

Balancing the Tightrope

Right to Information Vs. Protection of Personal Data in Sri Lanka

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Acknowledgement

I wish to thank the Sri Lanka Press Institute (SLPI) for their support in facilitating the publication of the report and the Right To Information (RTI) Commission of Sri Lanka for their comments when an early draft was presented to them in August 2023. My heartfelt thanks to RTI Commissioner and Attorney-at-law, Ms. Kishali Pinto-Jayawardena, for her valuable feedback.

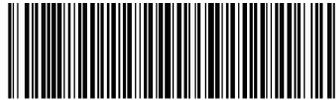
Published by

Sri Lanka Press Institute (SLPI)
96, Kirula Road, Colombo 05.
Tel: +94-11-5353635 | Fax: +94-11-5335500
E-mail: info@slpi.lk | Web: www.slpi.lk

Recommended citation

Ashwini Natesan “Balancing the Tightrope” Right to Information vs. Protection of Personal Data in Sri Lanka, Sri Lanka Press Institute (2023)

ISBN 978-955-1734-16-9



978-955-1734-16-9

Introduction

“...for [Canadian] democracy to function well in the complex context of the modern world, two rights must be safeguarded – the right to access to information and the right to privacy”

**– Right Honourable Beverley McLachlin,
P.C. Former Chief Justice of Canada¹**

Privacy and right to information (“RTI”) are often described as “two sides of the same coin”—mainly acting as complementary rights that promote individuals’ rights to protect themselves and to promote government accountability². The Right to Information Act No 12 of 2016 (“RTI Act”) has been a landmark in the legislative history of Sri Lanka. The statutory framework was preceded by the constitutional amendment resulting in the introduction of Article 14A to the Constitution. Since its operationalization in 2017, the RTI Act and the RTI Commission (the “RTIC”) have passed many orders (“Orders”) of far-reaching consequences³.

Privacy is a bouquet of many rights and protection of personal data forms a part of the larger right to privacy. An important legislation whose need has long been left is a comprehensive data protection law and in March 2022, the Personal Data Protection Act No 09 of 2022 (“PDPA”) was passed. Thus far only

1 Supreme Court of Canada, ‘Supreme Court of Canada – Speech by Beverley McLachlin – Access to Information and Protection of Privacy in Canadian Democracy’ (3 November 2009) <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2009-05-05-eng.aspx>> accessed 2 August 2023.

2 David Banisar, ‘The Right to Information and Privacy: Balancing Rights and Managing Conflicts’ [2011] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1786473>> accessed 20 July 2023.

3 T.Nadesan v Office of the Cabinet of Ministers, RTIC Appeal/216/2018 Centre for Policy Alternatives v Ministry of Justice and Prison Reforms, RTIC Appeal (In-Person)/1491/2019; Malinda Seneviratne v. Department of Prisons, RTIC Appeal(In-Person)/1492/2019.

Part V of the PDPA i.e., the formation of the Data Protection Authority has come into operation⁴. As of the date of writing this paper, the Board of Directors under Part V of the PDPA have been appointed⁵. The other provisions of the PDPA are not yet in force. While these two legislations may seem disparate with one focusing on disclosure of information, while the other on protection of personal data, there are areas of overlaps, conflicts and tensions that deserve attention. The increasing importance of both rights has exacerbated the need to find an equilibrium between them, with neither being compromised⁶. This article focusses on the potential conflicts that might arise between RTI and protection of personal data. The paper also seeks to analyse research and study in other jurisdictions on this subject so as to draw lessons for Sri Lanka.

4 Gazette Notification No 2341/ 59 dated July 21, 2023. Part V of the PDPA came into operation on 17 July 2023.

5 'Sri Lanka's Personal Data Protection Authority Progresses with Board of Directors Appointment – Presidential Secretariat of Sri Lanka' <<https://www.presidentsoffice.gov.lk/index.php/2023/10/09/sri-lankas-personal-data-protection-authority-progresses-with-board-of-directors-appointment/>> accessed 11 October 2023.

