CENTRE FOR LAW AND DEMOCRACY

Sweden

Comments on The Freedom of the Press Act, Chapter 2 On the Public Nature of Official Documents

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Introduction[1]

Sweden was the first country in the world to adopt a law giving individuals a right to access information held by public authorities (the right to information or RTI) when *His Majesty's Gracious Ordinance Regarding the Freedom of Writing and of the Press* was adopted in 1766.[2] Indeed, it was nearly 200 years before another country adopted such a law.[3] The whole of the (significantly amended) current right to information law for Sweden is now part of the Constitution of Sweden, specifically as the Freedom of the Press Act, Chapter 2 On the Public Nature of Official Documents (Swedish RTI law).[4]

Despite its very impressive pedigree, the Swedish RTI law is not as strong as observers tend to assume. Indeed, CLD's experience suggests that many of the countries which adopted RTI laws earlier on are not among the countries with the strongest RTI laws. One explanation for this is that it can be easy for more democratic countries, which generally tend to be the early adopters, to be rather complacent about RTI. The fact that they have regular and stable elections, strong rule of law systems, generally good respect for human rights and lower levels of corruption can lead their citizens to take it for granted that they are also strong in terms of transparency and/or to undervalue the importance of transparency.

The assumption falls down at least when it comes to the core legal framework for RTI, which is what provides the basis for practical implementation of the right. Over the past twenty years, it has been developing countries that have primarily demonstrated global leadership in designing RTI laws. There are no doubt many reasons for this, including the heightened need for transparency – as a foundation for government accountability, political participation and combating corruption – in those countries. Whatever the underlying rationale, the evidence shows that legal frameworks for RTI have gotten stronger and stronger in recent years. In contrast, RTI legal frameworks in many Western democracies have stagnated or even regressed as governments have sought to introduce more secretive rules.

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[2] Originally issued in the Council Chamber, Stockholm, on 2 December 1766 as Kongl. Maj:ts Nådige Förordning, Angående Skrifoch Tryckfriheten. English translation by Ian Giles & Peter Graves. Available at: http://www.peterforsskal.com/documents/1766-translation.pdf.

[3] Finland adopted its law in 1951, but it had been part of Sweden in 1766 when the original law was adopted. The third country – the United States – followed Sweden by almost exactly 200 years, in 1966.

[4] Available at: http://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf/.

Anecdotal evidence suggests that there is a close relationship between a strong legal framework for RTI and strong delivery of information in practice, although this relationship is certainly not linear. In particular, a strong legal framework is clearly not a sufficient guarantee of strong delivery, and there are some examples of countries with very strong laws that have failed miserably in terms of implementation. At the same time, the evidence strongly suggests that the phenomenon of bureaucratic resistance to openness is very widespread and that officials will often take advantage of any loopholes or limitations in the law to delay or deny access. To this extent, having a strong legal framework is needed to counteract the culture of secrecy and to support strong delivery of the right to information.

The core evidence for the above comes from the RTI Rating, a globally accepted methodology for assessing the strength of the legal framework for RTI. Developed by the Centre for Law and Democracy (CLD) and Access Info Europe,[5] every national legal framework has been included on the RTI Rating.[6] According to the Rating, and as illustrated in Table 1, every Scandinavian country's RTI framework could be significantly improved. While Sweden ranks second from among the five countries, it is only in 31st place globally, presumably far lower down the rankings than where most Swedes would like to see their country.

Table 1: Ratings for Scandinavian Countries

Country	RTI Rating Score (out of 150)	Global Ranking
1. Finland	105	26th
2. Sweden	101	31st
3. Norway	78	68th
4. Denmark	64	92nd
4. Iceland	64	92nd

Table 2 shows a breakdown of Sweden's performance on the RTI Ranking, broken down by category.[7] As the Table shows, while Sweden does well in Categories 1 and 2 of the Rating, Right of Access and Scope, and acceptably in Category 5, Appeals, it scores a weak 63 per cent or lower in every other category. It is, thus, clear that the Swedish legislation is in need of reform. While ordinary Swedes may not feel the need

[5] See www.rti-rating.org for the full results of the Rating globally. Note that the Rating only assesses the legal framework for RTI, not how that framework is implemented in practice. For more information about the two contributing organisations, see, respectively. www.law-democracy.org and http://www.access-info.org.

[6] There are a very small number of exceptions to this where the two sponsoring organisations have been unable to obtain either an original or translated version of the law, and there is normally a bit of a lag after a country passes or updates an RTI law in getting it assessed and onto the Rating.

[7] The full Rating for Sweden can be found on the RTI Rating website, at http://www.rti-rating.org/view_country/?country_name=Sweden.

for reform keenly, those that use the law regularly, and especially those that push the boundaries of disclosure, may. In stark contrast to the Swedish score of only 101 points, top-scoring Mexico earns a full 136 points out of a possible total of 150, while Serbia follows with 135 points, showing that earning higher scores is very achievable.

Table 2: RTI Rating Score for Current Swedish Law

Section	Max Points	Score	Percentage
1. Right of Access	6	5	83.33
2. Scope	30	25	83.33
3. Requesting Procedures	30	18	60.00
4. Exceptions and Refusals	30	19	63.33
5. Appeals	30	22	73.33
6. Sanctions and Protections	8	4	50.00
7. Promotional Measures	16	8	50.00
Total Score	**150**	**99**	**66.00**

These Comments start with the RTI Rating as a way of pointing to possible problems with the Swedish law, but they also draw heavily on international better practice in this area,[8] as well as the deep experience of CLD in developing and implementing RTI laws around the world. Suggestions for possible ways of reforming the law and sometimes practice are provided throughout.

