamaica, one full-time commissioner might have been preferable to a group of part-time commissioners, although other factors would also need to be looked at.

As with the other issues considered so far, Sri Lanka has already decided its approach on these issues, with a Commission comprised of multiple, essentially full-time members. In Sri Lanka, members are not entirely prohibited from working outside of their Commission functions, but they may not "hold any public or judicial office or any other office of profit".[38]

c. Binding vs. Non-Binding Powers

A final broad institutional design issue is whether the body should have binding order-making powers or just the power to issue recommendations. This has been a matter of some debate in Canada, the only one of the focus countries to use a non-binding model.[39] The logic in favour of binding order-making powers seems clear: public authorities either have to accept and implement the decisions of the

[37] Neuman (2009), note 3, p. 28.
[38] See section 12(2)(a)(iii) of the Act.
[39] Binding order powers are by far the more dominant approach globally. For example, only two of the top twenty countries on the RTI Rating do not give the oversight body fully binding order-making power. See http://www.rti-rating.org/by-indicator/?indicator=42 (which shows the scores on Indicator 42, which measures this specific quality).

oversight body or go to court to contest them, whereas they are largely free to ignore recommendations. According to Holsen and Pasquier, there is now general consensus in the access to information community that this is a preferable approach.[40]

Two features of the Canadian system may make this dynamic somewhat less important (and hence explain the national debate about it). The first is the strong rules-based tendency to respect even recommendations of the oversight body given the dominant culture within the Canadian bureaucracy and the expectations of external stakeholders. This is led to a high degree of responsiveness to even recommendations, contrary to the assertion above that these easily be ignored. Second, the Canadian Information Commissioner has the power to take public authorities who do not follow her recommendations to court,[41] a power she frequently uses. In this way, even though her recommendations are not binding, they can effectively become so, albeit only after ratification by a court. This means that public authorities are ill advised to refuse to follow recommendations, outside of some difficult cases where there can be a real difference of opinion about how the matter would be decided by a court.

Neuman notes that even the main claimed benefits of the recommendation approach – a less adversarial, more rapid, process which is more flexible and more amenable to negotiated solutions – may be illusory as the processing of requests can become "increasingly formalistic, contentious, and slow",[42] despite their non-binding nature. An informal comparison of current complaint processing times in Canada and the United Kingdom suggests that there are few time efficiencies to be gained from employing a non-binding decision model.

Even in Canada, the weight of opinion has now come solidly behind binding order-making powers. This has been the consistent position of civil society[43] and both the Information Commissioner[44] and the relevant Parliamentary Standing Committee[45] have also taken that position. Perhaps most significantly, even the government has

[40] Holsen and Pasquier (2012), note 3, p. 228.
[41] See section 42(1)(a) of the Access to Information Act.
[42] Neuman (2009), note 3, p. 9.
[43] See, for example, a Joint Letter from a group of civil society organisations to the leaders of the main political parties in advance of the October 2015 Federal Election, available at: http://www.law-democracy.org/live/wp-content/uploads/2015/09/Joint-Letter.final_3.pdf.
[44] See Office of the Information Commissioner of Canada (2015), *Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act*, Recommendation 5.1, p. 73. Available at: http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx.
[45] Parliamentary Standing Committee on Access to Information, Privacy and Ethics (2016), *Review of the Access to Information Act*, Recommendation 25, p. 41. Available at: http://www.parl.gc.ca/content/hoc/Committee/421/ETHI/Reports/RP8360717/ETHIrp02/ETHIrp02-e.pdf.

now tabled legislation before parliament which would give the Commissioner order-making powers.[46]

Taken together, the arguments above are strongly supportive of a binding order-making power model. There is also some hard evidence to back up the idea that it is a better model. A survey of information commission(er)s done in 2014 showed that, for those with binding order-making powers, their decisions were complied with 'always' or in a 'significant majority' of cases 85 percent of the time, while this dropped to less than one-half, or 45 percent, for those with only recommendation-making power. Even more compelling was that 55 percent of the former 'always' had their decisions complied with, compared with none for those with mere recommendation-making powers.[47]

Once again, Sri Lanka has chosen the preferred model, with its Commission enjoying binding decision-making powers. Specifically, it is an offence, punishable by imprisonment of up to two years and/or a fine of Rp. 50,000, to fail to comply with a decision of the Commission.[48]

I.3 Independence

It is well established both as a principle of international law and as a matter of practice that the oversight body needs to be independent of the government. As a quasi-judicial body – i.e. a body which makes decisions on complaints – the same reasons which underlie the principle of judicial independence essentially also apply to this sort of body.

A number of international standards reflect this idea. For example, in a Joint Declaration adopted in 2004,[49] the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated:

> Those requesting information should have the possibility to appeal any refusals to disclose to an ***independent*** body with full powers to investigate and resolve such complaints. [emphasis added]

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[46] In the form of Bill C-58: An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts. Available at: https://openparliament.ca/bills/42-1/C-58/. See also Canada's *Third biennial plan to the Open Government Partnership (2016-18)*, Commitment 1, pp. 10-11. Available at: http://publications.gc.ca/collections/collection_2016/sct-tbs/BT22-130-2016-eng.pdf.

[47] Centre for Freedom of Information (2014), *In the Experience of Information Commissioners: The Information Commissioners' International Exchange Network Survey 2014*. Available at: https://www.dundee.ac.uk/centrefoi/research/. It should be noted that this survey, as well as an earlier one done in 2013, was heavily weighted towards oversight bodies in Western democracies, with these representing 28 out of 53 respondents.

[48] Section 39(1)(e) of the Act.

[49] Adopted on 6 December 2004. Available at: http://www.osce.org/fom/66176.

A 2002 Recommendation of the Committee of Ministers of the Council of Europe refers to the right to lodge a complaint with a "court of law or another **independent and impartial** body established by law",[50] [emphasis added] implicitly drawing links between the rationale for independence of this body and the courts. Principle IV(2) of the *Declaration of Principles on Freedom of Expression in Africa*,[51] refers to two levels of complaints, "to an ***independent*** body and/or the courts". [emphasis added] In addition, the Principle 8 of the *Principles on the Right of Access to Information* adopted by the Inter-American Juridical Committee in August 2008 calls for two levels of complaints, to "an administrative jurisdiction" and to the courts.[52]

These standards are also reflected in the academic literature. As Holsen and Pasquier point out: "Nearly all scholarly work on ATI oversight bodies prefaces the term 'enforcement body' with the word 'independent,' as if it were a pre-condition of the organization's existence."[53]

Two of the key means of ensuring independence is the way members of the body are appointed and the way funding is provided to the body, addressed in the two subsections below.

a. Appointments

The manner in which members are appointed is essential to ensuring the independence of oversight bodies. As Neuman notes:

> The mechanics for determining the composition and appointment is often one of the most hotly debated topics in the establishment of the information commission(er).[54]

Beyond that, a robust appointments process also bolsters the credibility and the trust in which members are held which, in turn, contributes to their effectiveness. Legally, in both Canada and the United Kingdom the commissioners are appointed by the head of State (i.e. respectively the Governor General and Her Majesty).[55] In practice, however, applicants are shortlisted through a competitive process and then a final recommendation is made by the Prime Minister. There have been changes to the process in both countries, with more engagement of parliament. In practice, appointments have been robustly independent in both countries.

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[50] Recommendation R(2002)2 the Committee of Ministers to Member States on access to official documents, 21 February 2002.
[51] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at:
http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.
[52] Resolution CJI/RES.147 (LXXIII-O/08), 7 August 2008. Available at:
scm.oas.org/IDMS/Redirectpage.aspx?class=CP/doc.&classNum=4337&lang=e.
[53] Holsen and Pasquier (2012), note 3, p. 229.
[54] Neuman (2009), note 3, p. 25.
[55] See section 54(1) of the Canadian Access to Information Act and section 6(2) of the United Kingdom Data Protection Act, 1998.

In India, in contrast, the law provides far more detail about the appointments process, stating that commissioners shall be appointed by the President on the recommendation of a committee consisting of the Prime Minister, who shall be chair, the Leader of the Opposition and a Minister nominated by the Prime Minister.[56] Formally, this clearly gives the government a dominant role, although in practice observers have seen the process as being fair and the individuals appointed as independent. There has, however, been criticism of the fact that an unreasonably large number of commissioners are from the civil service or public sector.[57] While this certainly does not mean that the individuals lack independence, it does speak to a general bias in the system in favour of the public sector, which may lead to decisions which are, overall, biased against requesters.

In Mexico, yet another system of appointments prevails, based on Article 6(A)(VIII) of the Constitution. The Senate appoints members by a two-thirds vote, after extensive consultations with civil society and on the proposal of different parliamentary groups. The President may oppose an appointment within ten days, in which case another process before the Senate takes place. In the second round of appointments, before the current constitutional provisions were adopted, there was criticism about some appointments to the oversight body, but that now appears to have been resolved and members are largely seen to be independent in the way they work.[58] At the same time, there is always a risk that, where individuals have longer-term career goals which, in turn, depend on Senate appointments (which apply to a lot of more senior positions in Mexico), their decisions might be influenced by the prevailing attitude in the Senate towards controversial issues.

A number of other features are important here, including set periods of tenure and protection against dismissal before the end of that period, positive requirements of expertise on the part of members, prohibitions on individuals with strong political connections from being appointed, and protection against arbitrary adjustment of salaries and/or benefits, for example via linking these to those of a judge or senior official.[59]

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[56] Right to Information Act, 2005, section 12(3).
[57] See, for example, Aloke Tikku (25 February 2016), "Govt appoints 3 info commissioners to transparency watchdog CIC", *Hindustan Times*. Available at: http://www.hindustantimes.com/india/govt-appoints-3-info-commissioners-to-transparency-watchdog-cic/story-cABWScRaW0HdNz0301rdOK.html. The story notes that as of that point, only one of the eleven commissioners was not from the civil service or public sector.
[58] See Yemile Mizrahi and Marcos Mendiburu (2012), *Implementing Right to Information: A Case Study of Mexico* (Washington: World Bank), p. 18. Available at: http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/RTI-Mexico-Final-2.pdf.
[59] See Toby Mendel (2008), *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (Paris: UNESCO), p. 151. Available in various languages at: http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/freedom-of-information-a-comparative-legal-survey-2nd-edition/. See also Holsen and Pasquier (2012), note 3, pp. 229-231.

It is not enough for just the members of the oversight body to be independent. Given the crucial role played by staff, they also need to be independent and under the effective control of the commissioners. Conversely, where the staff are beholden to the executive for their appointments, career development and/or conditions of employment, this can seriously undermine the work of the oversight body. The matter was deemed to be so serious in Indonesia that the members of the oversight body brought a constitutional challenge against their own legislation claiming that it did not sufficiently guarantee the independence of the institution.[60]

Key here is the idea that the oversight body should hire its own staff, rather than having them allocated by (and/or from) the executive branch of government. This is not only a matter of independence but also of the effectiveness of the body, for it is only through the ability to hire staff with appropriate sorts of expertise that the body can function properly. The oversight bodies in all four of the focus countries retain the power to hire their own staff. In some cases, those staff are covered by the general employment and related policies of the civil service, modified, as necessary, to protect their independence and special roles. For example, in Canada, lawyers operating throughout the government fall under the authority of the Department of Justice, but this is not the case for the lawyers working for the Office of the Information Commissioner.[61]

It is probably too early to determine whether the appointments process for members of the Sri Lankan Commission will prove to be a robust one in terms of protecting their independence. Formally, however, it seems quite strong. Pursuant to section 12(1) of the Act, the President appoints the members, upon the recommendation of the Constitutional Council which, in turn, must recommend at least one person nominated by three groups, namely the Bar Association, organisations of publishers, editors and media workers, and other civil society organisations. There are also various other protections, largely in line with the international standards noted above. Pursuant to section 13(1) of the Act, the members appoint the Director-General and other staff.

b. Funding

It is clear that control of the purse strings is an indirect means of controlling the body, and a lot of attention has been given to this issue in different forums. For example, the *Commentary and Guide for Implementation for the Model Interamerican Law on Access to Information* states:

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[60] See Centre for Law and Democracy (2015), *Indonesia: Amicus Brief on Independence of Information Commission*. Available at: http://www.law-democracy.org/live/wp-content/uploads/2012/08/15.01.19.Indo-amicus.PR_.pdf. The commissioners ultimately lost their constitutional challenge.

