



## *Comments on the Bhutanese draft Right to Information Bill, 2013*

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### ***Introduction***

The Government of Bhutan has posted a draft Right to Information Bill, 2013 (RTI Bill), for comment.<sup>1</sup> The RTI Bill sets out procedures and other rules to give practical effect to citizens' right to access information held by public authorities, as guaranteed by Article 7(3) of the Constitution of the Kingdom of Bhutan. These Comments provide an assessment of the RTI Bill against international standards and better national practice, as reflected in the right to information laws of democracies around the world.<sup>2</sup> The aim is to help ensure that the law which is finally adopted is as strong as possible in the sense of providing protection for the right to information.

When assessed using the RTI Rating, a methodology for assessing the strength of legal frameworks for the right to information, developed by the Centre for Law and Democracy (CLD) and Access Info Europe,<sup>3</sup> the RTI Bill does extremely well, garnering 125 points out of a possible total of 150. This score would place Bhutan in

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<sup>1</sup> The draft was posted by the Prime Minister at:  
<http://www.tsheringtobgay.com/legislature/2013/draft-rti-bill.html>.

<sup>2</sup> See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2<sup>nd</sup> Edition* (2008, Paris, UNESCO), available in English and other languages at:  
[http://portal.unesco.org/ci/en/ev.php-URL\\_ID=26159&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>3</sup> See [www.rti-rating.org](http://www.rti-rating.org). 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 organizations, see [www.law-democracy.org](http://www.law-democracy.org) and <http://www.access-info.org>, respectively.

5<sup>th</sup> place globally in terms of the legal framework for RTI, behind Serbia (135 points), India and Slovenia (each with 130 points) and Liberia (126 points).

The detailed scoring for the RTI Bill, broken down into each of the seven categories used in the RTI Rating, is provided below. It will immediately be apparent that the RTI Bill did significantly less well in terms of Appeals (17 points out of a possible 30, or 57 percent), whereas it scores at least 75 percent in every other category. The reason for this is that the law fails to establish an independent oversight body for information appeals, instead relying on the Ministry of Information and Communications (MOIC) for this purpose. Detailed comments broken down by RTI Rating category are provided below.

### **RTI Rating Score of the Draft Law**

<b>Section</b>	<b>Max Points</b>	<b>Score</b>
1. Right of Access	6	6
2. Scope	30	26
3. Requesting Procedures	30	25
4. Exceptions and Refusals	30	29
5. Appeals	30	17
6. Sanctions and Protections	8	6
7. Promotional Measures	16	16
<b>Total Score</b>	<b>150</b>	<b>125</b>

## ***1. Right of Access***

The RTI Bill scored full points in this category. This reflects the fact that Bhutan has a constitutional guarantee of the right to information, and that the RTI Bill contains clear statements on the right of access, along with references to the wider benefits of the law and a requirement to interpret it so as best to give effect to those benefits.

## ***2. Proactive Disclosure***

Sections 12-17 of the RTI Bill address the issue of proactive disclosure of information, or the automatic publication of information regardless of whether or not there has been a request for that information.<sup>4</sup> Section 12 contains a long list of the categories of information subject to proactive disclosure, which are to be made available to the public via an “organizational and operational statement”. These are to be updated at least annually, or more frequently if deemed necessary by the head of the public authority (section 14). Public authorities are given five years to bring

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<sup>4</sup> Note that the RTI Rating does not address the issue of proactive disclosure.

themselves into full compliance with their proactive publication obligations, in accordance with minimum requirements set annually by the MOIC (sections 15-17).

Overall, this is both a robust and yet a realistic proposal regarding proactive publication, which sets strong targets while giving public authorities a reasonable amount of time to bring themselves into compliance with those targets. The one issue which may be reconsidered is the reference to the “organizational and operational statement”. This seems to suggest a physical publication, almost a document, whereas in practice it makes far more sense, subject to capacity constraints, to make this information available electronically (i.e. via websites), while also using other means of dissemination for individuals who do not have access to the Internet.

#### **Recommendation:**

- Consideration should be given to amending the references in the sections on proactive disclosure to “organizational and operational statements” so as to make it clear that these are not ‘statements’ as such, but simply categories of information, most of which will be provided via publicly accessible websites.