The goal of these Comments is to stimulate debate in Sweden about the need for reform of the right to information law. Sweden engaged in extensive celebrations – both internally and internationally – last year to mark the 250th anniversary of the world's first RTI law, for which the country can proudly claim credit. Now, however, it is time to reflect on the real strengths and weaknesses of this 250-year-old law, with the goal of ensuring that Sweden remains a leader in this important governance area.

1. Right of Access

The very first Indicator on the RTI Rating calls for the right to be constitutionally recognised. It goes without saying that Sweden passes this with flying colours, given that the whole of the Freedom of the Press Act, including Chapter 2 On the Public Nature of Official Documents (the RTI law), is considered to be of constitutional status. Indeed, this means that Sweden has more detailed constitutional protection for this right than any other country in the world. The RTI law also provides for a clear

[8] See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO).

presumption in favour of access, in Article 1, which meets the conditions of Indicator 2.

However, the RTI law performs less well on the next Indicator, which calls for the legal framework to recognise the benefits of the right to information and to require the law to be interpreted in the manner that best promotes those benefits. Although the law does recognise some direct benefits of the right to information – such as the free exchange of opinions and the availability of information (see Article 1) – it provides limited recognition of the wider benefits. Other laws, for example, recognise such benefits as promoting government accountability, fostering political participation, supporting fair, level playing field economic competition, protecting human rights and the rule of law, and combating corruption.

As a consequence of its failure to recognise the benefits of RTI, the law also fails to take the next step, which would be to require those tasked with interpreting it to do so in the manner that best gives effect to those benefits. Because the whole law is of constitutional status, progressive interpretation of it may to some extent be implicit in the legal system. At the same time, Article 4(1) of Chapter 1 of the Freedom of the Press Act essentially calls for interpretation of the law in such a way as to maximise press freedom, suggesting that it would be possible also to include an analogous provision specifically focusing on the right to information, as the RTI Rating calls for.

Recommendations:

- The law should include a clearer and broader statement of the benefits of the right to information.
- This should then be followed by a provision calling on those responsible for interpreting the law to do so in the manner that best gives effect to the benefits it recognises.

2. Scope

This is another category where the Swedish law does well on the RTI Rating, although there are still some areas for improvement. Indicator 4, the first in this Category of the RTI Rating, calls for the right of everyone to make a request for information to be recognised in the law. Although Article 1 of the law refers to Swedish citizens, in fact the law grants everyone the right to make a request and so full points are awarded here.

The Swedish law is relatively unique in the enormous space and attention it allocates to defining what constitutes an "official document", which is what the law grants a right of access to. Indeed, it devotes more than one-half of its provisions – fully nine articles, namely 3, 4, 6, 7, 8, 9, 10, 11 and 17 – to this issue. In contrast, many modern RTI laws only allocate one paragraph to this, defining information simply as any recorded material, regardless of the form in which it is stored (sometimes providing a non-exclusive list of types of forms of storage). A good example of this is section 4(1) of the Freedom of Information Act, 2004 of Antigua and Barbuda, which states:

> For purposes of this Act, a record includes any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the public authority or private body that holds it and whether or not it is classified.

The key elements of the definition of an official document, in accordance with Article 3(1) of the law, are that it be "held by" a public authority and that it be "received or drawn up" by that authority. There are some blanket exclusions that go beyond the scope of these terms, such as Article 4, which excludes from the scope of the law communications directed at an official which do not fall within the scope of work of the authority and are directed at the official exclusively in his or her capacity as holder of another position. Article 11 also excludes three categories of documents, namely communications which are solely for purposes of forwarding a communication, documents solely intended for publication in a periodical issued by the authority, and library material. These appear to be uncontroversial.

The term "held by" is mostly used to limit the scope to content which the authority can access using technical aids normally available to it, which is legitimate (see Article 3(2)). However, there are also some substantive exclusions, such as Article 10, which rules out documents held simply for purposes of technical processing or storage, or backup copies. An important exclusion is found in Article 3(3), which stipulates that compilations of data which contain personal information (defined broadly as any personally identifying material) which the authority is not authorised under a law to make available are not deemed to be held by the authority. This is problematical because it shifts responsibility away from the right to information law, to other legislation.

The definition of "received by", in Article 6, mostly operates so as to ensure that the public authority actually has possession of the document. However, it contains an important exclusion, namely tender and related documents which are sealed, until the appointed time for their opening. Rather than excluding such documents from the scope of the law, better practice is to cover sealed tenders generally as part of the commercial exception (which might then be overridden, for example in the public interest or because no harm to commercial interests would result).

The definition of "drawn up", found in Article 7, also excludes an important range of documents from the scope of the law. Essentially, Article 7, in conjunction with Article 9, excludes documents which are not final in nature in the sense that they have not been "dispatched", "finally settled", "finally checked and approved" or, in the case of memoranda, "accepted for filing and registration", although there are some (largely minor and logically necessary) exceptions to this (such as a register which is continuously updated and background documents used for court rulings or other decisions).

Article 8 also excludes from the ambit of both "received by" and "drawn up" documents shared internally, as long as the provider and recipient do not act as "independent entities".

It is not clear how far these exceptions and exclusions to the scope of an "official document" limit access in practice. However, a far better approach for almost all of the issues they address is to define the scope of information covered broadly and then to protect legitimate interests through the regime of exceptions to the right of access. This allows for exceptions to be drawn appropriately narrowly and for the harm test and public interest override to be applied (see below under Exceptions). Most RTI laws from other countries are designed in this way and work perfectly well to protect only justifiably confidential documents.

