Armenia

Analysis of the Legal Framework for the Right to Information

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Introduction[1]

The Law of the Republic of Armenia on Freedom of Information (RTI Law) was adopted in September 2003.[2] At the time, it was a groundbreaking development for the country, bringing it into conformity with a wave of adoptions of laws giving individuals a right to access information held by public authorities, or right to information (RTI) laws. However, the law has not been amended since that time, over 15 years ago, and it is now high time to revisit it. Although the RTI Law is a key part of the legal framework for RTI in Armenia, it by no means constitutes the entire framework, which also comprises the Constitution and the Law of The Republic of Armenia on the Human Rights Defender.[3]

Although 2003 was still in the early phase of the growth of recognition of the right to information, the importance of this right had already been clearly recognised by a number of official actors. For example, the (then) three special international mandates on freedom of expression – 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 in a 1999 Joint Declaration:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[4]

The right was formally recognised by the Inter-American Court of Human Rights almost three years later, in the case of *Claude Reyes and Others v. Chile*, decided in September 2006.[5] It took a few more years, but the European Court of Human Rights also recognised the right to information as a part of the wider right to freedom of expression in 2009.[6]

The recognition of the right to information as a human right is based on the scope of freedom of expression, as guaranteed under international law, which protects not only the right of the speaker (the right to "impart" information and ideas) but also the right of the listener (the rights to "seek" and "receive" information and ideas). In this way, international guarantees of freedom of expression are not just about free speech, but are based on the more fundamental idea of protecting the free flow of information and ideas in society as an underpinning of democracy and active citizenship. Viewed at from

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[1] This Analysis has been produced with support from UNESCO.
[2] Available in an unofficial English translation at: http://www.foi.am/u_files/file/legislation/FOIeng.pdf.
[3] Available in an unofficial English translation at: http://www.ombuds.am/en/legislation/the-law-on-the-ombudsman.html.
[4] Adopted 26 November 1999. Available at: https://www.osce.org/fom/66176?page=2.
[5] 19 September 2006, Series C, No. 151 (Inter-American Court of Human Rights). Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.
[6] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05.

this lens, the right to receive information and ideas is just as important, possibly even more important, than the right to speak.

In line with the idea of freedom of expression as underpinning democracy, a number of important practical benefits of the right to information have been recognised. These include, among others, fostering and enabling democratic participation, promoting government accountability, supporting positive relationships between government and the people, exposing corruption and other forms of wrongdoing, protecting human rights and, last but certainly not least, creating a better environment for businesses, which are an important user group in many countries.

This Analysis provides an assessment of the Armenian RTI Law based on international human rights standards relating to the right to information as well as better comparative national practice in this area.[7] Guidance as to both international standards and better national practice is provided, in part, by the RTI Rating,[8] an internationally recognised methodology for assessing the strength of legal regimes governing RTI that was developed by the Centre for Law and Democracy (CLD)[9] and Access Info Europe (AIE).[10] The legal framework for RTI in Armenia has been formally assessed using the RTI Rating[11] and the table below shows a breakdown of the specific scores achieved in each of the seven categories of the RTI Rating:

Section	Max Points	Score	Percentage
1. Right of Access	6	2	33
2. Scope	30	28	93
3. Requesting Procedures	30	20	67
4. Exceptions and Refusals	30	17	57
5. Appeals	30	17	57
6. Sanctions and Protections	8	6	75
7. Promotional Measures	16	10	63
Total score	**150**	**100**	**67**

Based on this score, Armenia sits in 41st position on the RTI Rating from among the 123 countries with RTI laws that have been assessed. This puts it at the bottom of the top third of all countries, neither a terrible position nor a leading one. Armenia's neighbours are all over the place, starting with Azerbaijan in 17th position (115 points), Georgia in 45th position (97 points), Turkey in 72nd position (72 points) and finally Iran in 97th position (69 points). For its part, Russia is in 44th position with 98 points. It should be

[7] See, for a comparative study on good RTI laws, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO).
[8] Available at: http://www.RTI-Rating.org.
[9] See www.law-democracy.org.
[10] See http://www.access-info.org.
[11] See: https://www.rti-rating.org/country-data/Armenia/.

stressed that the RTI Rating only looks at the legal framework for RTI and not the quality of implementation of the law.