[61] In India, the Central Information Commission has a Secretary who is usually deputised from the Indian Administrative Service, a practice that is less robustly independent than some other oversight bodies.

> [B]udget sovereignty is a significant component to overall independence and autonomy. If the Commission is vested with its own line item in the budget, it is less obliged to a specific ministry or agency for proposing and promoting its financial needs.[62]

Two surveys of oversight bodies in 2013 and 2014 revealed some interesting insights into how the bodies themselves regarded the issue of funding. In the 2013 survey, fully 84 percent of those surveyed felt their budgets were "insufficient" or not at all sufficient", while this dropped to 59 percent the following year. It is perhaps natural for public bodies to wish for more financial resources, and so it is hard to draw any firm conclusions from these figures. In both years, a strong majority of all those surveyed indicated that financial allocations would remain the same or increase over the previous year.[63]

In three of the focus countries – namely Canada, India and the United Kingdom – the budget of the oversight body is processed as part of the budget of a government department, which is not as protected an approach as might be desirable. At the same time, none of those interviewed for this paper suggested that there had been any instance of direct interference with the budget for political reasons.[64] In Mexico, in contrast, the budgetary independence of INAI is guaranteed in the Constitution.[65]

Once again, it is too early to assess the robustness of the budgeting model for the Commission in Sri Lanka, given that it is on its very first annual cycle. Its budget is essentially voted by parliament, which is generally a preferred model internationally.[66]

I.4 Accountability

While independence is of the greatest importance, this does not mean that the body is simply free to do what it wants. As a public entity, accountability remains very important. As one author noted:

> It is important for the health of the access to information regime created by the Act that the Information Commissioner, while independent in their day to day operations, should be accountable for the performance of his/her duties.[67]

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[62] Organisation of American States, Committee on Juridical and Political Affairs, 23 April 2010. Available at: http://www.oas.org/en/sla/dil/docs/CP-CAJP-2841-10_eng.pdf.
[63] Centre for Freedom of Information (2013), *In the Experience of Information Commissioners: Results of the Information Commissioners' International Exchange Network Surveys 2013* and Centre for Freedom of Information (2014), note 47. Both available at: https://www.dundee.ac.uk/centrefoi/research/.
[64] See notes 16, 17, 70 and 71.
[65] Article 6(A)(VIII).
[66] See section 16(1)(a) of the Act.
[67] Ecclestone (2007), note 28, p. 8.

A key form of accountability is for the oversight body to observe carefully the provisions in the law which govern its operations and gave it its powers. In recognition of this as a general principle of administrative law, courts in many countries will automatically accept cases alleging that an administrative body has overstepped its powers, normally understood broadly to include cases where it interprets the law in a way that is not deemed to be reasonable on review. Thus, in India, although section 23 of the law seeks to oust the jurisdiction of the courts to review orders made under it, the courts have engaged in a lively process of judicial review of decisions of the oversight bodies.[68]

An important question is whether courts exercise only the powers noted above, referred to in administrative law as 'judicial review'. Two other standards of review are commonly employed, namely *de novo* judicial review, in which courts will substitute their own understanding of the law (not just whether the oversight body has interpreted the law 'reasonably') and a review of both facts and law, or full merits review, where courts will review the oversight body's findings of fact as well as law. There are pros and cons to each approach. On the one hand, allowing judicial appeals on the full merits can encourage official abuse of power and the bringing of frivolous cases simply to wear down the requester and/or oversight body. In an interesting development, in Mexico only requesters and not public authorities may lodge an appeal with the courts.[69] In Canada and the United Kingdom both parties can lodge judicial appeals although these are fairly rare in both countries. On the other hand, these are very complex matters and the depth and insight that judicial scrutiny brings can sometimes be important to resolve the underlying issues.

Beyond court challenges, in most countries, and in all of the four focus countries, the oversight body is required to prepare an annual report on both its activities and the performance of all public authorities under the law. Ideally, such reporting should be to parliament, as part of the overall accountability of the body to the public, through parliament, rather than to the government of the day. This is how it is done in three of the four focus countries.[70]

Another, less formal but probably no less important, form of accountability is for the body to respect strict transparency standards itself. In Mexico, for example, INAI has been scrupulous about being open, particularly in relation to matters about which the public has expressed a particular interest. In recent years, for example, the body has made a special effort to be open about issues such as the cost of their new

[68] For a review of some of this jurisprudence, see Research, assessment, & analysis Group (RaaG) and Satark Nagrik Sangathan (SNS) (2016), *Tilting the Balance of Power Adjudicating the RTI Act for the Oppressed and the Marginalised*. Available at: http://snsindia.org/Adjudicators.pdf.
[69] Article 180 of the General Act of Transparency and Access to Public Information, 2015.
[70] This is not the case in the United Kingdom, although the Office of the Information Commissioner has called for it. Interview with Steve Wood, Head of International Strategy & Intelligence, United Kingdom Information Commissioner's Office, 7 April 2017.

headquarters, funds provided to members for travel and the way it allocates its advertising revenues.[71]

In Sri Lanka, the courts will presumably exercise full merits review powers over the Commission, given that there is nothing in the legislation to suggest otherwise. The Right to Information Act also includes all of the regular rules on accountability, including by requiring the Commission to prepare a report annually on its activities, and to table that report before parliament (and also to publish it).[72]

Part II: Complaints

Dealing with complaints – instances where the requester believes that his or her request has not been dealt with in accordance with the law – is a core activity for right to information oversight bodies, whether these are formally termed complaints or go by other names, such as appeals, reviews or petitions.[73] Indeed, for purposes of this paper, the fact that a body addresses complaints is a core part of the definition of what constitutes an oversight body.

This part of the paper looks at a range of issues relating to the processing of complaints. In some cases, these are dependent on how the body is structured, as addressed above. For example, the processing of requests may differ between single person bodies and those which have multiple members. The issue of binding versus non-binding powers will also impact the way complaints are processed.

As a preliminary point, it should be noted that the oversight body should also be a subject of the right to information law in the same way as other public authorities. This flows both from the human rights nature of the right to information, pursuant to which it binds all organs of the State, and the fact that the practical grounds underpinning the right to information apply with equal force to an oversight body as to any other body.[74] However, from the perspective of complaints this raises an issue about requests that went originally to the oversight body. Different bodies deal with this in different ways. In India, for example, the first request is dealt with by a senior official within the CIC and any complaint is dealt with by a Commissioner (albeit this is not really a fully independent review). In the United Kingdom, similarly, internal separations are used to ensure that matters are dealt with by different parties at the two different levels. In Canada, in contrast, such matters are

[71] Interview with Francisco Roberto Pérez Martínez, Deputy-Director of Research and Analysis in the Office of Commissioner Joel Salas (Subdirector de estudios y análisis de la ponencia del comisionado Joel Salas), INAI on 26 April 2017.
[72] See section 37.
[73] The term 'complaints' will be used in this paper except when referring to the exact term used in a law.
[74] See Ecclestone (2007), note 28, p. 5.

dealt with by an *ad hoc* commissioner whose report is then included in the annual report of the Information Commissioner.[75]

Given that it is just starting out, the Sri Lankan Commission may wish to use the Indian approach for now, although over time consideration should be given to the more high-powered (in terms of independence) Canadian approach.

A second preliminary point is that effective use of technology can enormously facilitate the timely processing of both initial requests and complaints. Some management system will be needed to track the processing of complaints. Technology can help ensure consistency in the way they are treated and ease the administrative burden this places on officials. One of the more sophisticated models is the Mexican central electronic requesting system, Infomex or Plataforma Nacional de Transparencia Gobierno Federal, which not only tracks initial requests but also allows for the electronic lodging and tracking of complaints.[76]

Sri Lanka should certainly consider whether it can create a strong online platform for making and processing requests. In Mexico, all requests are entered into the platform, even if they did not come in that way. This requires, of course, that all information officers have access to both appropriate digital devices, normally computers, and the Internet. An alternative could be to create a platform and run as many requests as possible through it until such time as all information officers are online. A third option would be to start out by piloting an online platform with a few leading public authorities.

This part of the paper comprises four sections, the first of which addresses a range of what are termed "Core Process Issues". This covers issues like initial screening of complaints (for example for technical eligibility), and how, procedurally, complaints are dealt with and by whom, including how due process or natural justice needs are met while also respecting time limits and reporting on cases.

The second section looks at the question of informal resolution of complaints, whether this is considered to be a form of mediation or something else. Experience in many countries shows that the proper resolution of a large percentage of complaints is more-or-less immediately obvious to experts within oversight bodies. In such cases, going through formal investigations or adjudications usually does not make a lot of sense and it is better to try to get the parties to agree informally (and hopefully rapidly) to an appropriate and mutually acceptable solution.

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[75] Information provided by email by Shailesh Gandhi, former Commissioner of the Indian Central Commission, Steve Wood, Head of International Strategy & Intelligence, United Kingdom Information Commissioner's Office and Nancy Bélanger, General Counsel and Director of Legal Services, Office of the Canadian Information Commissioner.

[76] See: https://www.infomex.org.mx/gobiernofederal/home.action (Spanish version of the website). Brazil also operates a sophisticated central tracking system for requests. See Lanza (2015), note 26, para. 61. More information about the use of electronic requesting "portals" in different countries is provided in Centre for Freedom of Information (2014), note 47, pp. 13-14.

The third section looks at one core complaints processing issue in more detail, namely the question of whether or when it makes sense to hold a hearing to resolve complaints. Practice on this is divided among the core focus countries, with India almost always holding hearings and the other three countries normally or always proceeding by means of investigations conducted by the staff of the oversight body rather than quasi-judicial hearings.

Finally, the fourth section looks at the powers exercised by the oversight body. Again, practice here is divided, with different powers being exercised by different bodies. This section looks at the pros and cons of having different powers, as well as issues regarding when more intrusive powers, such as inspection, should be used.

II.1 Core Process Issues

The front end of the processing of complaints for most oversight bodies consists first of either registering the request and then screening it for eligibility as a complaint or, in some cases, the other way around (i.e. in some cases requests are only registered if they are eligible). The former seems to be a better approach inasmuch as it facilitates better tracking, the possibility of reopening a case and reporting on the percentage of complaints which were ineligible.

It is important to screen out ineligible complaints at an early stage to limit the amount of time and energy that is expended on them, given that they can be quite numerous.[77] The precise list of considerations dealt with at the eligibility stage varies between different countries. Technical considerations such as determining whether formal procedures have been followed are usually dealt with at this stage. These might, depending on the legislation, include issues such as whether the complaint is timely (if there is a time limit on lodging complaints) and the requisite information for making a complaint has been provided. Another bar to eligibility may be when the body to which the original request was directed is not covered by the law.