6 The Future of Access to Information: Ensuring Complementarity between the Right to Information and Personal Data Protection - Observatory of Public Sector Innovation <<https://oecd-opsi.org/blog/the-future-of-access-to-information-ensuring-complementarity-between-the-right-to-information-and-personal-data-protection/>> accessed 11 October 2023.

**Protection of
individual privacy
under the RTI Act**

The constitutional provision for RTI specifically includes an exemption on ground of protecting individual privacy. It is trite to reproduce the relevant provision here –

Article 14 A (2) reads as follows:

“(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.”

(Emphasis added)

Consequently, through the RTI Act this exemption was included under Section 5 (1) (a)⁷. Section 3 of the RTI Act states that citizens have the right to access information in the possession, custody or control of a Public Authority (“PA”) subject to certain limited exemptions stipulated in Section 5 (1).

Section 5(1) states that “Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where (a) the **information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy** of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure;”

(Emphasis added)

The exemption provision encompasses protection of –

⁷ The wording is similar to Section 8 (1) (j) Right to Information Act 2005 (India)

- a) Disclosure of personal information, that has no relationship to any public activity or interest
- b) Cause unwarranted invasion of privacy unless there is a larger public interest

This has been referred to as the two-fold test in the application of the exemption⁸.

This exemption clause is not peculiar to Sri Lanka and access-to-information laws in other countries also contain exemptions for protecting personal privacy. It is indisputable that such an exemption clause is included under any access to information legislation. There cannot be a trade-off for individual privacy on grounds of transparency and access to information. However, it has been observed that conflicts frequently arise between the two rights because authorities often tend to rely on the privacy exemption to deny information to citizens. According to the U.S. Department of Justice, personal privacy and law enforcement records concerning individuals were the two most-used exemptions to the federal Freedom of Information Act in the United States in 2022. In comparison, in the United Kingdom, 41% of all refusals to share information in 2021 were to protect personal privacy. In India, 35% of all refusals relate to personal information⁹.

In Sri Lanka, there are no specific statistics on the number of requests rejected on grounds of Section 5 (1) (a) of the RTI Act by PAs. Notwithstanding this, a scan of the Orders passed by the RTIC shows that a large number of requests, on which an appeal has been preferred relate to rejections under Section 5 (1) (a) of the RTI Act by the PA¹⁰.

8 Legal Commentaries to Selected Orders of the Right to Information Commission of Sri Lanka (2019-2021)

9 Shefali Malhotra, 'Balancing the Right to Privacy with the Right to Know'.

10 <https://www.rticommission.lk/web/images/pdf/0000-2021/TABLE-OF-RTIC-DECISIONS-CLASSIFIED-AS-PER-UN-SDGS-1176-2017-2019-1.pdf> ; <https://www.rticommission.lk/web/images/pdf/SDG/TABLE-OF-RTIC-DECISIONS-CLASSIFIED-AS-PER-UN-SDGS-582-2020.pdf>

1. Some instances where Section 5 (1) (a) exemption were rejected by the RTIC

It would be useful to revisit some important Orders to understand how “privacy” exemption under section 5 (1) (a) of the RTI Act have been interpreted by the RTIC.

G. Dileep Amuthan v. Presidential Secretariat¹¹

The information request pertained to travel details of the former Presidents of Sri Lanka to Northern Province and overseas. In the first instance, the information request was denied by the Information Officer (“IO”) on grounds that the request was covered by the exemption of “defense and national security” under Section 5 (1) (b) (i) of the RTI Act¹². An appeal to the Designated Officer (“DO”) resulted in no response leading to the appellant (“Appellant”) preferring an appeal to the Commission. In this case a plethora of exemptions were relied on, including national security (Section 5 (1) (b) (i); parliamentary privilege (Section 5 (1) (k)¹³ and privacy (Section 5 (1) (a)).

On application of Section 5 (1) (a) of the RTI Act, it was categorically stated that claim of privacy would not arise, as travel information of the President (s) could not be considered as personal information.