This Analysis is broken down into two parts, the first focusing specifically on the system of appeals under the Armenian law, the subject of Category 5 of the RTI Rating. This starts with a section indicating why having a dedicated oversight body for RTI is crucially important for Armenia, and goes on to analyse the specific strengths and weaknesses of the current system of appeals from the perspective of the RTI Rating. The second part provides a general assessment of the RTI Law based largely on the other six categories of the RTI Rating. Both parts provide detailed recommendations for how the RTI Law could be strengthened. The aim of the Analysis is to provide assistance anyone who is interested in reviewing the RTI Law and, in particular, in bringing it more closely into line with international standards.

Part I: Analysis of the System of Appeals and Oversight

This Part of the Analysis is broken down into two sections. The first looks at the general approach towards appeals and oversight taken in the Armenian legal framework for RTI, highlighting how creating a dedicated oversight body, including with the power to hear appeals, would be a better approach. The second provides a specific assessment of the strengths and weaknesses of the current legal framework for RTI appeals, based on the RTI Rating.

1. The Overall Approach to RTI Oversight in Armenia

Broadly speaking, the oversight of RTI systems can be broken down into two component parts, namely the role of hearing appeals (or complaints) against refusals to provide information and other failures to respect the rules in the law, and the more general role of monitoring how public authorities in general are implementing the law, along with a number of support functions, for public authorities, in terms of public awareness-raising and so on.

There are a variety of options for how to provide these oversight functions for a right to information law. In many countries, a broad oversight role is allocated to a specialised or dedicated body which is created by the RTI law, often called an information commission (or sometimes commissioner, where the post is held by just one individual). According to Holsen and Pasquier, Canada, in 1983, was the first country to establish a body known as an Information Commissioner: "[N]early all of the ATI policies passed before the Canadian law gave responsibility for resolving requesters' complaints to an already established ombudsman".[12] However, since that time, a large majority of RTI laws allocate oversight functions to a dedicated body.

[12] 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*

In other countries, this role is allocated to a pre-existing body, such as an ombudsman or human rights commission. In the original South African approach, 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 appellate function.[13] In the original (2002) Pakistani law, appeals went to two ombudsmen, the federal ombudsman (Mohtasib) and, for cases relating to the Revenue Division, the Federal Tax Ombudsman.[14]

Armenia has so far opted to allocate the appeals function to an existing body, the Human Rights Defender of the Republic of Armenia, created by the 2017 Law of The Republic of Armenia on the Human Rights Defender.[15] The Human Rights Defender is essentially a sort of specialised human rights ombudsman for the country. The Armenian legal framework for RTI does not allocate other oversight and promotional roles, i.e. beyond appeals, to any central body.

There are pros and cons associated with using a pre-existing body for oversight of RTI but the overwhelming weight of both academic argument and practical experience strongly favours the creation of a dedicated body.

Authors such as McMillan, the Australian Ombudsman at the time,[16] and Holsen and Pasquier[17] have outlined a number of benefits associated with having a specialised oversight body (information commissioner) as compared to giving these functions to a pre-existing body. Some of the main arguments for this include the following:

- The possibility of allocating binding order-making powers to the office: Ombudsmen, including the Human Rights Defender in Armenia, almost never have binding decision-making powers. Rather, their role is more along the lines of a mediator between citizens and the government who aims to resolve problems to the mutual satisfaction of both parties. This works for the majority of issues that come before an ombudsman, which are often not very controversial. In contrast, RTI appeals, almost by their very nature, are more adversarial and it is now well established that the oversight body needs to have binding order-making powers to resolve these issues. Otherwise, there is a high likelihood that their recommendations will simply be ignored. This is supported by extensive experience in a number of countries around the world where oversight bodies, whether dedicated or not, do not have order-making powers.

214, p. 224.

[13] Promotion of Access to Information Act, 2000, sections 83-85.

[14] Freedom of Information Ordinance, 2002, section 19.

[15] Note 3.

[16] 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. 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.

[17] Note 12.

The medium term result of a lack of order-making powers may be that requesters do not bother to appeal to the oversight body because they do not want to waste time obtaining a positive recommendation only to have it ignored by the public authority in question. Theoretically, an ombudsman could be given special order-making powers in relation to the information function, but this will not align well with the overall approach and culture of an ombudsman office and, as far as we are aware, this has rarely if ever been tried.