### **3. Scope**

The RTI Bill does very well in terms of scope, scoring 26 out of a possible 30 points. This reflects the very broad scope of the law in terms of the types of information covered, as well as the types of public authorities which are subject to the law. The Bill loses points in relation to the individuals who may make requests for information, which is limited to citizens, contrary to better practice and international standards, which call for the right to apply to everyone.

Two arguments are commonly advanced for limiting the scope of access to citizens. First, concern is sometimes expressed that if non-citizens can access information, this might in some way harm the interests of the country. This concern is misplaced inasmuch as it postulates that citizens may be trusted while foreigners may not. Sensitive interests – such as national security, privacy and relations with other countries – are protected through the exceptions, and not by limiting the scope of access. Should sensitive information be made public, this can be just as problematical in the hands of citizens as of foreigners.

Second, it is sometimes argued that allowing non-citizens to make requests will place an undue burden on public authorities, which would have to expend public resources responding to their requests. This argument may have more merit in a very small country like Bhutan than in more populous countries, and especially in

light of the fact that Bhutan has some very large neighbours. At the same time, experience in other countries suggests that a large volume of foreign requests is unlikely. If full access by foreigners is considered to be too risky, alternatives could be considered, such as allowing for the full cost of processing requests to be charged to foreigners, or giving public authorities some discretion to refuse to answer requests from foreigners, where this would interfere with their ability to meet their primary public service obligations. At a minimum, the right to make requests should be extended to all residents, and not just citizens.

The RTI Bill also lost points in this category due to the lack of clarity over whether requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents). Thus, a requester may wish to ask how many officials are employed at a given public authority, even though this information may not be found in any single document. It is important to make this clear in the legislation, so as to avoid confusion on the part of both requesters and public authorities.

#### **Recommendations:**

- Consideration should be given to extending the right of access to everyone, instead of limiting it to citizens. As an alternative, foreigners could be given a more limited right of access, perhaps subject to charges for processing requests or to discretionary refusals to process their requests where this would place an unreasonable burden on the public authority. At a minimum, residents should have the right to make requests.
- The law should make it clear that requesters have a right to access both specific records/documents and types of information.

#### ***4. Requesting Procedures***

Once again, the RTI Bill does well in this area, scoring 25 out of a possible total of 30 points. One weakness is that while section 28 refers comprehensively to the different ways or forms in which access to information may be provided, it is not entirely clear that requesters may stipulate a preference for one or another of these forms, and that, if they do, public bodies are required to provide information in that form, unless this would cause harm to the record.

Section 27 sets out a maximum time limit of 14 working days for responding to requests, section 33 allows this to be extended to a total of 30 working days, and sections 35 and 36 allow for an exceptional additional extension of up to 90 working days. Better practice is to impose shorter initial time limits, for example of ten working days or less. Furthermore, extensions beyond a maximum of 30 or 40

working days should simply not be necessary, especially in a smaller country like Bhutan.

In general, the fee rules set out in the RTI Bill are progressive and comprehensive. The Bill does not, however, recognise an exemption from paying fees for impecunious requesters. Such an exemption is in line with better practice, taking into account the fact that the volume of requests from those below the poverty line can be expected to be low, and imposing fees on these requesters will pose yet another barrier to their ability to access information.

The combined effect of sections 19, 20, 23 and 24 appears to be to limit the amount of information that may be demanded from requesters to a description of the information they are seeking and an address for provision of the information, and full points were allocated under this indicator. This limitation is not, however, stated as clearly as it could be in the Bill.

Section 26 provides for requests to be transferred to other public authorities where the original authority does not hold the information, in line with better practice. The section does not, however, envisage cases where the original authority does not know of any other public authority which holds the information (perhaps because there is no authority which holds it).

Another gap in the law is that it does not explicitly stipulate that no fee may be charged simply for lodging a request for information (as opposed to the fees that may be charged for providing information).

#### **Recommendations:**

- The law should make it clear that requesters have a right to stipulate the form in which they would like to access information, and that public authorities are then required to provide access in that form, subject to limited exceptions.
- Consideration should be given to reducing the initial time limit to ten working days and to removing sections 35 and 36, which allow for extensions of up to 90 working days.
- Consideration should be given to adding fee waivers for impecunious requesters to the law.
- Consideration should be given to making it explicit that requesters may only be required to provide a description of the information sought and an address for provision of the information in their requests.
- Consideration should be given to allowing for the return of requests to requesters where the public authority with which the request was lodged does not hold the information or know of any other authority which does.
- The law should make it clear that requesters may not be charged a fee simply for lodging a request for information.