Citizen Council of Bandarawela v. Divisional Secretariat¹⁴

The Appellant had at the first instance requested information from the Divisional Secretariat of Bandarawela, relating to a land, namely the survey plan registered in accordance with the permits issued in respect of the said lands or certificate indicating the extent of the land and its boundaries.

¹¹ RTIC Appeal (In person)/114/2017 <<http://www.rticcommission.lk/web/images/pdf/rticappeal-114-2017/rtic-114-2017-en-06122018.pdf>>

¹² The said Section provides that “information shall be refused, where – (b) disclosure of such information – (i) would undermine the defence of the State or its territorial integrity or national security.”

¹³ The Section states: “the disclosure of such information would infringe the privileges of Parliament or of a Provincial Council as provided by Law;”

¹⁴ RTIC Appeal (In – person) 175/2017

The IO responded on denied disclosure of the information under Section 5(1)(a) of the RTI Act, on the basis that the request related to personal information. Dissatisfied with the said response, an appeal therefrom was made to the DO who also refused disclosure of copies of the deeds in terms of Section 5(1)(a) of the RTI Act on the basis that the deeds contain personal information and that there was no relationship to information therein to public activity. Subsequently, an appeal was preferred to the RTIC. In the appeal process before the RTIC, the Appellant submitted that the information concerned was in relation to a roadway used by students of the School, Bandarawela, Seevali Maha Vidyalaya. The PA initially denied disclosure of the information by purportedly claiming exemption under Section 5(1)(a) of the RTI Act (i.e., privacy), yet admitted during the RTIC appeal process that the property was State land (albeit on a 99-year lease to the private party).

This order makes it clear that there may be instances where Section 5 (1) (a) is used as an umbrage to avoid disclosure even where there has been no application of “unwarranted invasion of privacy.”

K. Dileep Amuthan v. Divisional Secretariat, Uduvil¹⁵

This information request related to distribution of COVID-19 relief goods. The Appellant requested a certified copy of the list of beneficiaries (including names, addresses, NIC numbers and the signatures of beneficiaries), who received COVID – 19 relief goods from the PA, the Divisional Secretariat, Uduvil , during the period of 20.03.2020 to 20.04.2020. The Appellant also requested for a list of dates and locations where the distributions took place. The Appellant was dissatisfied with the responses of the IO and DO. The RTIC determined that the responses of the PA were inadequate since the PA is expected to have maintained a list of the beneficiaries. The PA was directed to release the information requested by the Appellant or if the PA is unable to provide the information, the PA was required to deny disclosure under a ground of exemption in terms of Section 5(1) of the RTI

¹⁵ RTIC Appeal (Documentary) 2224/2020

Act. At the subsequent hearing, the PA denied the information disclosure under Section 5(1)(a) of the RTI Act. The RTIC observed that the PA had not substantiated the refusal of information under Section 5(1)(a) of the RTI Act. The RTIC held that the distribution of goods from public funds could be considered a matter that is exempted under Section 5(1)(a), and also observed that the PA's invocation of Section 5(1)(a) was contrary to its previous position that it had not compiled a comprehensive list of beneficiaries. The RTIC directed the PA to disclose the list of beneficiaries¹⁶.

This order is illustrative of requests where rejection under Section 5 (1) (a) is an afterthought and only taken belatedly to avoid disclosure of information.

S. Rubatheesan v. Parliament of Sri Lanka¹⁷

The PA objected to the information request regarding educational qualifications of Members of Parliament and the information related to criminal charges against them on grounds of Section 5 (1) (a) of the RTI Act. The RTIC rejected the objections of the PA on grounds that such information was per se not covered by Section 5 (1) (a) exemption and that there was no "unwarranted" invasion of privacy. The RTIC emphasized the importance of "aware citizenry", placing reliance on an Indian judgment with similar facts¹⁸.

¹⁶ The PA disclosed the information pursuant to RTIC's Order.