At this stage, the issue of whether all earlier procedures have been completed is also normally assessed. In all cases, this includes the completion of processing of the original request, whether this is achieved by a final response to the request from the public authority or by the expiry of the time limits.

[77] According to Kevin Dunion and Hugo Rojas, one-half of all of the complaints made to the Information Commissioner of the United Kingdom in 2014 were inadmissible for one reason or another. See (2015), *Alternative Systems of Dispute Resolution and the Right to Freedom of Information: Analysis of the Scottish, English and Irish Experience*, 3 Transparencia & Sociedad 69, p. 75.

Different countries have different rules regarding internal complaints (i.e. appeals to a higher ranking officer within the same public authority to which the request was originally directed). In some countries, there is no formal provision for such a complaint and it thus cannot be treated as a bar on eligibility for a complaint to the oversight body.[78] A second approach is where the requester has the option of making but is not required to make such a complaint.[79] In these cases, where no internal complaint has been lodged, this will not be a barrier to eligibility of a complaint to the oversight body. However, where such a complaint has been made, it is probably better practice for the oversight body to require that process to have run its course before it will accept a complaint, so as to avoid parallel consideration (i.e. by it and by the higher ranking internal officer) of the same matter. A third approach, found in some countries, is where requesters are required to make an internal complaint before they may complain to the oversight body[80] and in such cases completion of this stage will normally be treated as an eligibility requirement.

India presents a sort of dual-model approach with both 'appeals' and 'complaints'. Formally, 'appeals' to the CIC are allowed only after internal complaints have been made, the third approach outlined above, with the former sometimes being called 'second appeals'.[81] However, the law also provides for a system of 'complaints', which do not need to be preceded by an internal procedure, the scope of which is very broad indeed and includes, in addition to a list of specific grounds, "any other matter relating to requesting or obtaining access to records under this Act".[82] The two systems – i.e. of 'complaints' and of 'appeals' – have different procedures, although there are ongoing discussions about merging them.[83]

While it is important to screen out ineligible complaints, oversight bodies should take care not to go through the eligibility process in an excessively technical way as this may lead to unjust results and a failure to perform the oversight function properly. For example, in some cases, bodies respond to requests by claiming they are not covered by the law in the first place. The merits of such claims are not always obvious. If there is any doubt as to this, it should be addressed substantively through the complaints process and not at the eligibility stage. In other words, the mere fact that a body claims not to be covered by the law should not be dispositive of the matter, because sometimes this requires a substantive analysis of the merits of that claim.

There can also be difficult issues with time limits, especially in those countries where, as in Canada and the UK, public authorities have some discretion when it

[78] This is the case, for example, in Mexico and Canada.
[79] This is the case, for example, in the United Kingdom. See sections 36-46 of the Statutory code of practice issued under section 45 of the Freedom of Information Act 2000.
[80] This is the case, for example, in Brazil. See Article 15 of Law n. 12.527, of 18 November 2011.
[81] See section 19 of the Right to Information Act, 2005.
[82] See section 18(1) of the Right to Information Act, 2005.
[83] Interview with Shailesh Gandhi, note 16.

comes to setting the time limit for dealing with more complex requests.[84] In one case from Canada, for example, the Department of National Defence set itself a time limit of 1110 days for responding to a request. Although formally the time limit had not expired, and so processing of the original request had not been completed, the Information Commissioner accepted the complaint on the basis that it could assess whether the rules regarding extended time limits had been applied properly, ultimately finding the Department to be in breach of the law.[85]

It would make sense in Sri Lanka, as in other countries, to engage in eligibility screening of requests. Only some of the issues noted above will apply. For example, there are clear and strict time limits on the processing of requests so the problem highlighted in the previous paragraph should not arise. On the other hand, the definitions of a public authority allow for a measure of interpretation, so this eligibility issue might need to be assessed carefully. Obviously it will make sense to screen for technical issues, such as whether the formal processing of the original request has been completed (including because the time limits for responding have expired) and whether the complaint contains the requisite information, although where this is not the case the better option would be to assist the requester to provide the information rather than to reject the request. In Sri Lanka, there is an internal complaints process, with clear time limits, but this is not mandatory before lodging a complaint with the Commission.[86] The approach outlined above, whereby the Commission would not accept a complaint until the internal complaint had either been completed or perhaps formally withdrawn, is therefore recommended.

Once a complaint has been deemed to be eligible, there are different ways of processing it. The question of whether matters are dealt with via adjudication or investigation is addressed below, as is the question of whether informal resolution of the matter is attempted.

In the two focus countries where there is a single member of the oversight body – i.e. a commissioner – namely Canada and the United Kingdom, the practice is to assign each case to an investigator or a team of investigators and, in addition, to delegate the power to decide the case to senior case officers working at the oversight body. The same approach also applies in Scotland, which also has a single Commissioner. In these countries, most cases are decided without any direct

[84] In contrast, in Mexico, according to Article 132 of the right to information law, requests must be processed within 20 days which may be extended by another ten days, while in India, in accordance with section 7(1) of the law, requests must be processed within 30 days without any possibility of extending.

[85] The case went to court and the first instance court held that the Commissioner had no jurisdiction to hear the case until after the expiry of the extended time limit, although this was reversed on appeal and the Commissioner's original decision was upheld in its essence. See *Information Commissioner of Canada v. Minister of National Defence*, 3 March 2015, 2015 FCA 56. Available at: https://www.canlii.org/en/ca/fca/doc/2015/2015fca56/2015fca56.html?resultIndex=1.

[86] See section 31(4) of the Act.

involvement of the commissioner. The commissioner only gets directly involved in more difficult and/or sensitive cases, when they are referred up to her or him.

In direct contrast to this, in both of the focus countries with multiple-member oversight bodies, cases are decided by members. In India, individual commissioners decide cases without the involvement of the other commissioners, although the member responsible for the matter can refer it, via the Chief Commissioner, to panels of members (for example of three or five or even all of the other members) where the case raises difficult issues or the member is otherwise uncertain as to how best to deal with it.[87] In Mexico, in contrast, all seven members meet once a week to process cases collectively (about 200 per week). There is an elaborate procedure to prepare cases for this collective consideration. Each case is allocated to one of the members of INAI for initial processing, and the case with their summary and recommendation is then shared in advance with the other members. This allows for consensus cases to be identified early on and then agreed very rapidly, leaving more time to focus on cases where there are differences of opinion (which represent approximately 25 percent of the total).[88]

In India and Mexico staff of the oversight body prepare cases for consideration by the member, or leading member in the case of Mexico. This involves such activities as presenting it in a standard format and highlighting the key issues it raises.

It is also common for cases to be allocated – whether to members or investigators or teams of investigators – on some rational basis. In the United Kingdom, for example, there is consistent allocation of complaints relating to certain public authorities (i.e. those which receive more complaints) to given teams of investigators.[89] In India, as well, complaints from specific public authorities are consistently allocated to certain members.[90] This allows for subject specialisation (i.e. regarding the subjects dealt with by the relevant public authorities) as well as for the building of relationships with key staff (i.e. information officers) at those public authorities, both of which can facilitate the processing of requests.

In Sri Lanka, either the Indian or Mexican approach would make sense. If the former is selected, then the possibility of referring cases to a panel of members is strongly recommended. If the latter, then a system to ensure that non-contentious cases are able to be processed quickly, as employed in Mexico, would be useful.

A central challenge in relation to the processing of complaints is how to observe at least minimum due process guarantees while also respecting either statutory or, in the absence of these, reasonable time limits. Some laws provide for maximum time limits for processing of complaints while others do not. From among the focus

[87] Interview with Shailesh Gandhi, note 16.
[88] Interview with Francisco Roberto Pérez Martínez, note 71.
[89] See Dunion and Rojas, note 77, p. 75.
[90] Interview with Shailesh Gandhi, note 16.

countries, only Mexico sets a clear time limit on the processing of complaints, of 30 days.[91] When there are no such limits, it is better practice for oversight bodies to set clear performance targets for processing requests. Undue delay at this stage effectively amounts to a denial of the right of access and also undermines key objectives of legislative guarantees of the right to information.[92]

Several other issues crosscut this one. One is the core procedure for resolving requests, with adjudication (i.e. hearings) generally taking longer than investigation procedures and greater efficiency being possible where decision-making on complaints or at least substantial processing of complaints is delegated to senior staff. A second is resources, since a greater staffing complement obviously allows for more rapid processing of requests, especially if decision-making can be delegated from members to staff.

Third, there is an enormous difference between complaints that are simple to resolve and those that are more complex. Informal resolution is an important part of this, but even formal processes can be completed far more rapidly for easy requests.[93] In Canada, cases which appear to be relatively simple are identified for rapid processing as one means of limiting average time limits for processing complaints.

Fourth, quick processing depends on setting short and yet realistic deadlines for parties to provide submissions/respond to questions from the oversight body. The oversight body needs to set clear rules in this area and then apply them firmly but fairly (i.e. by granting extensions or waivers in appropriate cases). In the United Kingdom, the ICO aims to prepare cases so that it only needs to have one interaction with public authorities in most cases, although of course more interactions may be necessary in more complex cases.

It is important to keep in mind that the whole idea of a system of administrative oversight is to provide for rapid and cheap (at least for the parties) resolution of complaints. It is, therefore, neither practical nor consistent with the very idea of administrative complaints to try to provide the same degree of due process guarantees that one might expect to get from the courts. Normally, one opportunity to make representations on the matter, coupled with an obligation to respond to any

[91] See Article 165 of the law. For more information about average request processing times for several oversight bodies, see Centre for Freedom of Information (2013), note 63, pp. 5-6.
[92] According to Dunion and Rojas, note 77, p. 77, in the United Kingdom, internally set performance targets as of 2014 require all ineligible complaints to be resolved within 30 days, 90 percent of complaints to be decided within six months and 100 percent of complaints to be decided within one year, and these targets were met for the previous four years.
[93] In an Interview on 7 April 2017, Shailesh Gandhi, former Commissioner of the Indian Central Commission, indicated that even using a hearing procedure, he managed to complete the vast majority of cases to the satisfaction of the parties within ten minutes. While this is undoubtedly remarkable, and may speak to the relative novelty of the system and the fairly self-evident appropriate resolution of many complaints, it still suggests that it should be possible to resolve easy cases quickly.

further questions the oversight body might have, will be enough. Where completely new issues arise during the investigation of a case, a second round of representations might be needed.

There is a very strict time limit for processing complaints, of just 30 days, in Sri Lanka. This means that the procedure will need to be very streamlined indeed, especially for more complex cases. And it may not be possible to provide for a second round of representations.

In most systems, the first thing the oversight body does, at least for complaints relating to refusals to provide access but also sometimes for other complaints (for example regarding time limits or fees), is to request access to the information which is responsive to the request, as well as any other information that may be needed to resolve the complaint.[94] This raises a number of issues. One is the issue of security vetting for staff at the oversight body, since in many countries individuals need clearance to view classified documents.[95] In both Canada and the United Kingdom, investigators do have security clearance, with some staff being cleared to the very highest levels. For more highly classified information, however, an issue also arises as to the information security procedures available at the oversight body. For highly sensitive information, the practice in Canada is for staff with the requisite level of clearance to review the information on site, rather than have it delivered to their own office. A higher level of care is also exercised in relation to this information, so that it is only viewed where this really is needed to resolve the complaint. Mexico does not have a similar system of security clearance as applies in Canada and the United Kingdom, but where information is national security classified only Commissioners and their Secretaries are able to view it and, as in Canada, they often review the information at its home location rather than having it transferred to the offices of the oversight body.