## **5. Exceptions**

The regime of exceptions in the RTI Bill is one of its best features, resulting in a score of 29 out of a possible 30 points. This is due to the clear and narrow list of exceptions, strong structural provisions (such as the public interest override, the limitation of several exceptions to twenty years and the severability clause), and good provisions on consulting with third parties and notice in case of refusals to provide information.

The one area where the law loses points is in the area of the relationship between it and secrecy provisions in other laws. Formally, section 4 does repeal all existing laws and regulations which are inconsistent with the RTI law. However, experience in other countries has shown that general rules along these lines on inconsistencies are not always enough, at least in practice, to override secrecy provisions in other laws. Better practice, therefore, is to include a specific rule, in the part of the law containing the regime of exceptions, which indicates that only the exceptions in the RTI law may be relied upon to deny access, and that these may not be extended by secrecy provisions in other laws.

### **Recommendation:**

- Consideration should be given to adding a provision in Chapter 5, Exempt Official Information, making it clear that secrecy provisions in other laws may not extend the regime of exceptions in the RTI law.

## **6. Oversight and Appeals**

As noted at the outset, this is the category where the RTI Bill does least well, primarily because it fails to establish an independent oversight body to hear appeals from refusals to provide access and other failures to respect the RTI law. Instead, the RTI Bill provides for the MOIC to decide on appeals alleging failures to process requests in accordance with the law.

We assume that some thought has been given to this issue, given that all of Bhutan's neighbours have RTI laws which establish independent bodies, or information commissions. Perhaps one of the reasons for the approach taken is the cost of establishing a commission in a small country like Bhutan, which is certainly a consideration. At the same time, experience in countries around the world has amply demonstrated that putting in place an independent oversight body is key to

ensuring the successful implementation of an RTI law. We therefore urge the Bhutanese authorities to reconsider this point.

If it is felt that this is simply too expensive, in terms both of financial and human resources, an alternative might be to allocate this function to another independent body, perhaps the Royal Civil Service Commission. In either case, the powers currently allocated to the MOIC in terms of processing appeals and making remedial orders should be given to this body.

One issue which is not entirely clear in the current RTI Bill is whether the remedial orders of the MOIC under section 54 are formally binding on the public authorities to whom they relate (this is clear for court orders, pursuant to section 60). It is also not entirely clear that it is free to lodge appeals with the oversight body (currently the MOIC). Better practice is also to make it clear that, in an appeal, the public authority bears the burden of showing that it has acted in accordance with the law, given that any failures in this respect would undermine a fundamental right of the requester.

#### **Recommendations:**

- Consideration should be given to the idea of creating an independent oversight body to hear appeals regarding requests for information. As an alternative, this function might be allocated to an existing independent body.
- The law should make it clear that free to lodge appeals with the oversight body and that remedial orders issued by it are legally binding.
- The law should make it clear that, in relation to appeals, public authorities bear the burden of showing that they have acted in accordance with the law.

## ***7. Sanctions and Protections***

The RTI Bill provides broadly for sanctions for those who wilfully obstruct access to information, in line with better practice (section 57). It also makes it clear that such offences are relatively minor in nature (“petty misdemeanors”) (section 58). This makes sense as experience in countries which impose more serious sanctions for obstruction of access shows that, in practice, it is very rare indeed for such sanctions to be imposed. Another forward-looking rule is the power of courts to impose damages and costs on public authorities found to have denied access without any reasonable grounds (section 59). Finally, the Bill provides broad protection to officials for actions taken pursuant to the law (section 63).

Missing from the law is any rule providing protection to whistleblowers, or individuals who have disclosed information about wrongdoing. Such protection

provides an important informational safety valve, ensuring that information of importance reaches the public while at the same time allowing for liability for the unauthorised release of information which does not have significant public interest.

### Recommendations:

- Consideration should be given to adding a provision on whistleblower protection to the law.

## 8. Promotional Measures

The RTI Bill scores full points in this category, based on its comprehensive package of promotional measures. One small point to note here is that if an independent oversight body were created, it should also be given a role in terms of promoting strong implementation of the law and raising awareness among the general public.

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