Two examples serve to illustrate this point. First, Articles 7 and 9 simply exclude from the scope of the law non-final documents, which we presume covers a significant range of information. Better practice is to include all such documents, and to allow access to be refused only where this would undermine (harm) a legitimate interest, such as the free and frank provision of advice or the success of a policy (as against premature disclosure of the policy). Furthermore, even where disclosure would pose a risk of these harms, the information should still be disclosed where that is in the overall public interest. These limitations on the scope of exceptions do not apply to the Article 7 and 9 class exclusions.

Second, Article 8 excludes what appears to be a broad range of so-called internal communications. Once again, most RTI laws do not operate this way and, instead, cover all such information, allowing for non-disclosure only where providing the information would cause harm to a pre-identified interest (again, the free and frank provision of advice is a good example of such an interest), which outweighs the benefits of releasing the information. The importance of this in the modern digital world is greater than ever before, as more and more government business is conducted via what might be termed internal communications.

Three other issues are important in this context. The first is the threat that the use of private devices and systems poses to the right to information, whether these are

private mobile phones, email addresses or other systems. This was brought into stark relief during the latest United States presidential election with the recurring implications of the investigation into candidate Hillary Clinton's use of a private server to route emails containing public content.

One challenge here is that most modern officials use multiple devices, programmes and addresses to communicate, and it is also common for those officials to fail to distinguish strictly between public and private communications systems. How many officials, for example, put away their public telephone and pull out a private one when making a personal call from the office?

It is clearly not only better practice but also basic common sense that the coverage of the RTI law needs to follow content, rather than device or format, and several RTI oversight bodies have clearly indicated that public information held on private devices is covered by the law.[9] However, the obvious logic of this can be challenging to apply in practice, since it is often not easy for public authorities to access information held on or transmitted via private devices or accounts belonging to officials. As a result, it is better practice to have policies in place requiring officials to use official channels of communication for conducting official business whenever possible and to make sure, when private channels are used, that all important content gets transferred over to the official channel in due course.

A second issue is the use of communications systems that do not create permanent records, which is a functionality that is available, for example, via Blackberry Messenger. This approximates digital communications to oral communications inasmuch as they are not preserved. A third, related issue is the avoidance by other means of creating a document trail when undertaking official business. It is possible effectively to get around or avoid RTI obligations by simply avoiding documenting important matters such as the background to decisions, for example by conducting business orally or by failing to keep proper minutes of meetings.

One solution that is being developed for both of these problems is the idea of a duty to document.[10] Such a duty does not need to be unduly onerous and the idea is not to formalise all types of communications or to increase substantially the already enormous volume of information generated within public authorities. Rather, the idea is to ensure that at least the key considerations and steps in decision making

[9] See, for example, the United Kingdom Information Commissioner's Office guidance note, *Official information held in private email accounts*. Available at: https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf.
[10] See, for example, Office of the Information Commissioner of Canada, *Backgrounder on A Duty to Document*. Available at: http://www.oic-ci.gc.ca/eng/communique-de-presse-news-releases-2016_4.aspx. There is apparently some form of a duty to document under Swedish law (comments on file with CLD from an expert reviewer).

processes do get documented by establishing minimum requirements for this either in law or at least in a binding policy document.

Notwithstanding the above, the Swedish law does include some positive features in terms of procedures. One of these is Article 17, which ensures that even where public authorities have handed over their archives to private bodies for safekeeping, and even where public authorities have ceased to exist, their information is still covered by the RTI law.

The coverage of the RTI law in terms of public authorities, as provided for both in the RTI law and the Swedish Publicity and Privacy Law (OSL), is generally very broad, covering almost all core government entities from all three branches of government (i.e. the executive, legislative and judicial branches), as well as other public authorities, such as independent oversight bodies.

There are, however, some limitations. According to Chapter 2, Article 3 of the Publicity and Privacy Law (OSL), the term public authorities shall cover corporations and other commercial actors, but only "where municipalities or county councils exercise judicial control", thereby excluding nationally owned public corporations. There would appear to be no warrant for such a limitation, which is not found in better practice laws. For example, section 43 of the Sri Lankan Right to Information Act, 2016, states:

> In this Act, unless the context otherwise requires– "public authority" means –
> …
> (d) a public corporation;
> (e) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five per centum or more of the shares or otherwise has a controlling interest.

Similarly, the RTI law does not extend to private bodies which undertake public functions or which receive substantial funding from public authorities.[11] Once again, this is not in line with better practice. A good example of this is section 1.3.1 of the Liberian Freedom of Information Act, 2010, which states:

> "Access to information" refers to the right of the public to request, receive, review, reproduce and retain records and documents held by public bodies and private entities performing public functions or receiving public funding.

Recommendations:

[11] Amendments to the rules due to come into effect in August 2017 will extend coverage to private bodies that operate in the area of health care (comments on file with CLD from an expert reviewer).

- Although it does not in practice limit the scope of the law, for purposes of clarity consideration should be given to replacing the reference in Article 1 of the RTI law to "citizens" with something which better reflects the actual legal situation.
- Consideration should be given to revising entirely the whole approach taken in the law to defining its scope in terms of information covered. Instead of spending a lot of time and energy on defining "official documents" in an unduly narrow way, legitimate interests should be protected largely through the regime of exceptions. This would broaden the scope of the law and ensure that the protections which are built into the regime of exceptions always apply, which is not currently the case.
- To the extent that this is not already the case, consideration should be given to putting in place a binding policy requiring officials, whenever reasonably possible, to conduct official business using official communications channels and, when this does not happen, to ensure that important public communications get transferred over to the public system.
- To the extent that this is not already the case, consideration should be given to introducing a duty to document into the RTI law or at least including it in a binding policy document.
- The RTI law should cover all publicly owned or controlled corporations.
- The RTI law should apply to any body which undertakes a public function or which receives significant public funding, to the extent of that function or funding.