In Sri Lanka, as in each of the four focus countries, the Commission has the power to review all information, whether or not it has been denied to a requester.[96] In line with the practice not only in the focus countries but also in most other countries, the Commission should normally review information which is responsive to any request. This may be needed not only to assess whether or not it is covered by an exception listed in the Act, but also to determine whether any delay or fee is appropriate. At the same time, the Commission may wish to be more circumspect in its use of this power where the information is classified at the highest levels.

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[94] According to Centre for Freedom of Information (2013), note 63, 55 percent of oversight bodies surveyed always review information before coming to a decision while another 33 percent usually do. See p. 6.

[95] See, for example, section 61 of the Canadian Access to Information Act, which requires the Commissioner and her or his staff to comply with any security requirements before accessing information.

[96] See section 15(c) of the Act.

Even though oversight bodies normally have a right to access all information, this does not grant them a right to disclose it. Instead, they are normally bound by strict confidentiality rules. These are necessary to maintain confidence in the system and to ensure that the authority which is the custodian of the information retains control of the decision-making process regarding disclosure, including as to whether or not to lodge a judicial appeal against any decision by the oversight body to disclose information. So, while many oversight bodies can order the disclosure of information, they must leave it up to the original public authority to actually undertake that task.

It seems obvious that oversight bodies should engage in robust reporting on complaints, and most do, but there are some surprising limitations. In Canada, in an odd twist, the OIC is not allowed to report on cases other than those that are included in its annual report to parliament. According to the 2013 Survey of oversight bodies carried out by the Centre for Freedom of Information, 38 percent of oversight bodies surveyed are required by law to publish their decisions and another 56 percent are allowed to and usually do, but three percent each are, respectively, either forbidden from publishing decisions or usually choose not to. From among those that do publish decisions, 55 percent publish the full text, 33 publish only an edited version and 12 percent publish a summary. These are perhaps surprising statistics in the era of open government and given that it is easier to publish the whole decision than to produce a redacted or summary version. Finally, only 32 percent usually publish the name of the requester, compared to 85 percent the name of the public authority.[97]

It is recommended that Sri Lanka follow better practice, which is also the simplest way to do things, and publish its full decisions, although it may wish to redact the name of the requester. In due course, a summary could be added and consideration might be given to adding search tags to decisions (so that they could easily be searched, for example, by date, public authority concerned, exception(s) relied upon and so on).

II.2 Informal Resolution (Mediation)

Although only a few right to information laws provide expressly for the informal resolution of complaints (or mediation), in fact this is very commonly relied upon to resolve information disputes. Perhaps a high water mark of this is Albania, where 199 complaints were resolved through mediation in 2015, with only 48 going to a formal decision and another 27 falling into other categories (mostly being beyond the scope of the law).[98] However, consistently high statistics on informal resolution

[97] Centre for Freedom of Information (2013), note 63, pp. 7-8.
[98] Dorina Asllani (2016), *The Information and Data Protection Commissioner's Effectiveness on Transparency: Case Study Albania*, p. 19. Available at: https://www.degruyter.com/view/j/nispa.2016.9.issue-2/nispa-2016-0012/nispa-2016-0012.xml.

are reported from other jurisdictions, including those in Western democracies.[99] According to a 2014 survey, 35 of the 52 oversight bodies that responded on this issue indicated they had the power, formally or otherwise, to mediate and of those 21 said they used this power often, 13 used it sometimes and none had never used it.[100]

A first point is that while this might be preferable, there is no need for formal legal endorsement of informal information dispute resolution. Some jurisdictions – such as Scotland[101] and Indonesia[102] – provide explicitly for informal resolution of disputes (referred to in the latter law as mediation). In Ireland, the law provides that the oversight body can "endeavour to effect a settlement between the parties concerned" and, during this time, suspend its review of the matter.[103] In the United Kingdom, in contrast, the OIC is specifically required to "make a decision" on a complaint unless certain eligibility criteria are not met or the complaint "has been withdrawn or abandoned".[104] However, in practice this has not served as a barrier to the pursuit of informal resolution of complaints, as long as the requester consents to this and, where informal resolution is successful, withdraws his or her complaint.[105]

In Mexico, although there is no developed system for the informal resolution of complaints, there is an interesting system whereby complaints, once they have been determined to be eligible (i.e. once they have passed through the first step), are sent to the relevant public authority which then has to 'pronounce' on the matter. At that stage, i.e. once it is clear that the matter is being reviewed by the oversight body, the authority may revise its response, which may lead the requester to withdraw the complaint. Between 2014 and 2016, approximately 20 percent of all 'complaints' were resolved at that point.[106]

At the same time, as the above discussion makes clear, the precise wording of the legal framework may have important implications for the process for conducting informal resolution. In the United Kingdom, for example, this procedure can only be

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[99] For example, Harry Hammitt (2007), *Mediation Without Litigation*, p. 3, reports that historically over 50 percent of the cases resolved by the Connecticut Freedom of Information Commission, one of the few true oversight bodies in the United States, were resolved through mediation or administrative dismissals. Available at: http://www.nfoic.org/sites/default/files/hammitt_mediation_without_litigation.pdf. According to Dunion and Rojas, note 77, p. 75, about one-quarter of all complaints before the oversight body in the United Kingdom in 2014 were resolved informally. At p. 72, they report that about 10 percent of all cases in Scotland in 2013-14 were resolved informally.

[100] Centre for Freedom of Information (2014), note 47, p. 8.

[101] See s. 49(4) of the Freedom of Information (Scotland) Act 2002.

[102] See Articles 23, 26(1)(a) and 38 of Act Number 14 of the Year 2008, Public Information Disclosure Act.

[103] See s. 22(7) of the Freedom of Information Act 2014.

[104] See s. 50(2) of the Freedom of Information Act 2000.

[105] See Dunion and Rojas, note 77, p. 80.

[106] Interview with Francisco Roberto Pérez Martínez, note 71.

considered to have been completed where the requester withdraws his or her complaint which, among other things, means that the substance of the matter cannot be reported on, so that the general benefits of processing complaints in terms of openness standards and creating an historical record are lost. This will probably not be the case where the law specifically recognises mediation as an informal dispute resolution procedure.

In all cases, the successful informal resolution of an information dispute will fail to create a precedent of any sort since it has no formal legal status as a resolution (in essence, it is just a bilateral agreement between the parties). For this reason, some authors have suggested that where cases raise public interest issues or where the legal precedents are unclear (so the complaint may help fill a gap) they should not be dealt with via informal resolution.[107]

There are a number of benefits associated with informal resolution of complaints. One is that, due to the informal nature of the procedure, it is often much faster than going through a formal complaints processing procedure. At the same time, in India, processing of complaints is already so rapid, and informal, procedurally speaking, that a parallel informal process hardly makes sense and is rarely practised.[108]

Time efficiencies have also been identified as a possible risk with this sort of procedure. Oversight bodies are often under pressure to resolve complaints as rapidly as possible and this may create incentives for them to promote informal resolution even when it is not warranted. Ultimately, the whole purpose of the complaints process is to ensure that the rights of requesters are respected and this is recognised as an overriding goal by most oversight bodies. As Dunion and Rojas note:

> All the public agencies that we have researched in Scotland, England and Ireland have it as a priority that the informal result should satisfy the interests of the applicant.[109]

Strict rules on when it is appropriate to engage in, and to conclude, informal resolution procedures should help to mitigate this problem. In particular, oversight bodies should never accept an informal resolution that delivers a sub-standard result to the requester, something they are obviously in a good position to assess. Making sure that an informal dispute resolution processes are overseen by qualified staff – in terms both of trust in them by the parties and of their knowledge of the law and the rules – is also essential to avoiding abuse of or failures in the system.[110]

Notwithstanding the above, there are a number of potential benefits to informal resolution beyond just saving time and effort. It is possible that more information may be obtained via informal resolution either due to the informal nature of the

[107] See Dunion and Rojas, note 77, p. 81.
[108] Interview with Shailesh Gandhi, note 16.
[109] Note 77, p. 82.
[110] See Dunion and Rojas, note 77, p. 84.

proceedings – which, as noted above, fails to create a precedent for either the oversight body or the public authority – or due to the passage of time. For formal procedures, the date is normally frozen on the date that the original request is lodged but an informal resolution may take into account intervening factors that have removed or mitigated the sensitivity of the information over time.

Dunion and Rojas identify a number of other potential advantages, including: that the process may lead to higher levels of satisfaction for the parties (presumably by removing the adversarial element and creating greater certainty about the result); there may be cost savings for both parties (including the requester where fees are charged for complaints which might be returned following an informal resolution); the additional certainty for both parties due to the fact that no legal appeal may follow an informal resolution; and the fact that an unreported informal resolution may lead to face saving for the public authority.[111] The latter two benefits might also be posited as disadvantages, however. The absence of an appeal may deny one or another party, and particularly the normally weaker situated requester, from obtaining the more considered view of the matter that would be available via the courts. And it may be appropriate for the public authority to suffer some loss of face if it has behaved badly.

There is also the issue of securing compliance with the agreement, where relevant, by the public authority (which will by definition be the party which is required to take action because it has controlled everything up until that point). Dunion and Rojas suggest that – at least in Ireland, Scotland and the United Kingdom – compliance rates are very high, but also recommend that the oversight body not formally close the case until full compliance with any agreement has been secured.[112]

The very short time limit for processing complaints in Sri Lanka means that careful consideration needs to be given to the issue of informal resolution of information disputes. On the one hand, these still represent an efficient and positive way of resolving many disputes. On the other hand, this represents an additional step in the process where it is not ultimately successful, making it difficult to meet the time limits. One possibility might be to freeze the clock on complaints – with the agreement of the parties – while they are in the informal procedure. At a minimum, consideration should be given to the Mexican approach which, while not formally a dispute resolution procedure, at least gives the public authority the chance to reconsider its response to a request.

II.3 Investigation vs. Adjudication

[111] Note 77, p. 79.
[112] Note 77, p. 83.

A key issue regarding the processing of requests is the core procedure used. There are, essentially, two main options here, which will be called adjudication – i.e. a quasi-judicial process which involves a hearing and the ability of the parties to engage in a back and forth exchange or question each other – and investigation – i.e. a process whereby the members or staff of the oversight body receive essentially bilateral submissions from the parties and otherwise investigate the matter themselves.

As noted above, from among the four focus countries, three – namely Canada, Mexico and the United Kingdom – rarely if ever hold hearings while in the fourth – namely India – they are the rule. In both Mexico and the United Kingdom, the oversight body does not even have the power to compel witnesses to appear before it. In Albania, hearings are rare but not unheard of, with just two held in 2015 out of 48 cases.[113] In contrast, in Connecticut, hearings are the norm, as in India,[114] and this is also the case in Indonesia. According to Holsen and Pasquier, overall investigations is the procedure used by more information oversight bodies.[115]

One of the main arguments against hearings is that they are more time consuming than investigations. This does not, however, appear to be the case in India, where complaints decided via hearings are often dispatched very rapidly.[116] At the same time, in this case it is hard to see what the benefit of a hearing is, since a ten- minute exchange will hardly allow the parties to present their side of the issue fully. And, for obvious reasons, the cost and logistical challenges of arranging hearings is complicated.[117]

Investigations also arguably create more of a level playing field. Pursuant to the investigation approach, the burden falls mainly on the oversight body (and its staff) to ensure that complaints are investigated properly and that all of the evidence is collected. This means that the weaker party, almost always the requester, is at less of a disadvantage than in the more adversarial adjudication procedure, although the decision maker, i.e. the oversight body, can also play a more active (i.e. balancing) role in the adversarial procedure as well.