- Insulating the ombudsman from the political heat that is often associated with the contentious right to information function: As noted above, RTI appeals are often quite adversarial and can give rise to tensions between the oversight body and the administration. While this is not ideal even for a dedicated RTI oversight body, for an ombudsman it can have a negative impact on the main part of their work, which rests on having cordial relations with the administrative and the ability to work together to resolve problems. In other words, allocating the RTI function to an ombudsman can undermine the latter's ability to discharge its main function.
- Giving more profile to the right to information: The creation of a dedicated body necessarily attracts both initial attention to this issue and then more attention later on as the body allocates resources and attention to promoting the right. In contrast, non-dedicated RTI bodies rarely spend much time raising the profile of RTI.
- Extending the jurisdiction of the office: In many cases, the remit of an ombudsman is limited in scope to the executive and sometimes also the legislative branch of government. It may not extend to ministerial offices, other oversight bodies or arms-length bodies such as State-owned enterprises and NGOs which are controlled by the executive, and it will rarely extend to private bodies which are funded by the State or which undertake public functions. On the other hand, all of these bodies may easily be brought within the remit of a dedicated RTI oversight body, which would normally have jurisdiction over all public authorities covered by the RTI law.
- The promotional role: To be implemented successfully, a central body needs to play a promotional role in relation to RTI. Promotion is so important that it occupies an entire category of the RTI Rating. While it is common to allocate a promotional role to dedicated RTI oversight bodies, such as information commissions, this is rarely done when RTI appeals are added to the functions of another body. In the rare cases where promotion has been added to the tasks of a non-dedicated body, for example in South Africa as noted above, in practice this role receives only very limited attention.
- Building expertise and focus on RTI: Dedicated bodies focusing on RTI develop specialised expertise on this issue. In most cases, they are the primary locus of expertise within their countries on RTI. This is because they focus exclusively on RTI as an issue. In contrast, a lack of deep expertise on RTI has been a very serious problem among bodies like ombudsmen, which have had RTI issues added to their main roles. The experience at these bodies shows that it is perennially difficult for them to build real RTI expertise. In a related fashion,

> and for largely the same reasons, there is often only limited focus on RTI among bodies where this has been added as an additional function. For these bodies, RTI is, seemingly inevitably, a second-class cousin to the other functions that they perform.[18]

There are, certainly, advantages to the ombudsman approach. These are normally well-established offices, meaning that the RTI system automatically benefits from the credibility and profile which they have already built. This reaps economies of scale, especially in terms of administrative functions, which may be particularly important in very small countries, such as small island States. There can also be benefits associated with integrating information into the wider ombudsman function, given that many 'regular' ombudsman complaints also have an informational element.

On balance, the benefits of a dedicated body heavily outweigh the disadvantages and a number of authors have taken a clear 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.[19]

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."[20] Holsen and Pasquier 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."[21] Another author wrote: "There are several reasons for deciding that an Information Commissioner should be the independent review and appeals mechanism

[18] Pakistan is a good example of both of these problems, namely expertise and focus. 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.

[19] 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.

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

[21] Holsen and Pasquier (2012), note **Error! Bookmark not defined.**, p. 231.

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.[22]

In the case of Armenia, perhaps the most important point is that the volume of RTI appeals lodged with the Human Rights Defender is very low. This alone shows that citizens do not have confidence in the system of appeals. Ultimately, if citizens do not use the system, it cannot work to protect their rights. Another serious problem in the case of Armenia is that the only oversight role allocated to the Human Rights Defender is that of hearing appeals. Various promotional roles that are normally allocated to (dedicated) oversight bodies have not been assigned to the Defender. This leads to the loss of a number of points on the RTI Rating in Category 7: Promotional Measures. Far more importantly, it means that a number of important promotional roles for RTI are simply not being undertaken in Armenia.

Recommendation:

- It is strongly recommended that the relevant authorities in Armenia explore options for creating a dedicated oversight body for the RTI system, such as an information commission. This should be an independent body, like the Human Rights Defender, but focus exclusively on RTI. It should have a broad oversight role which includes appeals, monitoring and promoting overall implementation of the RTI Law, and supporting public authorities in their efforts to implement the Law.

2. The Strengths and Weaknesses of the Current System of Appeals

This part of the Analysis looks at the strengths and weaknesses of the current system of appeals, based on the RTI Rating. Although the legal framework in Armenia only gets 17 points out of a possible 30 or 57% on this Category, it should be noted that the Rating assesses only some of the issues which go to the pros and cons of having a dedicated oversight body. This is because it is a legal assessment which does not get into issues such as staff capacity or relations between the oversight body and the administration.