3. Requesting Procedures

This is the first Category in the RTI Rating where the Swedish RTI law exhibits greater weaknesses. In general, procedures are the nuts and bolts of the system for requesting information and a vital component in an effective RTI system. At the same time, this is an area where better administrative practice can offset in important ways legal shortcomings. Despite this, it is better practice to include clear and user friendly procedures in the law, if only to ensure that they are consistently applied by all public authorities and to give individuals a proper basis for complaints where they are not respected.

Technology is starting to impact significantly on the procedural rules relating to the processing of requests. Mexico is a country that has largely leapfrogged over physical requests by putting in place a powerful online requesting (and appealing) system, the Plataforma Nacional de Transparencia Gobierno Federal,[12] through which some 80

[12] Available (in Spanish) at: https://www.infomex.org.mx/gobiernofederal/home.action.

per cent of all requests are now made (and onto which all requests are now entered, however they are formally lodged).[13] The system allows for the online filing of requests and appeals, and includes a series of automated features – such as sending automatic email alerts to the requester when the status of his or her request changes and providing for automatic tracking of approaching time limits – as well as semi-automated features – such as allowing the requester to select different options for accessing the information, with their different fee implications automatically displayed – all of which produce enormous efficiencies. A number of other countries have put in place similar systems. These systems are normally created as a matter of policy and practice, rather than by law, but they should still be considered in other countries.

Articles 12-14 of the RTI law, along with Article 4 of the Swedish Administrative Procedure Act, provide for a reasonably robust set of procedures, but a number of better practices are missing. Indicator 18 of the RTI Rating calls for requesters to be provided with a receipt or formal acknowledgement of their request, which is missing from the Swedish system. Normally, such a receipt is provided in the same format as the request was made (i.e. in person, if the request was made in person, by email if the request was filed that way, by mail if the request was lodged that way and so on). For electronic requests – i.e. those presented by email or via an online system – a receipt or acknowledgement can be provided almost immediately (and even automatically via an online system), reducing or eliminating any additional burden this creates.

The Swedish law requires information to be provided "forthwith, or as soon as possible" (see Article 12(1) of the RTI law), and this apparently often results in the release of information more quickly than the maximum time limit suggested in Indicator 18 for providing a receipt (five working days). Clearly in such cases the utility of a receipt is diminished, although immediate, electronic receipts would still be useful. However, for the presumably reasonably large number of cases where more time is needed to respond to a request, it would be useful to require a receipt to be provided.

Article 4(3) of the Administrative Procedure Act provides for individuals to be referred to the appropriate public authority where they originally approach the wrong authority in relation to an administrative matter. This is helpful and earns Sweden one point on Indicator 19. However, better practice, because it makes matters easier for requesters, is for public authorities to transfer requests to the proper authority, where they are aware of one which holds the relevant information.[14]

[13] Information on file with CLD, provided by the Mexican oversight body, the National Institute of Transparency, Access to Information and Data Protection (INAI).

[14] There is some suggestion that Article 4(3) of the Administrative Procedure Act does require requests to be transferred, but the point has not been fully established (comments on file with CLD from an expert reviewer).

One of the more serious shortcomings with the Swedish system is that there is no requirement for public authorities to provide information in the format preferred by requesters and, in particular, to provide the information in electronic format. Instead, information is usually provided in paper format. There are usually some limitations to this, for example where to provide the information in the format stipulated would damage the record or place an unreasonable burden on the public authority.

In terms of time limits for responding to requests, as noted above, the RTI law requires public authorities to respond as soon as possible. However, in recognition of the fact that responding to requests in a timely fashion is a serious problem in many countries, the RTI Rating calls for strict overall time limits to be placed on responding to requests. It recognises that some requests are more complicated, and so accepts that these limits may need to be extended in appropriate cases, but again limits this both by calling for clear definitions of when extensions are appropriate and, once again, clear time limits to any extension. The Swedish legal regime lacks both of these protections. However, some decisions by the Ombudsman, as well as some jurisprudence, does suggest that there are some rules regarding the time limit within which requests need to be processed.[15]

Another problematical procedural issue in many countries is the regime of fees for responding to requests. As with time limits, the RTI Rating calls for three sets of measures here: a prohibition on charges simply for making a request; reasonable, centrally set fees for reproducing and sending information (but not for time spent processing requests); and fee waivers for impecunious or poorer requesters. Sweden earns full points on the first of these Indicators (because it is free to file a request).

However, it only earns one point on the second one. Article 13(1) of the RTI law refers to a fixed fee, but there is no requirement for this to be set centrally and neither is it entirely clear that the fee shall be limited to the costs of reproducing and sending the information. It may be noted that, if such a fee framework is in place, it will always be free to obtain information electronically because this does not impose costs for either duplicating or sending information.

Finally, Sweden fails to earn any points on the last Indicator in this series, because there is no reference in the law to fee waivers for poor people.

The final indicator in this category, Indicator 27, calls for there to be no limitations on or charges for reuse of information. However, in Sweden, in accordance with European Union Directive 2003/98/EC on the re-use of public sector information, charges may be levied for this. Better practice is not to impose such charges and,

[15] Comments on file with CLD from an expert reviewer.

instead, to licence the free use of data.[16] Such open data or open government licences typically grant users the non-exclusive right freely to reuse in any way the record to which the licence is attached. For example, the Canadian Open Government Licence grants a right to: "Copy, modify, publish, translate, adapt, distribute or otherwise use the Information in any medium, mode or format for any lawful purpose." There are typically exceptions, for example for private information or for official logos or other symbols, so as to avoid presenting modified information as coming from government. And these licences also often include a requirement of attribution to the original source, which may be specified in a general form in the licence or in a more specific way in any record to which the licence is attached. Of course such licences cannot be attached to information provided by private third parties (which may be subject to various intellectual property rights restrictions, including copyright).