It is probably true that hearings, at least potentially, allow for a more considered assessment of a complaint, which each side being able to respond dynamically to issues raised by the other side. It is no coincidence that the vast majority of legal cases in different countries and legal systems around the world are decided via live hearings. If so, a triage system is perhaps warranted whereby more simple cases are

[113] Dorina Asllani (2016), note 98, p. 18.
[114] Harry Hammitt (2007), note 99, p. 3.
[115] Note 19, p. 224.
[116] Yutika Vora and Shibani Ghosh (2009), *Report on Work-practices at an Information Commission* (monograph on file with the author), suggest that between five and seven cases may be scheduled for each one and one-half hour time slot. See p. 10.
[117] In India, the practice has moved towards using videoconferencing, especially for requesters, to facilitate hearings, but this obviously involves significant costs.

generally decided via informal resolution, intermediate cases are decided via an investigation procedure and the more complicated cases go to a hearing. Of course this depends on whether the legislation ultimately allows for these options.[118]

In Sri Lanka, the Commission explicitly has the power to hold hearings and to require witnesses to appear before it, so using this procedure is obviously an option for it.[119] At the same time, the disadvantages of hearings, particularly given the very strict time limits for completing complaints, are very relevant. As a result, a triage system may make most sense, with hearings only being held exceptionally where this would significantly facilitate the proper resolution of a complaint.

II.4 Powers

This section of the paper looks at the powers which can be exercised by an oversight body during the complaints process. In most cases these powers are formally defined by the law and they can be divided into two broad categories (not including powers relating to promotional and support activities, addressed below): powers relating to the investigation/adjudication of complaints; and powers following a decision in a complaint (i.e. to impose remedial measures). Sort of running in parallel to this are powers exercised by some oversight bodies to set rules governing the processing of requests by public authorities (for example, to approve the fees that may be charged).

Crossing-cutting this is the issue of when those powers which are available to the oversight body should be used. The fact that a body has a power does not mean that it will necessarily use that power frequently. This section will canvas considerations relating to the exercise in practice of powers.

Three main powers are normally associated with the investigation/adjudication of complaints, namely the power to order the production of documents, the power to compel witnesses to appear and to testify under oath, and the power to inspect the premises of public authorities. The vast majority – 88 percent – of oversight bodies not only have the power to but also always or usually actually use that power to review information which is responsive to a request when determining a complaint.[120] Such review may not, however, be necessary when:

- The complaint is not about whether or not information was provided (for example, it might be about time limits or fees or the format in which the information was provided).
- It is immediately obvious on the face of the complaint that the information either is or is not confidential.

[118] In the survey conducted by the Centre for Freedom of Information (2014), note 47, p. 8, only 24 of 51 oversight bodies that answered the question indicated that they had the power to hold hearings.
[119] See sections 15(a) and (b) of the Act.
[120] See Centre for Freedom of Information (2013), note 63, p. 6.

- The oversight body has already dealt with an essentially identical complaint.

In addition, there may be other reasons why oversight bodies might not review this information. For more highly classified information – especially of a national security nature – maintaining the security of the information is an important countervailing consideration. Threats to this can be mitigated, but not totally eliminated, by viewing the information on site, but this may not be very convenient, especially if, as is the case in many countries, only a small number of people are cleared to view this information. Where the information in question is very voluminous, it may also be sufficient to review a random sample of the information – to get a sense of its sensitivity – rather than all of it.

From among the four focus countries, two – namely Canada and India – have the power to order witnesses to appear before them while the other two – namely Mexico and the United Kingdom – do not have this power. In Canada, however, this power is rarely used because complaints are investigated without in-person hearings. The power is, therefore, only used when for some special reason access to the personal testimony of an individual is needed for purposes of resolving a complaint or a wider investigation. In the United Kingdom, where this power is not available, this does not appear to have undermined the ability of the oversight body to pursue its functions successfully.[121] More generally, a 2014 survey indicated that 28 of the 53 respondents to the question had the power to compel individuals to testify before then, but that only eight used this power often, 14 used it sometimes and another four had never used it.[122]

The power to inspect public authorities is also something that needs to be used sparingly but would seem to be more important for deciding complaints than the power to compel witnesses. Here, the 2014 survey suggested that 26 of 51 respondents had this power, and that 3 used it often, 10 sometimes and one never.[123] It may be important to use this power when the oversight body does not believe claims by the public authority regarding the amount of information that they claim to hold which is responsive to a request (in other words, where the oversight body believes the public authority is withholding responsive information). This power may also be needed where the oversight body has the power to assess overall compliance with the law (i.e. inspection may be used to assess structural shortcomings on the part of public authorities in terms of implementation of the law).

In terms of remedial powers, almost all oversight bodies have the power to order or recommend that public authorities disclose information, which is what most

[121] Interview with Steve Wood, note 70.
[122] Centre for Freedom of Information (2014), note 47, p. 8. It is not clear why, when 28 jurisdictions said they had the power to do this, only 26 responded on the issue of how often they used it.
[123] Centre for Freedom of Information (2014), note 47, p. 8. Once again, the reason for the gap between the total number of positive responses (26) and those responding on frequency of use (only 14) is not clear.

complainants are looking for.[124] However, a number of other remedies for requesters are available in different jurisdictions. In India, for example, the CIC can order the public authority not only to provide the information but also to provide it in a specific format (such as electronically or in printed form), and to compensate the requester for any loss suffered.[125]

A related power is that of imposing punishments on either public authorities or individuals who breach the law, otherwise than by failing to implement a decision of the oversight body. This power is exercised by a few oversight bodies, although it is relatively rare. Once again, India provides a leading example of this with the various oversight bodies (Central and State) having the power, where information officers have not complied with the law, both to impose fines directly on them and to recommend them for disciplinary action.[126] These powers have been used relatively often in India,[127] while powers of sanction, whether exercised by the oversight body or other actors, have been used very rarely in many other countries.[128] In India, the oversight bodies also have the power to impose wide-ranging structural remedies on public authorities, such as to undertake training, to manage their records better or to appoint an information officer.[129]

In Sri Lanka the Commission does not have the power to inspect pubic authorities but it has the other investigation powers listed above. In terms of remedial powers, it does not have the power to order compensation for requesters, although it may order a public authority to reimburse fees charged.[130] The Commission also does not have the power to sanction either information officers or public authorities and the main law is silent on imposing structural remedies on public authorities. However, Rule 27 of the Rules adopted in February 2017 gives the Commission the power to direct the public authority to undertake a number of remedial actions, including to better manage its records, to train its staff and to publish more information on a proactive basis.

Part III: Promotional and Support Mandate

[124] For a broad overview of this power, see the results achieved by different countries on Indicator 43 on the RTI Rating, which is available (sorted out from the other indicators) at: http://www.rti-rating.org/by-indicator/?indicator=43.
[125] Sections 19(8)(a)(i) and 19(8)(b) of the Right to Information Act, 2005.
[126] Sections 20(1) and (20 of the Right to Information Act, 2005.
[127] Interview with Shailesh Gandhi, note 16.
[128] See Susman, Thomas, Jayaratnam, Ashwini, Snowden, David and Vasquez, Michael, *Enforcing the Public's Right to Government Information: Can Sanctions Against Officials for Nondisclosure Work?* (December 2012), p. 1. Available at SSRN: https://ssrn.com/abstract=2295466.29 or http://dx.doi.org/10.2139/ssrn.2295466.
[129] See section 19(8)(a) of the Right to Information Act, 2005.
[130] See section 15(g) of the Act.

III.1 Introductory Part

It makes a lot of sense for right to information oversight bodies to play other roles than simply dealing with complaints. The complaints function means, essentially by definition, that these bodies have an enormous amount of expertise on the right to information and not applying this in other areas of need would be a loss for everyone. Oversight bodies tend to act as right to information champions which, given the strong countervailing winds that are normally present, often referred to loosely as the 'culture of secrecy', is crucially important.[131] Oversight bodies can also help to ensure that implementation is coherent across the normally hundreds and sometimes thousands of different public authorities that are subject to the right to information law.[132] At the same time, it is also important to have a central internal body (sometimes referred to as a 'nodal body') that takes on promotional/support roles, especially vis-à-vis public authorities.

In many countries, the right to information laws specifically allocate a number of promotional and support roles to oversight bodies. For fairly obvious reasons, this is ideal where it applies. But even where a role is not allocated to an oversight body, in most cases there is nothing formal to prevent it from taking on that role, as long as it is sufficiently closely connected to its core mandate of promoting the right to information.

At the same time, at least in some cases having a legal mandate to engage in promotional issues does make a difference to how this is or can be done. For example, having a formal mandate to set minimum standards in a given area – such as proactive publication or records management – is very different from merely offering support, even in the form of suggested minimum standards, to public authorities. Similarly, there are clear benefits to requiring government to consult with the oversight body before legal or policy changes affecting the right to information are introduced, although even without this there is normally nothing to stop an oversight body from, for example, making comments on draft legislation.

In most cases, the real issue is one of priorities and, ultimately, of funding. Where an oversight body lacks a formal mandate to engage in promotional or support activities, it can only do so once its primary responsibility, namely to process complaints effectively, has been discharged. Otherwise, it will likely be subject to criticism, perhaps even from those who oversee the approval of its budget.

Even where it has a legal mandate to undertake promotional/support activities, the extent to which it can actually do so will naturally be bounded by the resources available for this, especially given that many of these activities are relatively cost-

[131] Holsen and Pasquier (2012), note 3, p. 226, quote several oversight bodies, including those of Australia, Canada, Mexico and Ireland to the effect that this is one of their responsibilities.
[132] *Ibid.*

intensive. Experience in countries around the world shows that most oversight bodies have very limited resources to undertake promotional or support activities.

Regardless of whether or not there is a legal basis for promotional activities, they may give rise to a risk of certain real or apparent conflicts of interest. This is perhaps particularly the case where one of the roles of the oversight body is to provide advice to public authorities. In the United Kingdom, for example, separation is maintained between the complaints function and the provision of guidance, whether written or via the helpline. Furthermore, when advice is provided via the helpline, care is taken to avoid making specific comments on a particular case. Instead, the advice will identify general principles and rules, and perhaps point the recipient to documents or cases that appear to be relevant to the issue they raise.[133]

A number of authors refer to a range of possible promotional and/or support roles for oversight bodies.[134] Five main areas are addressed here. The first is raising public awareness, which is probably the most ubiquitous promotional role undertaken by oversight bodies, with almost all of them at least participating in activities which aim to create awareness. The second looks at a range of activities which, broadly, aim to provide support to officials and, in particular, those officials who are given dedicated responsibilities for implementing the law, often referred to as information officers. Under this section, issues such as training, central tracking systems, records management and proactive publication are all addressed.

A third activity which broadly falls into the category of promotion/support is that of monitoring/assessing the extent to which public authorities are complying with their obligations under the law. This runs in parallel to the complaints function, and can been seen as a sort of *suo moto* or self-driven version of this.