Ideally, requesters should benefit from three levels of appeals, an initial internal appeal, to give the public authority an opportunity to fix the problem itself, an appeal to an independent administrative body, such as the Human Rights Defender or an information commission, and an appeal to the courts. The RTI Law only provides for the latter two types of appeals and fails to provide for an internal appeal to a more senior official within the public authority. This can be a quick and relatively simple way of

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

resolving RTI issues, taking into that more senior officials often have more confidence to release information.

Although there are fairly strong protections for the independence of the Human Rights Defender, as set out in the Law of The Republic of Armenia on the Human Rights Defender (Law on the Defender), one protection that is lacking is a prohibition on individuals with strong political connections from occupying this position. Better practice in this regard is to exclude elected officials, individuasl who hold official positions in political parties and others with clear political connections from being appointed to such a position.

The Defender has a number of powers when conducting an investigation, as set out in Article 24 of the Law on the Defender. However, the Defender has only a partial right to review confidential information which, according to Article 24(3) of this Law, "*may* be made available" to him or her [emphasis added]. Furthermore, he or she appears to lack the power to order witnesses to appear and give testimony, an important power for an RTI oversight body.

A key weakness with the Defender as the appellate authority for RTI is that this position only makes recommendations to public authorities, which they are free to ignore. As noted above, binding order-making powers are essential in the relatively confrontational context of RTI. Absent such powers, public authorities can regularly be expected to ignore the recommendations of the oversight body.

The legal framework is not entirely clear when it comes to the question of the grounds for lodging an appeal. According to Article 11(4) of the RTI Law, appeals may be lodged against decisions "not to provide information". This is a relatively limited ground for appeals, which should also be able to be brought for other failures to apply the law, such as a breach of the time limits, a failure to provide information in the format preferred by the requester or charging excessive fees. On the other hand, Article 16(1) of the Law on the Defender provides that anyone can apply to the Defender "if his or her rights and freedoms are violated".

Better practice is to require public authorities, when responding to an appeal, to show that they acted in accordance with the RTI Law when processing a request (i.e. to impose the burden of proof on these authorities). This is justified based on both the fact that the right to information is a human right and the position of the public authority, by virtue of which it is in a strong position to show that it acted in accordance with the law whereas it is almost impossible for the requester to show that it did not. For example, where a public institution claims that information is exempt, it can justify that based on the content of the information whereas the requester has no idea what is in the information, so cannot prove that it is not exempt. Both the RTI Law and the Law on the Defender are silent as to the burden of proof.

Finally, in many cases, appeals expose wider problems in the processing of requests by public authorities. For example, they may have failed to appoint an information officer

at all or they may not have provided sufficient training to their information officer. To address these more structural or institutional problems, oversight bodies need to be able to call on public authorities to undertake structural measures, such as by appointing an information officer, providing him or her with training or managing their records more appropriately.

Recommendations:

- Requesters should have a right to lodge an internal appeal with a more senior officer within the public authority, as well as to appeal to an administrative body and before the courts.
- Individuals with strong political connections should be prohibited from being appointed as the Human Rights Defender.
- Public authorities should be required to provide the Defender with any information he or she needs to resolve an RTI complaint, regardless of whether or not it is classified, and he or she should also have the power to order witnesses to appear and testify.
- The oversight body for RTI should have the power to issue decisions which are binding on public authorities which have failed to respect the provisions of the RTI Law relating to requests.
- The legal framework should be very clear as to the grounds for lodging RTI appeals, which should include any claim that a request for information was not processed in accordance with the rules.
- The law should make it clear that, on appeal, the burden of proof lies with public authorities to show that they acted in accordance with the law.
- The oversight body should have the power to order public authorities to undertake structural measures to remedy wider problems they may be having in responding to RTI requests.

Part II: General Analysis of the Legal Framework for the Right to Information

This Part of the Analysis provides a general assessment of the Armenian legal framework for RTI, looking at the issues covered in Category 1: Right of Access, Category 2: Scope, Category 3: Requesting Procedures, Category 4: Exceptions and Refusals, Category 6: Sanctions and Protections and Category 7: Promotional Measures (i.e. all of the categories apart from Category 5: Appeals, addressed in Part I. It also provides brief comments on an issue that is not covered by the RTI Rating, namely the Duty to Publish or the proactive publication of information.