Recommendations:

- Consideration should be given, to the extent that this is not already the case, to developing a central platform, along the lines of the one in place in Mexico, for making requests for information and for lodging appeals against refusals to provide access to information.
- Consideration should be given to requiring public authorities to provide a receipt or acknowledgement of a request either forthwith (for requests lodged electronically) or within a few days where they expect that it will take longer than that to provide a final response to the request (for other requests).
- Consideration should be given to requiring public authorities to whom a request for information has mistakenly been lodged to transfer that request to the public authority which does hold the information, where they are aware of one.
- The law should place an obligation on public authorities to provide information in the format preferred by a requester, unless that would either take an unreasonable time or pose a risk to the preservation of the record containing the information.
- A strict and explicit presumptive limit should be placed on the time public authorities can take to respond to a request in the legislation. The law may allow for this to be extended, but only in appropriate cases and, even then, only for a limited additional period of time.
- Consideration should be given to making it clear in the RTI law that fees shall be set centrally, for example by the Minister of Finance, and that they shall be limited to the reasonable costs of duplicating and sending the information, if any.

[16] In Canada, for example, an Open Government Licence governs the reuse of public data. Available at: http://open.canada.ca/en/open-government-licence-canada.

- Consideration should be given to providing for fee waivers or exemptions for impecunious or poorer requesters.
- Consideration should be given to adopting an open licence which grants users a right freely to reuse public information and attaching it to all or at least most publicly disclosed records which were originally created by public authorities.

4. Exceptions

The regime of exceptions is another Category of the RTI Rating where the Swedish RTI law is relatively weak, achieving a score of just 63 per cent of the possible total here. This is also the Category for which international standards are most precise. Under international law, the right to freedom of expression, which also embraces the right to information, is not absolute. This is in recognition of the fact that a number of public and private interests – such as national security, the administration of justice and privacy – may be unduly harmed by both expressive activity and the disclosure of information.

However, international law does not give States a free hand in limiting these rights. Rather, it sets clear rules for, respectively, restrictions on free speech and exceptions to the right to information. In terms of the latter, it is generally accepted that exceptions need to meet a strict three-part test. The first part of the test is that the exception should be clearly set out in law and aim to protect an interest which is recognised under international law as potentially warranting restrictions on the right to information. The second part is that information may legitimately be withheld only where disclosure of that information would materially harm a legitimate interest. In other words, an exception may not cover all information relating to national security, just information the disclosure of which would harm national security (often referred to as the 'harm test'). Finally, even where the second part of the test is met, the information should still be disclosed where the public interest in accessing the information outweighs the harm which is likely to be caused by the disclosure (often referred to as the 'public interest override').

These standards are reflected in the following statement from the 2004 Joint Declaration of 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:

> The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy.

> Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.[17]

The Swedish RTI law takes a relatively unique approach towards exceptions. Article 2 sets out seven grounds which would justify an exception, and then stipulates that any restriction must be "scrupulously specified in a provision of a special act of law", which in practice is the Public Access to Information and Secrecy Act (Secrecy Act), in another law to which the Secrecy Act refers or, where this is authorised by one of the preceding two, in a government ordinance. Article 2(3) also envisages the possibility of a regulation meeting the conditions above granting the parliament and the government the discretion to permit the release of a document taking into account the circumstances.

Most RTI laws include a full regime of exceptions within them, complete with a full description of the interests that are being protected, the harm test and the public interest override (at least for better practice laws). In terms of the relationship with other laws, one of two approaches is normally taken. Some laws provide that, in case of conflict, their provisions prevail over other laws. In this case, there is nothing to stop other laws from elaborating on the nature of an exception, as long as they do not extend it beyond what is envisaged in the RTI law. An example of this is South Africa, where section 5 of the Promotion of Access to Information Act provides:

> This Act applies to the exclusion of any provision of other legislation that—
>
> (a) prohibits or restricts the disclosure of a record of a public body or private body; and
>
> (b) is materially inconsistent with an object, or a specific provision, of this Act.[18]

In other cases, RTI laws specifically preserve other (secrecy) laws. Thus, section 44(1) of the United Kingdom Freedom of Information Act 2000, states:

> Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
>
> (a) is prohibited by or under any enactment,

This approach is problematical because pre-existing secrecy laws often do not conform to the standards of the three-part test for exceptions.

[17] Adopted 6 December 2004. Available at: http://www.osce.org/fom/66176.
[18] Act No. 2, 2000.

As noted above, Article 2 of the Swedish law stipulates that secrecy provisions should be provided for or authorised by the Secrecy Act. In addition, since the access to information law is part of the Constitution of Sweden, it may be assumed that it overrides other laws to the extent of any inconsistency. If this is the case, even exceptions in other laws need to conform to the conditions of the first paragraph of Article 2.

Article 2(1) lists the following interests, described in summary here, as justifying a restriction on the right of access to information: national security; relations with other States or international organisations; central economic (fiscal) policy; supervisory activities; preventing or prosecuting crimes; economic interests of public authorities; the personal or economic interests of individuals; and the preservation of animal or plant species. Depending to some extent on how these have been elaborated on in the Secrecy Act[19] or related legislation and/or interpreted by the courts, all of these interests are recognised under international law as being legitimate justifications for restricting access to information.