Fourth, most oversight bodies undertake a central reporting function, providing consolidated statistics and other information about implementation measures to key decision makers, academics and the general public. This is key to ensuring that there is some degree of awareness about what is happening within the system.

Fifth, oversight bodies are increasingly being allocated a range of regulatory/policy functions. These may range from setting fees for providing information to approving exceptional measures, such as extensions of the time limits or periods for historical classification of information. Closely related to this, many oversight bodies undertake some sort of advocacy whether this is aimed at law reform or promoting better implementation of the law.

In the case of Sri Lanka, the Commission has a legal mandate to undertake a number of promotional/support roles. These include, among others, monitoring the

[133] Interview with Steve Wood, note 70. See also Neuman (2009), note 3, p. 13.
[134] See, for example, Holsen and Pasquier (2012), note 3, p. 225 and Ecclestone (2007), note 28, pp. 3-4.

performance of public authorities, making recommendations for reform, undertaking training and public awareness-raising activities and issuing guidelines on record management.[135] The Commission also has important powers in relation to the requesting process,[136] proactive publication,[137] and reporting.[138]

Section 5(5) of the Act is relevant to the issue discussed above of a possible conflict of interest. It states, in full:

> An information officer may seek the advice of the Commission, with regard to an issue connected with the grant of access to any information which is exempted from being disclosed under subsection (1), and the commission may as expeditiously as possible and in any event give its advice within fourteen days.

This appears to refer to issues arising in the context of a specific request, given the time limit and the way the section is worded. In any case, it would certainly apply in that context. In line with how the ICO operates in the United Kingdom, the Sri Lankan Commission should consider limiting itself in such cases to providing general advice and information of relevance to the case, rather than specific advice as to how to deal with the matter at hand. It should also make sure that the advice function is institutionally separated from the complaints processing function.

III.2 Public Awareness

As noted above, almost all oversight bodies undertake some sort of public awareness raising activities, even if it is only to give talks at public events. Members of the oversight body or senior staff may be invited to public events which target a particular set of stakeholders – such as the media, civil society or academics – and then further publicity is achieved through media coverage of the event.

Beyond this very basic type of activity, there are a number of options. In many cases, official actors are tasked with preparing a guide for requesters as to how to exercise the right to information, although this is the case in only one of the focus countries, namely India, where the central and state governments are tasked with preparing guides, in their official languages, to show citizens how to make requests.[139] Similar obligations exist, among others, in Serbia,[140] Sierra Leone[141] and South Africa.[142]

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[135] See sections 7(2) and 14(a), (b), (f), (g) and (h) of the Act
[136] For example, pursuant to sections 14(c)-(e) of the Act, to set the fees.
[137] See sections 8(1) and 9(1)(b) of the Act.
[138] See section 42(1)(d) of the Act.
[139] See sections 26(2)-(4) of the Right to Information Act, 2005.
[140] See Article 37 of the Law on Free Access to Information of Public Importance, 2003, which requires the oversight body to adopt such a guide.
[141] See section 8(1)(f) of the Right to Access Information Act, 2013, which requires each public authority to adopt a guide.
[142] See section 10(1)-(4) of the Promotion of Access to Information Act, 2000, which requires the Human Rights Commission to adopt a guide in each official language.

Under many laws, certain actors are also given a more general public awareness raising role. In India, for example, the central and state governments are required to undertake general public awareness raising activities and to encourage public authorities to participate in those activities.[143] In addition to attending conferences and public events hosted by others, oversight bodies in many countries host their own public awareness-raising events. There is a particular focus on hosting events on International Right to Know Day, which is 28 September, when activities are happening all around the world.[144]

Beyond this, the options here are essentially bounded only by imagination. It is not easy to reach an entire, or even a significant portion of, a population. Trying to engage the participation of public authorities, as is formally required under the Indian law, can be very important, given the massive outreach capacity that, collectively, they possess. Imagine if, for example, every public authority with a public office – every police station, every hospital and health clinic, every public service office – displayed a poster about the right to information. Given the amount of time that people spend waiting in these places, the public outreach would be huge, even though it is a simple and essentially low-cost measure.

The media are another way to multiply public outreach effectiveness, although this is far more challenging today, given the proliferation of social media, media silos and the waning or even disappearance of media playing a true 'public square' role. At the same time, catchy media outreach ideas – such as giving positive (golden key) and negative (rusty padlock) awards to best and worst performing public authorities – can foster strong media interest in this issue.[145] Of course the award of these sorts of awards depends on having an appropriately robust methodology and system of monitoring, so that awards will be fair.

Related to, but different from, public outreach efforts, is the promotion of research about the right to information. Despite its importance as a democracy issue, the right to information attracts limited academic interest in most countries. At the same time, there is an important need for academic research into this issue, to inform new ideas, to assess past performance and to generate a better understanding of the strengths and weaknesses of the system.

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[143] See section 26(1) of the Right to Information Act, 2005. For more information on this, see http://www.rti-rating.org/by-indicator/?indicator=56, which shows the obligations in this area for all countries which have right to information laws.

[144] For more information on these events, visit http://foiadvocates.net/?page_id=10255. In 2015, UNESCO formally recognised the day, albeit under a different name, i.e. International Day for Universal Access to Information. See http://www.unesco.org/new/en/brasilia/about-this-office/prizes-and-celebrations/international-day-for-universal-access-to-information/.

[145] See http://www.freedominfo.org/2013/10/awards-programs-reward-effort-chastise-opacity/ for a story about such awards in Bulgaria.

In some countries, oversight bodies play a direct role in terms of supporting and promoting research. In Mexico, for example, INAI supports the publication of around ten research publications each year.[146] Not all oversight bodies have the resources to do this, but there are many other ways of fostering greater academic interest, including by hosting conferences directed at academics, by offering to collaborate with them on research (for example by helping them access relevant information and giving interviews to them) and by proposing ideas for research, something academics are often looking for.

As has already been noted, the Sri Lankan Right to Information Commission has a broad mandate to undertake public awareness-raising activities. These often depend on resources, but there is also the option of obtaining funds from donors, which the Commission is specifically allowed to do.[147] Some of the more accessible outreach activities that should be considered in the early days include celebrating International Right to Know Day, perhaps in collaboration with some other actors, and perhaps some innovative ideas, like the posters. Awards have proven very successful in other countries but, as noted, this depends on first developing a methodology and then monitoring against it. Soft research support activities could also be contemplated early on, but actually providing funding for this could, if at all, come later on.

III.3 Support for Officials

Just as economics are often explained by reference to supply and demand, these two descriptors are also often applied to the right to information. If the previous section looked at the role of oversight bodies in terms of building demand, this section looks at their role in promoting supply. Many right to information laws place a general obligation on oversight bodies to advise, support, guide or assist public authorities or sometimes information officers in implementing the law. Even where this is not specifically mandated by law, the oversight body may provide such support.

As it happens, from among the four focus countries, only in Mexico and the United Kingdom does the oversight body really provide significant support to officials. In Mexico, a rather unique approach has been taken whereby what is called the National Transparency System, Access to Information and Protection of Personal Data has been created with INAI at its helm. The National System comprises INAI, its counterpart bodies at the state level, the Superior Audit Office, the General Archive of the Nation and the National Institute of Statistics and Geography. It is chaired by the President of INAI, its Executive Secretary is appointed by INAI and INAI has overall responsibility to "lead and coordinate" it.[148] Article 31 of the General Act of

[146] Interview with Francisco Roberto Pérez Martínez, note 71.
[147] See section 16(1)(b) of the Act.
[148] See Articles 32, 36 and 41(V) of the General Act of Transparency and Access to Public Information, 2015.

Transparency and Access to Public Information sets out a long list of functions for the National System, many of which include providing support and guidance to information officers and/or public authorities.

In the United Kingdom, the ICO has a general responsibility to "promote the following of good practice by public authorities" in relation to observing the law.[149] Other examples of general promotion on the part of the oversight body include Kenya, where: "The functions of the Commission shall be to— … work with public entities to promote the right to access to information …".[150] Similarly, in Bosnia-Herzegovina, where the Ombudsman is the oversight body, the law states:

> In performing its functions in relation to this Act, the Ombudsman for Bosnia and Herzegovina may inter alia consider: a. creating and disseminating information such as guidelines and general recommendations concerning the administration and implementation of this Act; b. including in its annual report a special section regarding its activities in relation to this Act; and c. proposing instructions on the implementation of this Act to all competent ministries within Bosnia and Herzegovina, in coordination with the ombudsman institutions of the Federation of Bosnia and Herzegovina and the Republika Srpska.[151]

In other countries, this task may be allocated to another body, such as the responsible ministry in Slovenia[152] or a designated administration body in Brazil.[153]

As noted above, the ICO in the United Kingdom provides general advice to the public via a hotline. In Sri Lanka, given that, pursuant to section 5(5) of the Act, the Commission also has to provide advice to information officers, it might also consider offering that service to the general public.

In addition to *ad hoc* advice, a common responsibility of oversight bodies is to participate in or support training. This makes a lot of sense, given that this activity requires specialised expertise on the right to information and, in particular, on the right to information law, which the oversight body is normally very well suited to provide. In some cases, this is cast as an obligation (i.e. the oversight body is required to do it), while in other cases it is merely something the oversight body can do.

From among the four focus countries, training is only addressed in two of the laws. In Mexico, the National System is tasked with establishing training programmes for officials.[154] In contrast, in India, this task is formally allocated to the central and state governments. In the case of the latter, the Department of Personnel and Training has taken the lead on this issue.

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[149] Freedom of Information Act 2000, section 47(1).
[150] Access to Information Act, 2016, section 21(1)(d).
[151] See Law on Freedom of Access to Information for Bosnia and Herzegovina, 2000, Article 22.
[152] Access to Public Information Act, 2003, Article 32(2)(2).
[153] See Law n. 12.527, of 18 November 2011, Article 41.
[154] See Article 31(X) of the General Act of Transparency and Access to Public Information, 2015.

Another example of mandatory training obligations for oversight bodies is Serbia, where:

> The Commissioner shall: ... Undertake necessary measures to train employees of state bodies and to inform the employees of their obligations regarding the rights to access information of public importance with the aim of their effective implementation of this Law.[155]

A non-mandatory model is more common globally. An example of this is the Maldives, where the Information Commissioner has the power "to participate, run and cooperate in providing training programs for Government employees, for the purpose of administering this Act".[156]

This is very similar to the situation in Sri Lanka, where one of the functions of the Commission is to "co-operate with or undertake training activities for public officials on the effective implementation of the provisions of this Act".[157] Given the enormous resources that training all of the information officers in Sri Lanka will take, the Commission should consider playing only a more strategic role, for example by developing model and perhaps e-courses, and providing training of trainers.

Another common role of oversight bodies is in relation to records management and the classification of documents. In Mexico, once again, it is via the National System that INAI plays a role. Public authorities are generally required to keep their records management practices in line with established standards, while the National System has a variety of roles in this regard, including:

> [To develop] criteria for the systematization and conservation of files ... Establish policies regarding the digitization of public information; ... Design and implement policies for the generation, updating, organization, classification, publication, dissemination, preservation and accessibility of public information.[158]

It is fair to say that the engagement of oversight bodies in records management and classification issues is particularly well developed in Latin America.[159]

A rather different system applies in the United Kingdom, where it is the Lord Chancellor, who is also called the Secretary of State for Justice (i.e. the Minister of Justice), who has responsibility for this. Specifically, the Lord Chancellor is tasked with developing a code of practice for public authorities to govern the "keeping,

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[155] See Law on Free Access to Information of Public Importance, 2003, Article 35(4).
[156] Right to Information Act, 2014, section 56(c). See also Sierra Leone, Right to Access Information Act, 2013, section 32(2)(c).
[157] Section 14(f).
[158] General Act of Transparency and Access to Public Information, 2015, Articles 24(IV) and 31(V), (VII) and (VIII).
[159] For more information on this, see Lanza (2015), note 26, paras. 54-59.

management and destruction of their records".[160] The ICO is tasked with promoting compliance with the code and may issue recommendations to public authorities which are failing to meet its standards.