1. Right of Access and Scope

The Constitution of Armenia[23] does not specifically guarantee the right to information, although the guarantee of freedom of expression, at Article 42(1), does include the right to "seek, receive, and impart information and ideas". As a result, it could, as with the guarantee under international law, be interpreted so as to include the right to information. However, there are clear advantages to having a dedicated (i.e. specific) constitutional guarantee for this right.

Article 6(1) of the RTI Law provides that everyone has the right to lodge a request for information and to receive that information, in accordance with the law, which creates a reasonably clear presumption in favour of access.

Article 4 of the RTI Law sets out the main principles for securing the right to information. However, it fails to refer to the wider benefits of the right, such as fostering participation, combating corruption and promoting accountability. It also fails to require those tasked with interpreting the law – whether they be information officers, an oversight body or the courts – to do so in the manner which best gives effect to the principles for securing the right. This would help ensure positive interpretation of the Law and, in particular the regime of exceptions, which often raises difficult interpretation issues.

In terms of scope, the RTI Law is commendably broad in many respects, leading to this being by far the highest scoring category for Armenia on the RTI Rating. Among other things, it covers everyone, including foreigners, all information, and all three branches of government, namely the executive, judicial and legislative. The one area where points were deducted on the RTI Rating was in terms of the executive branch, on the basis that certain bodies that were created by public authorities ("information holders" according to the Law) might not themselves be covered. The Law does cover all bodies that are funded by the State, as well as those that undertake a range of public functions. But it does not clearly cover every body that is controlled by a public authority, where that body does not receive public funding.

Recommendations:

- In due course, consideration should be given to amending the Constitution to incorporate a dedicated guarantee for the right to information.
- The strong statement of the principles for securing the right to information in Article 4 of the RTI Law should be strengthened by adding in the wider benefits of the right and also given teeth by requiring those tasked with interpreting the law to do so in the manner that best gives effect to those principles.

[23] Available in an unofficial English translation at: https://www.constituteproject.org/constitution/Armenia_2015.pdf?lang=en.

- The definition of a public authority should explicitly include every body that is owned and/or controlled by a public authority.

2. Duty to Publish

The primary focus of most RTI laws is on delivering information to citizens via requests, including the procedures for making those requests, exceptions to the right of access and the system of appeals. At the same time, the other system for providing access to information – namely through proactive disclosure – is indispensable to ensuring a robust flow of information to the public.

The only provision in the draft Law which addresses proactive publication is Article 7. This calls on each public authority generally to "work out and publicise the procedures according to which information is provided", to urgently publicise information which can prevent various sorts of harm and, at least annually, to publish a list of types of information. The list of types includes information about the activities and public services of the authority, its budget, detailed information about staff, recruitment information, impact on the environment, public events, how citizens can participate in the work of the authority and information about the information services of the public authority. This is a broad list of types of information but it could be further expanded. Types of information that might be added include more specific details about what sort of budget information needs to be provided, information about the specific beneficiaries of public services and programmes, including a list of those who have been awarded licences, permits, concessions or other authorisations, specific information about the information officers appointed in line with Article 13 of the Law (such as contact details) and how to make a request for information.

Experience shows that public authorities rapidly increase their capacity to disclose information proactively over time. As a result, it is useful to build a system into the right to information law which allows for these obligations to be extended and increased periodically. Often this power is given to an information commission but it could also be allocated to a central government actor, such as the Ministry of Information.

Recommendations:

- Consideration should be given to expanding the list of information which is subject to proactive publication to include the items noted above.
- Consideration should also be given to granting a central body the power to extend the list of proactive publication obligations over time.

3. Requesting Procedures

The RTI Law scored just 20 points or 67% on this category of the RTI Rating. This is a decent score but obviously leaves important room for improvement. It may be noted that this is a very important part of the law for both requesters and public institutions. Poor or unclear procedures can make it difficult for requesters to use the law and also be confusing for public institutions, since it is not clear exactly how they are supposed to process requests.

The RTI Rating category Requesting Procedures covers two main sets of procedures, namely the making and then the processing of requests.

In terms of the former, Article 9(1) of the RTI Law, dealing with written requests, requires requesters to provide their "name, last name, citizenship, place of residence, work or study" or, for legal persons, name and physical address. Requiring all of this information is not necessary. All that should be required is for a requester to provide a description of the information they are seeking and some sort of address for delivery of the information, which might just be an email.