¹⁷ RTIC appeal 369 / 2021

¹⁸ Union of India v Association for Democratic Reforms [2002 (3) SCR 294]

Burden of Proof- Sri Lanka Red Cross Society v Ministry of Home Affairs¹⁹

The information requested was an inquiry report of the Appellant Society. The IO and DO rejected the information request on grounds that the report submitted contained statements by relevant parties which would result in invasion of privacy. The RTIC categorically laid down that the PA is required to establish that an exemption under Section 5 (1) is made out, in addition to satisfying the burden of proof under Section 32 (4) that the harm of disclosure is greater than public interest.

This Order evidences the fact that a mere reliance on Section 5 (1) (a) would not pass muster and the application of exemption should be substantiated before the RTIC.

2. Overriding public interest in disclosure of information.

The RTI Act in Sri Lanka is noteworthy for its “public interest override” provision envisaged under Section 5 (4) of the Act. The said section unequivocally provides that “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” where even if an exemption is found to apply, an overriding public interest in disclosure would effectively trump the applicability of exemptions.

It should be emphasized here that Section 5 (1) (a) itself has a public interest exemption embedded thereunder itself in addition to the general public interest override under Section 5 (4) of the RTI Act.

There have been many Orders of the RTIC where even when there have been instances of privacy exemption application, they have been rejected on grounds of overriding public interest. These Orders have had wide reaching consequences in ensuring that privacy exemption is not paramount but larger public interest should prevail in such cases.

¹⁶ The PA disclosed the information pursuant to RTIC’s Order.

¹⁷ RTIC appeal 369 / 2021

¹⁸ Union of India v Association for Democratic Reforms [2002 (3) SCR 294]

¹⁹ RTIC Appeal (In- Person) 113 / 2018

Transparency International Sri Lanka v. Presidential Secretariat²⁰

The Appellant (Transparency International Sri Lanka) filed two information requests to the PA- the Presidential Secretariat, under S.24(1) of the RTI Act to obtain access to certified copies of the Declarations of Assets and Liabilities of the then President and Prime Minister for the years 2015 and 2016. The IO rejected the requests for information, which refusal was upheld by the DO. The IO of the PA refused disclosure of the information citing a Ruling by the Speaker on the Declarations of Assets and Liabilities of Members of Parliament under the provisions of the RTI Act. The DO however, albeit upholding the IO's decision to refuse disclosure, nevertheless noted a different basis, merely citing 5(1)(a) and 5(1)(g) of the RTI Act as the purported grounds for the denial of the request.

Rejecting the PA's purported ground for non-disclosure under Section 5(1) (a) of the RTI Act, namely privacy rights, the RTIC determined as follows – "In instances where Section 5(1) (a) is urged to deny information, it is an important factor that this Section contains the public interest embedded within the exemption itself. We find that, on a consideration of Section 5(1) (a) itself, that the public interest in this matter outweighs the claim of unwarranted invasion into the privacy of an individual. In any event, we find that Section 5(4) containing the general public interest override will apply to support the release of the information requested.²¹"

Ceylon Bank Employees' Union v. People's Bank²²

The Appellant requested information, inter alia, on the quantum of moneys expended from public funds by the People's Bank, in retaining private counsel (without retaining the Attorney General), to represent the PA in a litigation instituted against members of the trade union, who had protested in regard to alleged internal financial irregularities of the PA, as

20 RTIC Appeal/06/2017

21 The PA has challenged the Order of the RTIC in the Court of Appeal, which appeal is pending to date.

22 RTIC Appeal (In person)/58/2018

well as the criteria on which the retained private counsel was selected. The PA refused disclosure of the said information, citing grounds under Sections 5(1) (a), (j), (f), (g) of the RTI Act. The PA was heavily reliant on exemptions under Sec.5(1)(a) – ‘privacy’. The RTIC interpreting the scope of ‘privileged information’ between the client and the Attorney, rejected the said argument, also determining that although the legal fees paid to the counsels was entirely the PA’s prerogative and perhaps constitute confidential information, such expenses were met using public funds, and that attaches an overwhelming public interest that outweighs the ‘privacy’ contemplated under 5(1)(a) of the RTI Act²³.