The introductory part of Article 2(1) permits restrictions only where they are "necessary" to protect the interests noted above, which would seem to suggest some sort of harm test. However, the nature of this test is not clear so, once again, the extent to which this conforms to international standards depends on exactly how this harm is phrased in the Secrecy Act and/or how it has been interpreted by the courts.[20]

Better practice laws make it clear that the assessment of any risk of harm needs to be done at the time of a request, and in a forward-looking way (i.e. the question is whether harm will result now or in the future if information is disclosed). As such, whether information was, in the past, classified is irrelevant to the issue of whether or not it may be disclosed. Instead, the only issue is whether, at the time of a request, disclosure of the information would harm a protected interest.

The situation regarding the public interest override is unclear in Sweden. In particular, it is not clear whether this is deemed to be included either in the term "necessary" in Article 2(1) or in the specific provisions of the Secrecy Act. Different countries take different approaches here. In some countries, the approach is to provide for a very general public interest override. An example of this is section 5(4) of the Sri Lankan Right to Information Act, 2016, which provides

[19] Unfortunately this is not available in English so CLD has not been able to assess it directly.
[20] Since the Secrecy Act is not available in English, we have not been able to assess this directly but we understand that while some exceptions require a harm test in some cases harm is presumed and in yet other cases there is no harm test. Comments on file with CLD from an expert reviewer.

> Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.[21]

In other countries, the law stipulates the types of public interests that would justify overriding the exceptions. An example of this is South Africa, where section 46 of the RTI law provides:

> Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—
>
> (a) the disclosure of the record would reveal evidence of— (i) a substantial contravention of, or failure to comply with, the law; or (ii) an imminent and serious public safety or environmental risk; and
>
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.[22]

The advantage of the South African approach is that it provides clarity to what is otherwise a very broad and complex notion, i.e. the public interest, which courts in most countries have never managed to define. The disadvantage, essentially by the same token, is that providing a list of public interests necessarily excludes other public interests, because the list of such interests is never closed. For example, in the United Kingdom, the Office of the Information Commissioner has often found that supporting the ability of members of the public to participate in decision-making is a worthy public interest (which, notably, is not listed in the South African law).

Perhaps the best approach is that of Bosnia-Herzegovina, where the law provides:

> **9. Public Interest Test.**
>
> 1. A competent authority shall disclose the requested information, notwithstanding that it has claimed an exemption under Articles 6, 7 or 8, where to do so is justified in the public interest having regard to both any benefit and harm that may accrue from doing so.
>
> 2. In determining whether disclosure is justified in the public interest, a competent authority shall have regard to considerations such as but not limited to, any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment.[23]

[21] Act No. 12 of 2016.
[22] See note 18.
[23] Law on Freedom of Access to Information for Bosnia and Herzegovina, 2000.

This combines an open-ended definition of the public interest with an indicative list of what needs to be considered, providing both breadth and clarity.

A few countries provide for absolute public interest overrides for particular interests, such as the protection of human rights or preventing crimes against humanity or corruption.[24] In other words, where information contains material relating to those issues, none of the exceptions apply (and you do not need to engage in a balancing exercise).

Another key element of a strong regime of exceptions, which does not appear to be present in the Swedish RTI law, is a sunset clause, whereby exceptions to protect public interests effectively lapse after a set period time, for example 15 or 20 years. This is in recognition of the fact that the sensitivity of information declines over time and that, after a long time, very little information remains sensitive. At the same time, there is a possibility that certain information would remain sensitive even after the expiry of the initial time limit. It is, therefore, appropriate and prudent to provide for an exceptional procedure for extending the time limit where this really is necessary. It may be noted that by excluding internal documents and communications from the very scope of the law, as is the case in Sweden (see above, under Scope), any sunset clause could not apply to these types of information and the same is true of any public interest override.

In Mexico, the sunset clause presumptively applies after just five years, but this may be extended for another five years by the appropriate internal body (specifically the "transparency committee" which each public authority is required to establish). For extensions beyond that time (i.e. a total of ten years), an application must be made to the independent oversight body (i.e. the National Institute of Transparency, Access to Information and Data Protection (INAI) for federal information).[25]

Another positive feature of an RTI law is to require public authorities to consult with third parties where a request is made for information provided by them on a confidential basis. This consultation provides an opportunity for the third party either to consent to the release of the information or to object, giving reasons. In the former case, this makes it a lot easier for the public authority to process the request (since they can just disclose the information). In the latter case, the objections of the third party should be taken into account, but they should just be one set of factors (i.e. they should not be treated as a veto).

[24] See, for example, Article 115 of the Mexican General Act of Transparency and Access to Public Information, 4 May 2015 and Article 26 of the Tunisian Loi organique n°22-2016 du 24 Mars 2016 relative au droit d'accès à l'information (Organic Law on the Right of Access to Information).
[25] See Article 101 of the General Act of Transparency and Access to Public Information, 4 May 2015.

Recommendations:

- It would be useful to clarify, in the main right to information law, the standard that harm is required before a request for information may be refused (so consideration should be given to adding an explicit requirement of harm into Article 2(1) of the law).
- Consideration should also be given to making it explicit that the assessment of harm should be done at the time of a request and should be forward looking in nature, so that previous classification of the information is not relevant.
- A clear public interest override should be added to the law, preferably along the lines of the approach taken in Bosnia-Herzegovina, whereby the law includes a non-exclusive list of public interests that may mandate disclosure of the information.
- To the extent that this is not already in place, a clear sunset clause on secrecy of information should be added to the RTI law, along with special procedures for extending this limit in exceptional cases.
- The law should provide for consultation with third parties to obtain either their consent or their objections to disclosure, whenever a request is made for information provided by them on a confidential basis.