Articles 9(10) and (11) address cases where the public authority does not hold the information or only holds part of it. In this case, the information officer is called upon to direct the requesters to the place where the information is held. This is useful, but better practice in such situations, which arise frequently because requesters are often not familiar with how the bureaucracy is organised, is to require the information officer to transfer the request to the right public authority, if he or she is aware of where the information is held, and inform the requester about it (rather than to make the requester lodge the request a second time, with the right public authority).

In terms of the second procedural issue, namely the processing of requests, a key issue is the time limits for responding, which is addressed in Article 9(7). This Article fails to place an obligation on public authorities to respond to requests as soon as possible. This is important because the maximum time limits should be treated as maximums, not as standard periods for responding. Where the information officer can find the information quickly and easily, he or she should provide it forthwith.

Article 9(7)(a) provides for responses within five working days. This is a very short time limit which is positive in some sense but it may also place undue pressure on public authorities. Article 9(7)(c) then provides for an extension of this time limit, "if additional work is needed", for up to 30 working days, with notice about the extension being provided to the requester within the original five working days. While the initial time limit is perhaps too short, the period for an extension is a bit too long. It would be preferable if the extension were limited to 20 working days or less. Also, the ground for an extension, namely "if additional work is needed", is too broad. The specific conditions which would justify an extension – such as a need to consult with third parties or to search through a large number of documents – should be specified so that a requester could challenge an extension if he or she did not feel that the reasons given to justify it were legitimate.

In general, the system of fees, set out in Article 10 of the RTI Law and elaborated through a 2015 Regulation, is in line with international standards. However, Article 10(2)(b) provides for just ten pages to be provided for free, whereas better practice is to provide up to 20 pages for free. In addition, better practice is to establish fee waivers for impecunious requesters, which the RTI Law fails to do.

Finally, the RTI Law fails to set out any framework for the reuse of information. Such a framework is important to make it clear that once requesters receive information they are free to use (reuse) however they may wish. In some cases it would be appropriate to require reusers to acknowledge the source and/or author of the original information, and this condition can be included in the licence. However, where a third party holds intellectual property rights in the information, such as copyright, the right of reuse needs to be restricted accordingly.

Many States address this issue by developing a set of open reuse licences and then attaching the appropriate licence to information in relation to which a public authority owns the intellectual property rights either when the information is first created or when it is released publicly (whether on a proactive basis or in response to a request). This is the approach taken, for example, in the work of the Creative Commons and their licences.[24] Ideally, the RTI law would mandate the creation of a system of open licences to underpin an open reuse policy.

Recommendations:

- Requesters should only be required to provide the minimum necessary information when making a request rather than additional information such as their home address or place of work.
- Where a public authority does not hold requested information, it should be required to transfer the request to the authority which does hold it (or simply inform the requester where they do not know where to find the information).
- Consideration should be given to extending the initial time limit to ten working days but also to require public authorities to respond to requests as soon as possible. Clear conditions should be added for when this initial period might be extended, and the time limit for extensions should be capped at 20 working days.
- Consideration should be given to expanding the number of pages to be given for free to twenty and to establishing fee waivers for impecunious requesters.
- The law should establish at least a framework of rules on reuse, for example by calling for the adoption of a set of open licences which should then be attached to information which is made public.

[24] See https://creativecommons.org.

4. Exceptions and Refusals

The regime of exceptions is the most complicated part of any RTI law and yet it is absolutely central since it determines the line between secrecy and openness (i.e. which information will be disclosed and which may justifiably be withheld). It is very important to get the regime of exceptions right. It is essential to ensure that legitimately confidential information is protected but it is equally important to ensure that exceptions are not overbroad or unduly discretionary since otherwise they will undermine the whole purpose of the RTI law. Exceptions is one of the weakest performing categories on the RTI Rating for the RTI Law, which earns only 17 points out of 30 or 57% in this category.

The main way that international law maintains an appropriate balance between protecting legitimate secrecy interests and ensuring robust transparency is by requiring exceptions to meet a strict three-part test. First, exceptions must protect only legitimate confidentiality interests, such as national security and privacy. These are very similar in better practice RTI laws, since the types of interests that need protecting do not really vary from country to country. Second, access to information should be refused only if the disclosure of the information would pose a risk of harm to one or more of the protected interests (and not just because information "relates" to an interest). Third, even where disclosure of the information would pose a risk of harm, it should still be disclosed where the benefits of this – for example in terms of combating corruption or exposing human rights abuse – would outweigh that harm. This latter is often referred to as the public interest override (because where the public interest in disclosure outweighs the harm, that overrides the exception).