Chamara Sampath v. Parliament of Sri Lanka²⁴

The Appellant had requested the list of names of Members of Parliament (MPs) who had handed over their respective Declarations of Assets and Liabilities in 2018 and the list of names of MPs who had handed over their Declarations from 2010 until the date of the information request. In the appeal, the Commission *inter alia* rejected the argument made by the PA that information relating to declaration of assets and liabilities is ‘personal information’ of MPs which was protected from release in terms of Section 5 (1) (a). The RTIC in its Order stated regarding the applicability of Section 5 (1) (a) that, “This cannot be so as, firstly an MP is taking on a public role and as such has accepted a higher level of public scrutiny which was recognized by this Commission in *TISL v Presidential Secretariat*.²⁵” The PA preferred an appeal against the decision of the RTIC to the Court of Appeal. The Court of Appeal in a judgement of grave importance affirmed the decision of the RTIC on information disclosure and the PA complied with the decision.

²³ Initially PA appealed against this Order to the Court of Appeal that appeal was later withdrawn by them and the matter concluded.

²⁴ RTIC Appeal 719/2018

²⁵ RTIC Appeal 06/2017.

²⁶ ‘Kudos to Court of Appeal on RTI Ruling on MPs | Daily FT’ <https://www.ft.lk/ft_view__editorial/kudos-to-court-of-appeal-on-rti-ruling-on-mps/58-745859> accessed 11 October 2023.

Airline Pilots Guild of Sri Lanka v. Sri Lankan Airlines Ltd.²⁷

The RTIC directed disclosure of salaries and other allowances of the Chief Executive Officer, Head of Human Resources and the Chief Commercial Officer. Inter alia rejecting the Section 5 (1) (a) exemption raised by the PA on grounds that “Section 5 (1) (a)... yield to the imperative provisions of Section 5 (4) of the Act in that the information requested is such that the public interest in disclosing the information outweighs the harm that would result from their disclosure” the RTIC ordered disclosure of requested information.

T. Rusiripala v. People’s Bank²⁸

The information request pertained to disclosure of particulars of salaries, wages, ex gratia, payment, bonus, expenditure incurred by bank for overseas trips and details of all other perks provided by the bank to the senior management from June 2010 to 2018. The objection on grounds of Section 5 (1) (a) exemption was rejected by the RTIC on ground that public interest outweighed the claim of unwarranted invasion to the privacy of an individual and Section 5 (4) override would apply to support the release of information²⁹.

3. Due consideration to privacy protection by RTIC

It is pertinent to note that the RTIC has time and again through its Orders prioritized individual privacy where there is a legitimate cause to protect personal information of individuals. In requests where there is legitimate and reasonable cause to substantiate protection of privacy the RTIC has affirmed decisions of the PA or ordered for disclosure by redacting the relevant personal details. A few such relevant Orders are analysed below.

²⁷ RTICAppeal (In-Person)/99/2017

²⁸ RTIC Appeal 774 / 2019.

²⁹ The PA disclosed the information pursuant to RTIC’s Order.

Centre for Policy Alternatives v. Ministry of Justice and Prison Reforms³⁰

The Appellant requested information relating to the names of persons convicted of the death penalty for drug related crimes, conviction dates and cases numbers of persons convicted of the death penalty for drug-related crimes forwarded to the President in February 2019. The PA refused to grant information citing Section 5 (1) (a) and 5(1) (g). Dissatisfied with the response of the PA, the Appellant preferred an appeal to the RTIC. At the appeal hearing, the RTIC directed the PA to release the conviction dates and case numbers as they are statistical data relating to concluded cases and therefore no consideration of privacy attached to the same. With regard to the names of the said prisoners, the PA was directed to obtain written instructions from the prisoners if they wish to disclose their names publicly. Accordingly, the RTIC decided that the disclosure of the names of those who have expressed their consent for disclosure sufficiently fulfils the requirement of public interest. As for those prisoners who had not provided their consent, the RTIC directed those reports with redacted personal details (removing the names) be provided by the PA.