5. Oversight and Appeals

For fairly obvious reasons, there needs to be a system of oversight of the way the RTI law is applied, including the possibility for requesters to lodge appeals if their requests for information have been refused or otherwise dealt with in a manner other than is prescribed by the law.

Better practice in this respect is to provide for three levels of appeal. The first appeal should go to a higher official within the same public authority that dealt with the original request. This gives that authority a second chance to resolve the matter internally. Experience suggests that, where such an appeal is available, this often happens and, where it does, this represents a quick and simple way to address the problem.

A second appeal should go to a supervisory administrative appeals body, such as an information commission(er) or ombudsman. Experience around the world suggests that it is useful to have a dedicated body for this purpose. Where this function is added to the other functions of a more general purpose oversight body, such as a human rights commission or ombudsman, it can fail to attract the dedicated attention and expertise that it deserves.

Finally, a third appeal should lie to the courts. Although the courts are expensive and time consuming, it is important to provide for this more probing level of appeal in appropriate cases, for example to deal with very complex issues such as the scope of the exceptions to the right of access.

It appears that, pursuant to the Public Access to Information and Secrecy Act, there is a right to lodge an internal appeal against at least refusals to provide access. However, the Act fails to set out clear time limits for the processing of these appeals, which is important to avoid having them cause delays.

In Sweden, the Parliamentary Ombudsmen[26] exercise general oversight over compliance with laws adopted by parliament, including the RTI law. This, then, constitutes a sort of administrative level of appeal for those whose requests for information have not been dealt with in accordance with the law. It is clear from the wide mandate of the Ombudsmen that they do not focus specifically on the right to information. Although the four Ombudsmen do specialise in different areas, issues relating to freedom of expression and access to information are allocated among them according to their respective areas of specialisation.[27] Generally speaking, as noted above, better practice is to have a dedicated oversight body for RTI matters. However, the longstanding practice of implementing this law in Sweden, along with the enormous respect for the office of the Ombudsmen in the country, may mean that this is less important. More study is needed to ascertain whether it would be useful to allocate the information oversight role to another body in Sweden.

One of the weaknesses with relying on ombudsmen as oversight bodies is that their decisions are normally not binding. Instead, their role is to mediate between citizens and public authorities in the hope that an agreement can be reached, failing which they may make a recommendation for resolving the matter. While this works for most issues, it tends to be less effective in terms of access to information, given the strong vested interests that often apply in this context.

The scope of remedial powers available to the Ombudsmen is not entirely clear from the relevant legislation. Fairly obviously, the oversight body needs to have the power to order (or recommend) the disclosure of information. But better practice is for this body also to be able to make wider orders, for example for the requester to be compensated in appropriate cases.

For example, section 32(4) of the Sierra Leonean Right to Access Information Act, 2013, provides:

[26] Pursuant to Article 2 of Chapter 13 of the Riksdag Act, there shall be four such Ombudsmen, one Chief and three others.
[27] See the Annex to the Administrative Directives for the Parliamentary Ombudsmen.

> The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order–
>
> (a) the release of any unlawfully withheld information;
>
> (b) the payment of compensation; or
>
> (c) any other lawful remedy or redress.

Finally, where the oversight body observes, either directly or in the context of a specific appeal, that a public authority is structurally failing to respect the requirements of the RTI law, it should have the power to order that authority to take the necessary steps to bring itself into compliance. Although this may seem like a strong power to allocate to an oversight body, administrative bodies in most countries operating in many other sectors – such as regulation of broadcasting, stock markets or the legal profession – commonly have very extensive powers.

In terms specifically of the right to information, there are also a number of examples of oversight bodies having these sorts of power. For example, in the context of appeals, Article 19(8) of the RTI law in India grants the Information Commissions the following powers:

> In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—
>
> (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—
>
> (i) by providing access to information, if so requested, in a particular form;
>
> (ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;
>
> (iii) by publishing certain information or categories of information;
>
> (iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;
>
> (v) by enhancing the provision of training on the right to information for its officials;
>
> (vi) by providing it with an annual report in compliance with clause (b) of sub-section (1) of section 4;
>
> (b) require the public authority to compensate the complainant for any loss or other detriment suffered;
>
> (c) impose any of the penalties provided under this Act; (d) reject the application.

Recommendations:

- Clear procedures, including time limits, should be established for internal appeals.

- The question of whether it would be useful to establish a dedicated oversight body for information appeals – such as an information commissioner – should be studied and be the subject of a public consultation to determine the best way forward.
- In the area of access to information, the decisions of the oversight body – whether an ombudsman or an information commissioner – should be binding.
- The remedial powers of the oversight body should be set out clearly in law, and should include not only making information available but also other remedies, including compensating the requester for any losses suffered due to the failure to provide him or her with information.
- The oversight body should have the power to order public authorities to take such actions as may be required to address any structural problems they are having in implementing the law.

6. Sanctions and Protections

It is important that the law provide for an appropriate regime of both sanctions and protections for those who obstruct access and those who grant access. First, sanctions – whether of a disciplinary, administrative or criminal nature – should be available for those who hinder access to information either directly or by means of obstructing the work of officials or organs tasked with facilitating access. Many countries provide for criminal sanctions for obstruction of access in their RTI laws, but experience suggests that these are rarely, if ever, applied.[28] Disciplinary or administrative measures are, therefore, preferable. Under Swedish law, the Parliamentary Ombudsman can either refer individuals for disciplinary action or institute legal proceedings against individuals for breach of the law.