A key issue for any regime of exceptions is the relationship between the RTI law and secrecy laws, noting that in most countries secrecy provisions are scattered across a number of different laws, some of which may have been adopted a long time ago. Article 6(3) of the RTI Law provides that access to information may only be limited in cases foreseen by the Constitution and the RTI Law. This looks very positive, because it appears to call for the RTI Law to override secrecy laws.

However, for an RTI law to override other laws, it needs to recognise all legitimate grounds for secrecy itself, which might then be defined more clearly in other laws (such as a privacy or data protection law which defines what privacy covers). Article 8(1) does not do that. It refers to only a few grounds for secrecy, such as privacy, pre-investigation information and copyright, omitting many others, such as national security, public order and commercial confidentiality. Instead, Article 8(1)(a) allows for access to information to be refused when the information contains a "state, official, bank or trade secret". There is no definition of a State or official secret, with the result that what is included within the scope of these very wide notions is essentially clarified in other laws. As a result, what appears to be an override of secrecy laws in Article 6(3) is

in fact undermined by the grant of power to other laws to establish new types of exceptions in Article 8(1)(a).

Another problem is that some of the specific interests which are protected, as set out in Article 8(1), are not considered to be legitimate interests under international law. Specifically, the following go beyond what is considered necessary under international law:

- As already noted, State and official secrets (Article 8(1)(a)) are not defined and hence are not legitimate.
- Article 8(1)(c) protects "pre-investigation data not subject to publicity". Most RTI laws include an exception for information the disclosure of which would undermine investigations or the administration of justice more generally (such as fair trials). However, this exception not only fails to include a harm test but it is also defined in a circular way that could be interpreted very broadly.
- Article 8(1)(e) provides for protection for copyright and associated rights (presumably meaning intellectual property rights). It is perfectly legitimate to protect these rights when they vest in third parties. However, as noted above, a key idea behind the reuse of public information is that public authorities do not assert intellectual property rights in their own work. Rather, since these works are produced using public funds, they should be made generally available to the public. Article 8(1)(e) therefore should be limited in scope to privately held intellectual property rights.

In addition to these issues, one of the exceptions in Article 8(1) does not have a proper harm test:

- Article 8(1)(d) protects information that is classified based on "professional activity (medical, notary, attorney secrets)". Most RTI laws exclude legally privileged information (i.e. attorney secrets). However, other professions do not have the same degree of protection under the law of evidence. Furthermore, the key element justifying secrecy in these other cases, and specifically for doctors and notaries, is privacy, which is already protected by Article 8(1)(b). At a minimum, this exception should include some sort of harm test or it should be limited in scope to legally privileged information.

Article 8(3) establishes a sort of public interest override, excluding from the scope of secrecy information which: involves an urgent case of security, health or a national disaster; presents the situation of the country in terms of economy, nature, environment, health, education and so on; or where refusing the request would impact negatively on the implementation of State programmes in various areas (socio-economic, scientific and so on). This is positive. However, it falls short of a full, general public interest override, which would call for information to be released whenever the benefits in terms of any public interest are greater than the harm to the protected interest. Just as examples, Article 8(3) fails to refer to public interests such as human rights, exposing corruption or promoting public participation.

Better practice RTI laws place overall time limits – for example of 15 or 20 years – on the exceptions which protect public interests, such as national security and public order (as opposed to private interests such as privacy or commercial confidentiality). The Armenian RTI Law does not do this. Such a limit could be extended, in highly exceptional cases and using a special procedure, such as having the responsible minister specifically sign off on it, where the information in question really did retain its sensitive character even after 20 years.

Better practice RTI Laws also require a public authority to consult with a third party when a request is made for information which that third party supplied to the authority in confidence. In such cases, the third party can either consent to the disclosure of the information or object to it. In the former case, the information can simply be disclosed, while in the latter case the information officer should take the views of the third party into account, without treating them as a veto over disclosure.