Malinda Seneviratne v. Department of Prisons³¹

The RTI request inter alia related to whether there were any intimations, orders and writings from the President or any other person relating to the execution of the death sentence. If there was such an order all specifics in relation thereto such as; which prison, when, whether executioners were appointed etc. were also requested. Similar to the above Order (Centre for Policy Alternatives v. Ministry of Justice and Prison Reforms), the RTIC directed the release of information redacting the names of death row convicts, who had not consented for such disclosure.

³⁰ RTIC Appeal 1491 / 2019

³¹ RTIC Appeal 1492 / 2019

H.C.S.de Zoysa Siriwardena v Sri Lanka Army³²

Similar to the above Orders, in this instance the RTIC ordered that the PA disclose the Court summons and complete inquiry report redacting the evidence given by third parties whose privacy would be affected.

G. Dileep Amuthan v. Northern Provincial Council³³

This Order is illustrative of how the RTIC is cautious in directing disclosure where there is genuine invasion of privacy and in this instance a potential threat to the public officer who was a whistleblower. The RTIC confirmed that the exemption under Section 5 (1) (a) of the RTI Act applied, inter alia. observed as follows:

“While it is conceded that the public has a right to know what transpired in the Urban Council prior to its dissolution, the Appellant has failed to prove how the omission of a portion of the report hampers such public interest especially when, given the nature of the case, the public officer concerned fears repercussions of such information being made public.”

Dileep Amuthan v Ministry of Defence³⁴

The information requested inter alia included ‘A list of allegations made by citizens of Haiti against the peacekeepers deployed from Sri Lanka including the nature of their crimes, names of victims of such crimes and/ or any other relevant information regarding the allegations made against the peace keepers deployed from Sri Lanka’. The RTIC ordered that the information regarding identity of victims, other personal details pertaining to nature of crimes, names of victims etc. be redacted from the report on the basis of Section 5 (1) (a) of the RTI Act.

32 RTIC Appeal 89/2017

33 RTIC Appeal (In-Person) /21/2017

34 RTIC Appeal 70 / 2018

K.K.G Chandrika v. Office of Director General of Health Services³⁵

The information request largely pertained to salary details of the Appellant, this was released by the PA. However, details of complaints received against third parties and transfer of other persons was withheld on grounds of Section 5 (1) (a). This was affirmed by the RTIC.

W.A. Dhammika Fernando v. People's Bank³⁶

The Appellant requested several items of information pertaining to promotion of Manager Grade (3-1) of the PA. The PA rejected certain information on grounds of Section 5 (1) (a). The RTIC directed only release of the cumulative final mark list and the cut-off marks of the relevant applicants and not the detailed breakdown of marks requested on grounds that such release would cause "unwarranted invasion of privacy" in a manner that has no relation to public interest. The RTIC thus affirmed one part of the PA rejection and reversed another part.

There have been several other Orders where information has been refused on grounds of them being violative of Section 5 (1) (a) by the RTIC and where there has been no overriding public interest³⁷.

³⁵ RTIC Appeal 2110 / 2020

³⁶ RTIC Appeal 1193 / 2019

³⁷ K.K.G Chandrika v. Office of the Director General of Health Services, Galle RTIC Appeal 2110/2020 ; H.G. Chathurika Dilhani Premathilake v. Dambadeniya Multipurpose Co-Op Society RTIC Appeal 2122 / 2020 ; W.R.M.F.H.A Walosundara v. District Secretariat, Gampaha RTIC Appeal 83/ 2017 ; Methsiri de Silva v District Health Service Office, Galle RTIC Appeal 1166 / 2019 ; M.J. Roche v Department of Immigration and Emigration RTIC Appeal 191 / 2018; G R M N B Rathnayake V. Central Environmental Authority RTIC Appeal(In-Person) /219/2018

The following conclusions can be drawn from the Orders of the RTIC –

- Section 5 (1) (a) exemption is to be considered in light of whether there is any personal information that has relationship to any public activity / interest or whether a disclosure would cause unwarranted invasion of privacy
- Even if there some personal information, it can be disclosed provided there is an overriding public interest
- The burden of proof rests on the PA in establishing that the exemption is applicable
- In cases of genuine invasion of privacy and no furtherance of larger public interest the RTIC has ensured protection of privacy.