In some countries the courts and sometimes even the independent administrative oversight body can impose fines and other sanctions on public authorities which are systematically failing to implement their obligations under the RTI law. In other countries, this is dealt with in other ways, largely through internal government arrangements (for example, a minister may be warned or even removed for serious failures within his or her ministry). No formal system of sanctions for public authorities for breach of the RTI law is in place in Sweden.

[28] See Susman, Thomas M., Jayaratnam, Ashwini, Snowden, David C. 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.

It is also very important to provide protection for those who disclose information. In Sweden, a whistleblower law came into force on 1 January 2017 which extended protections for whistleblowing to private sector employees. These laws essentially grant protection against retaliation for individuals who expose or blow the whistle on wrongdoing.

However, the legal regime appears to lack provisions guaranteeing proper protection to officials who, in good faith and pursuant to the law, provide access to information. This is quite different from whistleblowing inasmuch as the motivation for disclosing information in this case is a good faith understanding that this is mandated by law rather than any desire to expose wrongdoing. The reason that protection is needed is to make it clear that an official will not be held responsible for disclosing information, even if it is subsequently determined that the law did not warrant the disclosure of that information. For example, the application of the public interest override, noted above under Exceptions, is complicated and different conclusions may be arrived at by different decision-makers. This should not deter first-level decision-makers from applying the override robustly. But obviously they would be very reluctant to apply it if they faced the possibility of subsequent responsibility for 'wrongful' disclosure of information.

Recommendations:

- Consideration should be given to whether the current system in Sweden provides for appropriate disincentives for public authorities that are systematically failing to implement the right to information law and, if not, what additional measures, potentially including sanctions, might be instituted.
- A system of protection for officials who disclose information in good faith pursuant to the law should be introduced.

7. Promotional Measures

The last Category on the RTI Rating covers a mix of promotional measures which experience with this issue around the world has shown are key to proper implementation of the right to information. Put differently, experience has shown that these laws need certain measures of support if they are to be implemented properly, and this category assesses the extent to which those measures are provided for in the legal framework. It is true that, in a country like Sweden, in some cases these measures may be less important than in countries with new RTI laws. Public education about the right may, for example, be fairly widespread in Sweden and the

capacity of public authorities to implement the law may also be fairly developed. At the same time, it is still useful to promote these objectives in a consistent way across all public authorities.

One measure which appears to be absent from the Swedish legal framework is a requirement for all public authorities to appoint officials with dedicated responsibilities for ensuring implementation of the RTI law. The most important such responsibility in most countries is for these officials to receive requests for information and to ensure that they are processed in a timely and otherwise appropriate manner. The individual may also have responsibilities in related areas, such as records management, annual reporting, proactive disclosure and so on.

A second measure which is generally considered to be of some importance is raising public awareness about the law. It is well established that strong implementation of an RTI law depends in important ways on strong demand for information (i.e. a reasonable volume of requests). Absent this, it is not realistic to expect public authorities to expend a lot of time and energy developing robust systems for responding to requests and, absent that, the whole system starts to fail.

Linked to this is the need to allocate overall responsibility for promoting implementation of the law to a central body. In many countries, this is the same body as is responsible for overseeing implementation, whether this is an information commission(er) or an ombudsman, as in Sweden. In some countries, in contrast, the role of the oversight body is largely limited to dealing with appeals, and this more general promotional responsibility is allocated to a government actor, perhaps the Ministry of Justice or a central training institution for public officials.[29]

As noted above, given the longstanding Swedish experience with the right to information, there may be relatively modest need for both of these functions. At the same time, it certainly cannot hurt for these responsibilities to be provided for in the law, with the extent of effort required being left open, depending on the need.

Finally, it is good practice to require there to be robust reporting on the manner in which the RTI law is being implemented. This requires a two-stage system of reporting. First, each public authority should produce a report on what they have done to implement the law, which should include detailed statistics on how many requests they have received and their response to them (including how long it took to respond, any fees charged, the exceptions relied upon where access was refused and so on). In appropriate cases, this might be part of a general annual report prepared by the public authority. Second, a central authority, such as the Ombudsman in Sweden, should be tasked with preparing a central report on what has happened overall in the

[29] This is the case, respectively, in Canada and India, with the Department of Personnel and Training being the lead agency in the latter.

country in terms of RTI, which should include consolidated statistics along the same lines as suggested above for each public authority. Given the importance of this report, and the specific detail on RTI that it would be useful to include in it, it would be preferable to prepare a separate or dedicated RTI report rather than just including this as part of a wider report.

It is not clear to us whether or not public authorities are required to report annually on what they have done to implement the RTI law. In terms of the Ombudsmen, they are required to report annually on the overall work of their offices,[30] but it would appear that no separate report on RTI is required to be produced. It is unclear to us how much of the content in the general annual reports of the Ombudsmen is devoted to RTI.

Recommendations:

- Public authorities should be required to appoint officials with dedicated responsibilities to implement the RTI law and, in particular, to receive and process requests for information.
- Consideration should be given to placing a general obligation on a central body – which could be the Parliamentary Ombudsmen – to support and promote proper implementation of the RTI law, including by raising public awareness about the rights of individuals under the law.
- To the extent that this does not already happen, every public authority should (be required to) produce a report annually, whether as a separate report or as part of its wider annual report, on what it has done to implement the RTI law.
- The Parliamentary Ombudsmen should, collectively, be tasked with producing a dedicated overall report on what has been done across the country to implement the RTI law.

[30] See para. 11 of the Act with Instructions for the Parliamentary Ombudsmen.