Recommendations:

- The RTI Law should contain a complete list of the specific interests – such as national security, privacy and so on – that might justify a refusal to disclose information and it should not then allow other laws to extend that. The references in Article 8(1)(a) to very general secrecy notions, such as State and official secrets, should be removed because they essentially allow other laws to extend the types of secrecy interests that are protected.
- The exceptions in Article 8(1)(c) ("pre-investigation data not subject to publicity") and Article 8(1)(e) ("copyright") should be replaced with more precise and limited exceptions.
- The exception in Article 8(1)(d) should either be limited in scope to legally privileged information or at least have a harm test added.
- A broader, more general public interest override should be added to the law.
- Consideration should be given to introducing an overall time limit for exceptions protecting public interests to 20 years and then to provide for an exceptional possibility of extending this through a special procedure in the rare cases where the information really does remain sensitive after 20 years.
- Third parties should be consulted where a request is made for information provided by them in confidence, so that they may either consent to the disclosure of that information or provide reasons why they feel it should be kept confidential.

5. Sanctions and Protections

The RTI Law does rather well in this category, earning six points out of a possible eight, or 75%. Part of the reason for this is the whistleblower legislation that was adopted in

2017. The RTI Law also provides for sanctions to be imposed on officials on fairly wide grounds for wilfully obstructing the right to access information.

Best practice is also to provide for sanctions for public authorities which are systematically failing to respect the RTI law. The rationale for this is that problems regarding RTI are often institutional in nature rather than being the fault of one or another individual. While it is appropriate to punish officials who wilfully obstruct access, it can be more effective to impose sanctions on public authorities as such, in an attempt to get them to change their (institutional) behaviour. This sort of rule is not found in the RTI Law, although it is partially provided for in Article 189(7) of the Code of Administrative Violations.

According to Article 14(2), those releasing information pursuant to Article 8(3) (which contains the public interest override, as described above) shall not be subjected to administrative or criminal liability. This is helpful but this protection should be extended to cover all cases where officials release information under the RTI Law and not just when they are applying the public interest override.

Recommendations:

- Consideration should be given to providing for sanctions for public institutions which are systematically failing to implement the RTI Law.
- The protection afforded by Article 14(2) should be expanded to cover all disclosures of information under the RTI Law, not just cases where information is released pursuant to the public interest override as set out in Article 8(3).

6. Promotional Measures

RTI laws need some support to be implemented properly and this is what is covered in the Promotional Measures category of the RTI Rating. The draft Law achieves a rather mediocre score on this category, earning just ten points out of a possible total of 16, or 63%. One of the key reasons for this is that the Law does not create a dedicated body, such as an information commission, to promote RTI and to deal with complaints. As such, no central body is generally tasked with responsibility for ensuring proper implementation of the law. As noted above, in Part I of this Analysis, this is key to a successful RTI regime.

An RTI law creates rights for members of the public and it is essential that steps be taken to ensure that the public is aware of these new rights. As with general promotion of implementation, the RTI Law fails to place an obligation on a central body to do this, again likely because it does not create a dedicated oversight body. Articles 7(1) and (2) do place very general responsibilities on individual public authorities to publicise the

procedures according to which information is provided, which is helpful but cannot replace the role of a central awareness-raising effort.

If public authorities cannot find information which has been requested, or need to spend a lot of time and effort doing so, they will face serious challenges in meeting their RTI obligations. The RTI Law provides generally, in Article 4(a), that a key principle behind RTI is having "unified procedures to record, classify and maintain information", while Article 5 states that the system for doing these things shall be as defined by the government. These provisions represent a very general records management system but they fail to conform to better practice in this area. This starts by mandating a specific central body, again often the dedicated oversight body or information commission, to set minimum records management standards for all public authorities. This avoids both the inefficiency of having each authority do this separately and ending up with a patchwork of different standards across the public sector. There will then need to be training to build the capacity of public authorities to apply the standards and, finally, some sort of system for monitoring performance and addressing the problem of authorities which are failing to manage their records properly.

Finally, a robust system of reporting is needed to be able to follow what is happening under the RTI law and to identify problems and bottlenecks and then rectify them. According to Article 7(3)(j1), public authorities need to report annually on the requests they have received and how they have dealt with them, and this is also supported by Article 13(2)(c). However, better practice is also to require a central body, normally the independent administrative oversight body, to prepare a central report on overall efforts to implement the law, including by publishing aggregated statistics on requests and how they have been dealt with. This latter report should be tabled before parliament and also made widely publicly available. Due to the absence of any dedicated oversight body, this function is not provided for in the RTI Law.

Recommendations:

- The RTI Law should give a central body a general mandate to promote proper implementation of the law, to raise public awareness about its provisions and the rights it creates for citizens, and to adopt a central annual report on implementation.
- The RTI law should also put in place a proper records management system that involves the setting of standards by a central body, the provision of training and a monitoring system to promote compliance with the standards.