The personal data landscape under PDPA

The RTIC orders discussed above throw light on how privacy of individuals has been balanced with the need to ensure transparency and openness. To state that the PDPA would have an impact on the nature of RTI disclosures would be an understatement. Before detailing the conflicts, the overlap between the legislations also deserves attention. Where data concerns oneself i.e., a person requesting her or his own personal data, that is with a PA, now such person (data subject) can seek for such information under both the RTI Act and the PDPA.

The PDPA seeks to protect “personal data”, this has been defined as follows under Section 56:

“personal data” means, any information that can identify a ***data subject***³⁸ ***directly or indirectly***, by reference to– (a) an identifier such as a ***name, an identification number, financial data, location data or an online identifier***; or (b) ***one or more factors specific to the physical, physiological, genetic, psychological, economic, cultural or social identity*** of that individual or natural person.

(Emphasis Added)

The definition of “personal data” includes information pertaining to the individual that can identify such a person either directly or indirectly. Admittedly, the PDPA legislation in Sri Lanka follows the blueprint of the EU- General Data Protection Legislation (“GDPR”) and other data protection laws in defining “personal data”. There can be no dispute that this is a necessity, however, what is the situation when personal data is involved in an RTI request.

It should be noted that the PDPA protects all personal data whilst the RTI Act exempts information from disclosure where- personal information that has no relationship to any public activity / interest or where such disclosure would *“cause unwarranted invasion of the privacy”*³⁹. Indisputably, the protection of personal data afforded through the PDPA is much wider than the privacy protection under the RTIC, as the former protects “personal data”. Any personal

38 “data subject” means, an identified or identifiable natural person, alive or deceased, to whom the personal data relates;

39 H.M. Abeyratne v.Thalawa Pradeshiya Sabha RTIC Appeal 2128/2020 ; Sathyakala v. Department of Motor Traffic RTIC Appeal 2128 / 2020.

data, provided the same is covered under Section 2 of the PDPA, will be subject to compliance requirements including but not limited to consent under the said Act. All the RTIC orders discussed above include vast amounts of personal data. How will these be disclosed in the future?

Section 40 exemption clause of the PDPA is relevant in this context-

Section 40 – “Any exemption, restriction or derogation to the provisions of this Act shall not be allowed except **where such an exemption, restriction or derogation is provided for in any law and respects the essence of the fundamental rights and freedoms and constitute a necessary and proportionate measure** in a democratic society for-

(e) the protection of the rights and fundamental freedoms of persons, particularly the freedom of expression and the ***right to information.***”

(Emphasis Added)

The general exemption clause allows for some protection of the RTI and more so since the right is constitutionally guaranteed it can be reasonably concluded that the PDPA does not nullify the right to access information. This is not to say that the guardrails are very clear and defined, particularly in light of Section 3 of the PDPA. Section 3 of the PDPA provides for overriding effect to the PDPA in the event of any inconsistency. On a comparison, Section 4 of the RTI Act also includes such an override provision. But the PDPA being the statute that is later in time is a factor to be considered.

For instance, where an information request in relation to the salary details of officials in a PA or details of scores obtained by candidates in interviews which include personal information of individuals⁴⁰, once the PDPA comes into force, how will these be dealt with? Will the PDPA or the RTI Act prevail? Will the RTIC and Data Protection Authority (DPA) have to concurrently decide on such a request? Will the DPA take precedence over the RTIC due to Section 3 of the PDPA? These are some pertinent questions that would arise.

The Latin maxim *Generalia specialibus non derogant*, applied for statutory

40 O.W.K Ghandasa v Bank of Ceylon RTIC Appeal 131 / 2017

41 1992 7 OR (3d) 1

interpretation can offer some guidance in this regard. Justice Griffith said in *R v Greenwood*⁴¹, “The maxim generalia specialibus non derogant means that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one.” The provisions of the special rule are preferred over general rule as they are meant to address that subject in greater detail. This maxim is used in the interpretation of statutes, to decide which statute is valid, should there be a conflict.