Here again, Sri Lanka represents good practice, with the law both mandating the Commission to issue guidelines on records management standards and requiring public authorities to abide by those standards.[161]

This can be a challenging issue for oversight bodies because records management is a science all unto its own. At the same time, it is clearly very important to have binding central standards on this, for otherwise there is a risk of a patchwork of standards being applied across the civil service and of the right of access being undermined by poor records management standards, because public authorities cannot provide access to information they cannot locate. One part of the solution here is for the oversight body to collaborate with the body which is responsible for the archives. This is hardwired into the Mexican system, where the General Archive of the Nation sits on the National System and, in practice, at least, it is part of the system in the United Kingdom where there is close collaboration between the ICO and the Public Records Office on records management standards.

The Sri Lankan Commission will need to think carefully how it will go about this task. One option might be to prepare rather general standards as a first round and then, as it becomes more established, develop those standards more fully.

Yet another common area of engagement of oversight bodies in supporting public authorities/information officials is in relation to the proactive disclosure of information. In most countries, for example in Canada and India, the law provides a list of the categories of information that must be published on a proactive basis.[162] Mexico also relies essentially on a list approach.[163] However, it also calls on the oversight bodies to adopt "proactive transparency policies" to provide for additional openness obligations for public authorities, which would allow for obligations to be increased over time.[164]

The United Kingdom has pioneered a unique approach to this issue. There, the law requires each public authority to adopt a publication scheme. Importantly, these schemes must be approved by the ICO and approval may either be time limited or withdrawn. To help mitigate the burden on public authorities, the ICO also publishes

[160] Freedom of Information Act 2000, section 46.
[161] See, respectively, ss. 14(h) and 7(2) of the law.
[162] See, respectively, section 5 of the Access to Information Act and section 4(1)(b) of the Right to Information Act, 2005.
[163] Article 70 of the General Act of Transparency and Access to Public Information, 2015 contains a long list of proactive publication obligations while Articles 71-79 provide for additional publications for specific types of public authorities.
[164] See Articles 56-58 of the General Act of Transparency and Access to Public Information, 2015.

a model publication scheme, which they can use rather than developing their own version.[165]

This has a number of benefits over the list approach. First, it allows for obligations to be increased over time, as the capacity of public authorities in this area grows, something that technology has greatly facilitated. Indeed, it is fair to say that in most developed countries, older list-type provisions in laws have largely become irrelevant as public authorities have gone far beyond their minimum stipulations, so that the law no longer provides for any leveraging up pressure.

Second, it grants an important role to the oversight body, which can engage directly on the setting of minimum standards – through both the process of approving or not proposed schemes and the adoption of the model publication scheme – and the enforcement of those standards – again through the approval or not of proposed schemes. However, like many other proactive publication systems, enforcement is weak. Although the ICO does have the power to enforce these rules *suo moto*, the office has few resources to monitor this issue and there is no provision for processing complaints relating to proactive disclosure, even though this is often more important for citizens than reactive or request-driven disclosure.[166]

India appears to have found a solution for this, via the system of "complaints" noted earlier (which run in parallel to "appeals", the sorts of applications that we are calling 'complaints' in this paper). Pursuant to section 18(1)(f) of the Indian Act, anyone may lodge a complaint, "in respect of any other matter relating to requesting or obtaining access to records under this Act", which also covers proactive disclosure failures. This means that the burden does not fall exclusively on the information commissions to monitor such issues and that citizens can also assist.

In Sri Lanka, the law takes a list approach to proactive publication, with the main obligations being set out in section 8(2) of the law. According to section 8(1), ministers responsible for subjects must publish reports containing this information biannually, "in such form as shall be determined by the Commission". It is not clear exactly what the reference to "form" means, and whether it is limited to the manner of such disclosures or also extends to substance of what should be disclosed. However, the Commission will adopt rules on this imminently which should help clarify the situation. However, the first set of regulations adopted by the Minister under the law, which were adopted after close consultation with the Commission, included a significantly expanded (as compared to the law) list of proactive publication obligations.[167]

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[165] Freedom of Information Act 2000, sections 19 and 20.

[166] In a very recent report on this issue, the Scottish Information Commissioner, Rosemary Agnew, describes this enforcement power, which her office also has, as being "limited". See Scottish Information Commissioner (2017), *Proactive Publication: time for a rethink?*, p. 17. Available at: http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReportProactivePublication2017.aspx.

[167] Regulation No. 20, published in the Government Gazette on 3 February 2017.

In response to poor achievement rates and mixed performance regarding proactive publication in India, the government has issued a series of guidance notes for public authorities. These both clarify what is to be made available proactively and provide some tools to help facilitate this.[168] Given that this is likely to be a challenge there too, this might be considered in Sri Lanka.

There are other ways in which oversight bodies can support more robust proactive publication. In Mexico, for example, as part of the Plataforma Nacional de Transparencia Gobierno Federal, INAI posts all information that has been released in response to a request that is available electronically.[169] In other words, once a request has been responded to, rather than the information simply going to the individual requester, it is pooled into the wider body of proactively disclosed information.[170]

There are numerous other ways in which oversight bodies can support the work of public authorities or information officers. Given that numerous public authorities all have very similar obligations under each national right to information law, there can often be significant efficiencies to having a central body, such as the oversight body, develop central models, protocols or tools for discharging these obligations which each individual pubic authority can then adapt to their own circumstances. Some areas where these efficiencies have been reaped in other countries include:

- Preparing a simple guide for the public, into which each authority can incorporate its own specific information and then publish it as its own public guide.
- Developing a protocol or procedure for processing requests for information which, again, can be adapted to the circumstances of each public authority (for example, different procedures may be needed for authorities which are highly centralised and those which have offices scattered around the country).
- Creating a system for ensuring that proactive publication obligations are met not only at the beginning but by regularly uploading new documents and updating old ones on an ongoing basis as needed.
- Publishing a template for a good annual report which can guide different public authorities as they undertake this task.
- Preparing a sample action plan which public authorities can use to help them plan their implementation activities (or develop their own action plan).
- Providing online training tools – such as training manuals and even online courses – which public authorities can use to train their information officers

[168] See, for example, Implementation of suo motu disclosure under Section 4 of RTI Act, 2005- DOPT Guidelines, 16 April 2013. Available at: http://www.gservants.com/2013/04/16/implementation-of-suo-motu-disclosure-under-section-4-of-rti-act-2005-dopt-guidelines/4474/.
[169] See https://www.infomex.org.mx/gobiernofederal/homeOpenData.action.
[170] More information about this is available in Lanza (2015), note 26, para. 72. See also paras. 67-74 for more information about proactive publication in the Americas.

and/or regular staff (all of whom should get at least some training on the right to information).

Obviously it is not possible to undertake all of these activities at once or at the outset, so the Sri Lankan Commission will need to identify the main priorities under its system. Some of the main priorities in other countries include assisting public authorities to develop requesting protocols, helping them with their annual reporting obligations and training.

An extremely useful tool which INAI in Mexico has developed for public authorities is the Plataforma Nacional de Transparencia Gobierno Federal, which serves as a central electronic platform for making and tracking requests. It serves multiple functions essentially at the same time. It is possible to make requests via this system and approximately 87 percent of all requests made at the federal level in Mexico between 2014 to 2017 were made in this way.[171] All requests are logged onto the system once they come in, and formal steps in the processing of the request are also logged. As such, the system serves as a very high-powered means of tracking both individual requests (requesters can log into the system to find out about progress in the processing of their request) and the processing of all requests, since aggregated information about requests can easily be generated from the system.[172] This means not only that it is possible to obtain very sophisticated information about requests on an essentially real time basis, but also that the statistical information that needs to be included in annual reports can also be generated at the touch of a few buttons.

The system does not only cover requests. Complaints may also be made using the system and they are, similarly, all tracked through the system. Once again, individuals can see what stage the processing of their complaint has reached by logging onto the system and central information about the processing of complaints can be generated electronically. As noted above, the system can also be used for other purposes, such as proactively publishing information which has been disclosed pursuant to a request.[173]

The utility of a central requesting/complaints/tracking system cannot be overestimated. Although this requires considerable up-front resources, it ends up saving a considerable amount of time and effort. Serious consideration should therefore be given to whether something along these lines could be developed in Sri Lanka. If a fully developed "Mexican" model is not realistic, another option would be to put in place a voluntary system for use by those public authorities which wanted

[171] The exact period for these requests is 14 May 2014 to 26 April 2017. Document provided by INAI and on file with the author.
[172] For example, INAI provided the author with the information referenced in the previous footnote, current to 26 April 2017, on 27 April 2017, which it could easily do using the central tracking system.
[173] More information about the Mexican system is available in Lanza (2015), note 26, para. 65. Mexico is not the only country in Latin America to put in place such a system. See Lanza, paras. 60-66, for more information on these systems in different countries in Latin America.

to do that. The benefits of this system speak for themselves and so it is very likely that other public authorities would sign on over time.

Finally, in many cases oversight bodies provide guidance to public authorities on how to meet their obligations under the right to information law. Given the challenges in interpreting exceptions, especially some of the more difficult ones, this is an area where such guidance is most commonly provided. This is the most challenging part of applying a right to information law, and also one where the Commissions have very particular expertise. The ICO in the United Kingdom, for example, provides extensive guidance to public authorities in many areas.[174]

III.4 Monitoring/Assessing Compliance

Oversight bodies often play a general monitoring/compliance assessment role, whether this is formally provided for by law or it is just understood to be covered by their wider mandates to ensure proper implementation of the law. In Canada, the Commissioner may initiate his or her own complaint where he or she is satisfied that there are "reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act".[175] This effectively gives the Commissioner the power to assess the compliance of any public authority with its obligations under the law, whenever monitoring of such compliance suggests that this is necessary. The Commissioner has also produced "report cards" on various public authorities, overall assessments of their performance under the act complete with grades.[176]

In Mexico, as well, INAI has broad powers to monitor and investigate compliance with the law, both in its role as a leading player in the National System and on its own.[177] The power of the various Indian Information Commissions to do this *suo moto* is less clear. However, as noted above, the Commissions have very broad powers to receive complaints from citizens about non-compliance with the law. An interesting system applies in the United Kingdom where the ICO may investigate whether or not a public authority is following good practice, but only with the consent of that public authority.[178] In the end, this is probably less of a monitoring approach than a way of providing assistance to public authorities which know they need help and request it.

Oversight bodies in many other countries also monitor and/or investigate

[174] For general guidance on the law see: https://ico.org.uk/for-organisations/. Specific guidance on refusing requests is available at: https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/.
[175] Section 30(3) of the Access to Information Act.
[176] These are available at: http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren.aspx.
[177] See Articles 31 and 41 of the General Act of Transparency and Access to Public Information, 2015.
[178] See section 47(3) of the Freedom of Information Act 2000.

compliance with the right to information law by public authorities.[179] This is also the case in Sri Lanka, where the Commission has the power both to monitor the performance of public authorities and to "ensure the due compliance by public authorities" with their obligations under the law.[180]

Here, as in many other areas, the biggest challenge is resources. It is easy to allocate this power to oversight bodies and quite another thing for them actually to do this properly. As noted above, it is hard enough to monitor compliance with proactive publication obligations, and this is, by definition, transparent in nature. At the same time, there are some means to facilitate the monitoring of overall compliance. First, this can be done in part via monitoring of the complaints that come in from a public authority. Where these consistently show serious breaches of the law, this should raise a red flag about the overall performance of the authority. Random testing can also be done on a few authorities each year, rather than trying to tackle every authority in each cycle. A 'mystery shopper' approach can be used whereby the oversight body presents requests, again on a random basis to a few authorities, as a means of testing the way they respond. However, even using these approaches, the resources required for these exercises can be considerable. In Canada, for example, the Report Cards reports were produced from 2005 to 2012 but discontinued after that due to the human resource implications.

In Sri Lanka, the Commission will need to consider whether active monitoring of public authorities is an early priority or something it will defer for the short term. If it does engage in this area, no doubt using the approaches noted above to limit the costs of monitoring will be useful.

III.5 Reporting

In a large majority of countries, including all of the focus countries, some central body – usually the oversight body (which is the case in all four focus countries) – is required to report annually on implementation of the law. Better practice is for such reports not only to outline what the oversight body itself is doing – as a form of accountability – but also to provide a snapshot of overall implementation of the law across all public authorities.[181] These reports provide invaluable insight into how the system is working, where there are bottlenecks and pressure points, trends over

[179] In South Africa, for example, Article 83(3) of the Promotion of Access to Information Act, 2000, the Human Rights Commission may monitor implementation and make recommendations for reform. According to Holsen and Pasquier (2012), note 3, p. 226, the same power exists in both Germany and Australia.
[180] Section 14(a).
[181] A review of scores on the RTI Rating on Indicator 61, which measures this features, shows that only two of the top twenty scoring laws did not produce central reports on both the activities of the oversight body and overall implementation performance. See http://www.rti-rating.org/by-indicator/?indicator=61.

time, and so on. A report on this by the World Bank in 2014 pointed to benefits in terms of rewarding better performers and exposing poor performance. It also noted:

> The statistics, if reported accurately and with useful metrics, have the potential to serve as one of the benchmarks for measuring the performance of a country's RTI system over time.[182]

Ideally, to promote the potential benefits of this system, these reports should be laid before parliament and also made available publicly.[183] In an odd twist, the report prepared annually by the Jordanian oversight body is deemed to be secret and not published. Placing the report before parliament helps promote accountability for the oversight body without undermining its independence, while making it public ensures that the strengths and weaknesses it highlights are public knowledge.

For the central body to be able to do this properly, it is essential that each public authority report on its own implementation activities, including detailed reporting about the requests for information it has received and how it has processed them. Absent a sophisticated central system, such as the one used in Mexico, it is not possible for the central body to produce an accurate, comprehensive report without each individual public authority providing it with this information. Unfortunately, even where the law requires public authorities to report in this way, compliance is often weak. As the World Bank report noted above concluded:

> The data about requests and appeals presented in this paper demonstrates primarily that the state of data collection and reporting by oversight agencies is far from complete or standard.[184]

In many cases, part of the problem is the lack of any proper system for enforcement of this obligation. In South Africa, where a failure to produce these reports had been a particular problem, the oversight body, the Human Rights Commission, wrote to public authorities one year indicating that it would expose by name those authorities which failed to provide a report in its next annual report. This soft threat resulted in much greater compliance but, as the World Bank report showed, there were still important weaknesses in the system.

Another reason for poor compliance with these reporting obligations is that it can be a challenge, especially for smaller public authorities, to prepare such a report. The virtues of the Mexican central tracking system in supporting the production of these annual reports have already been noted. Otherwise, the oversight body can

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[182] Jesse Worker with Carole Excell (2014), *Requests and Appeals Data in Right to Information Systems: Brazil, India, Jordan, Mexico, South Africa, Thailand, United Kingdom, and United States* (World Bank Right to Information Working Paper Series), pp. 5 and 7. Available at: http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/Requests_and_Appeals_RTI_Working_Paper.pdf.

[183] See Holsen and Pasquier (2012), note 3, p. 227.

[184] Jesse Worker with Carole Excell (2014), note 184, p. 28.

help to reduce the reporting burden on public authorities. It should be possible, for example, to include a chapter on the right to information in an authority's general annual report, rather than producing a special report just on this issue. Efforts to simplify this reporting requirement as far as possible, without sacrificing the quality of information provided, could also help. Providing a model template for such reports could be part of this. And trying to find simple yet effective ways to present the information so that it does not impose too great a burden might also be helpful.

In Sri Lanka, each public authority is required to produce such a report, with the law outlining the specific contents required to be included, in the format which is approved by the Commission. For its part, the Commission is also required to prepare a central report on its activities, which needs both to be laid before parliament and published.[185] It is not, however, required to include an overview of performance across the system in its annual report. This should either be incorporated into the rules on annual reporting which the Commission needs to prepare or done as a matter of practice.

In addition to this regular reporting, oversight bodies should have the power to prepare *ad hoc* or special reports to parliament on issues which they consider to be important.[186] This allows the body to study and highlight special problems and to propose reforms. The Report Cards reports prepared by the Canadian OIC mentioned earlier were such reports and the office has prepared about one major thematic report per year.[187]

III.6 Regulatory and Policy Development

In addition to strictly promotional/support roles, there is a growing trend towards allocating wider powers to oversight bodies to engage in regulatory and policy development and even law reform. A number of oversight bodies are explicitly given the power to review legislation affecting the right to information before it is passed, and others do this in practice even if it is not spelt out in the legislation. In some cases, such as in Tunisia, it is mandatory to seek the views of the oversight body before legislation or regulations of this nature are passed.[188] The Sri Lankan Right to Information Act does not refer explicitly to such a power but it does give the Commission the power to propose reforms of a general or specific nature, which would presumably include making comments on legislation.[189]

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[185] See sections 10, 42(1)(d) and 37(1).
[186] See Ecclestone (2007), note 28, p. 7.
[187] These are available at: http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren.aspx. The power to prepare these reports is found at section 39 of the Access to Information Act.
[188] See Article 38 of the Loi organique n°22-2016 du 24 Mars 2016 relative au droit d'accès à l'information (Organic Law on the right to access information).
[189] See section 14(b).

It is increasingly common to allocate oversight bodies the power to set fees for satisfying requests for information. This is the case, for example, in Serbia,[190] Albania[191] and Bangladesh (in consultation with the government).[192] This is also the case in Sri Lanka, where the Commission has adopted detailed Rules on fees.[193]

A range of other regulatory or approval powers can be allocated to the oversight body. In Mexico, for example, where a public authority does not respond to the request within the time limits, the information is automatically deemed to be public (i.e. it cannot be denied to the requester), unless INAI agrees that it is secret. In Vanuatu, there is a strict ten-year time limit on secrecy of all information apart from personal information, unless the oversight body agrees to extend this.[194] In Tunisia, public authorities must notify the oversight body when they appoint information officers.[195] In Sri Lanka, the Commission has a number of general regulatory powers including to set standards for records management, proactive disclosure, fees and the annual reports, as well as to refer disciplinary cases to the relevant authorities and to initiate prosecutions under the Act.[196]

Beyond these formal powers, there is the question of the extent to which oversight bodies should engage in what amounts to advocacy or pressure for law reform. Clearly if the relevant authorities are reviewing the right to information law or other enabling legislation for the right to information, it will be important to gain the views of the oversight body on the matter. It has a unique perspective operating, as it does, in a space between requesters and public authorities (or the government). It also has specialised and dedicated expertise on this issue which is unlikely to be able to be found elsewhere.

The issue of promoting law reform absent the relevant authorities having initiated a process of reform is somewhat delicate because the oversight body is a creation of the very legislation which is being reviewed and it could be seen as inappropriate for it to be pushing for reform of its own legislation. However, this should be accepted if it is done in an appropriate manner.

A good example of this comes from Canada, where external reports, and especially the RTI Rating,[197] demonstrate clearly that the Canadian legislation is in serious need of reform. The OIC conducted a wide-ranging consultation with all interested parties and then presented a special report to parliament on this issue, *Striking the*

[190] See Article 17 of the Law on Free Access to Information of Public Importance, 2003.
[191] Article 13(2) of the Law on Right to Information of Official Documents, 2014.
[192] Section 8(5) of the Right to Information Act, 2009.
[193] Rule 4, published in the Government Gazette on 3 February 2017.
[194] See section 51(1) of the Right to Information Act, No. 13 of 2016.
[195] See Article 32 of the Loi organique n°22-2016 du 24 Mars 2016 relative au droit d'accès à l'information.
[196] See, respectively, sections 7(2), 14(h), 8(1), 14(c)-(e), 41(d), 38(1) and 39(4) of the Act.
[197] The RTI Rating is an internationally recognised methodology for assessing the strength of the legal framework for the right to information. See www.RTI-Rating.org.

Right Balance for Transparency – Recommendations to modernize the Access to Information Act.[198] The fact that the report was based on extensive consultations, that it was presented to parliament, which is an explicit power of the OIC, and that it responded to a clearly established need all helped to protect the OIC against criticism.

Conclusion

Sri Lanka was one of the last countries in South Asia to adopt a right to information law but it appears to have taken advantage of the opportunity to learn from its neighbours, with its legal framework now standing at third position globally and at top position in South Asia.[199] One of the strongest features of the Sri Lankan legal framework for the right to information is its system of complaints, based on the Right to Information Commission, where it achieves a nearly perfect score on the RTI Rating.

At the same time, as right to information experts around the world know only too well, having a strong law is simply the first step in terms of creating an effective right to information system. Good implementation has to follow the adoption of the law if the right to information is to become a reality for citizens. Sri Lanka's Right to Information Act came into effect for requesters on 4 February 2017, six months after the Act came into force. The initial signs are that implementation is going well, but these are of course very early days.

For implementation efforts to succeed, a key element is a successful oversight body or, in the context of Sri Lanka, the Commission. The legal framework provides a good basis for this, but a number of other elements are needed as well. One of the particular challenges facing the new Commission is how to strike an appropriate balance between trying to do as much as possible to support strong implementation and yet remaining within its resources, both human and financial. Looked at differently, this challenge could be cast as how to ensure that it does not try to do too much, so that it succeeds at what it does do.

The first, most important and legally mandatory task of the Commission is to ensure that it processes complaints within the very short 30-day timeframe stipulated by the Act. To do this, it will need to put in place effective complaints processing systems. Learning from the experience of other countries can help inform the choices made by the Commission. The same is essentially true of the promotional/support role played by the Commission, although in this area the

[198] March 2015. Available at: http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx.
[199] See http://www.rti-rating.org/country-data/.

Commission will need to engage in a process of prioritisation so as to achieve the balance noted above.

It is hoped that this paper provides the Sri Lankan Right to Information Commission – as well as other bodies around the world which are either seeking to establish themselves or reviewing the way they operate – with useful information relating to some of the choices it needs to make. Just as it built on the experience of other countries when preparing its law, so it is hoped that Sri Lanka will do this as it goes about implementing that law.

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