The question then arises as to what is the general and what is the special law? The observations of the Supreme Court of India in *LIC v. D.J Bahadur*⁴², are of relevance, wherein it has been held that in determining whether a statute is a special or a general one, the focus must be on the “principal subject-matter plus the perspective”. For certain purposes, an Act may be general and for certain other purposes, it may be special.

In this scenario, it might seem easy to relegate the RTI Act to the general law and the PDPA being the special law, having regard to the fact that the latter has been enacted to protect personal data. This coupled with the override provision under Section 3 of the PDPA would tilt the balance in favour of non-disclosure of personal information. However, this would result in the erosion of the right to access information which is not the intent of the PDPA as is evident from Section 40 of the Act (exemption section). In comparison, the Digital Personal Data Protection Act No 22 of 2023 (“DPDP Act India”) under Section 44(3) amended the RTI Act Section 8 (1)(j) to read as “(j) information which relates to personal information”. Previously, personal information that had no connection to public activity or interest or that would cause unwarranted invasion of privacy could only be denied. The DPDP Act India’s amendment could mean that all information which can be related to a person could be legally denied. This amendment has drawn much criticism from several quarters⁴³. While PDPA in Sri Lanka has an exemption provision, there is still room for conflict and tension.

42 (1981) 1 SCC 315,

43 Soumyarendra Barik ‘Bill on Table, a New Worry: Could Data Protection Bill Weaken the RTI Act?’ (The Indian Express, 4 August 2023) <<https://indianexpress.com/article/technology/tech-news-technology/bill-on-table-a-new-worry-could-data-protection-bill-weaken-the-rti-act-8875467/>> accessed 11 August 2023 ; Aiman Chishti, “Denying Information Under The Guise Of Data Protection”: Concerns Raised About Digital Personal Data Protection Bill Amending RTI Act’ (10 August 2023) <<https://www.livelaw.in/articles/unravelling-impact-of-personal-data-protection-bill-on-right-to-information-234884>> accessed 11 August 2023. Guest Author, ‘RTI Amendment Threat to Democracy, Rights: Shailesh Gandhi’ (MediaNama, 24 August 2023) <<https://www.medianama.com/2023/08/223-rti-amendment-threat-democracy-rights-shailesh-gandhi/>> accessed 11 October 2023.

The RTIC has given due regard to protect individual privacy as detailed above through its many Orders. A middle ground has to be struck between access to information which includes personal data and over compliance with personal data protection law and regulations by the PAs. The observations of the Canadian Supreme Court in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*⁴⁴ are trite in this regard, the “*Privacy Act* and the *Access Act* have to be read jointly and that neither takes precedence over the other.” The question in this case was whether job-related information concerning officers, such as historical records of successive postings, ranks, and statuses, fell into the definition of “personal information” and should therefore be withheld from disclosure. The PA had refused to follow the Information Commissioner’s recommendation to release this information. The Supreme Court agreed with the Information Commissioner, deciding that, although this was indeed personal information, it was associated with the general characteristics of a federal employee position, such that it might figure in a job-posting, and that it should be disclosed. It was, in effect, information about the position, not about the person. The observations of the RTIC in *W.K.W.Deshapriya v. Information Communication Technology Agency*⁴⁵ (and other Orders on this subject discussed above) echo similar views. In this instance salary details of the employees of the PA were ordered to be released inter alia, placing reliance on Regulation 20 on proactive disclosure⁴⁶.

44 *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66, 21.

45 RTIC Appeal 169 / 2021.

46 RTI Regulations in terms of Section 41 (2) of the RTI Act (Gazette No 2004/66 dated 03.02.2017)

1. Limitation of data retention and Right to be forgotten v. Duty to maintain records under RTI Act

It is crucial in this context to delve deeper into two specific areas of conflict, how the period of data storage and the right to erasure of data will contravene with the RTI Act.

Section 9 of the PDPA reads as follows:

“9. Every controller ***shall ensure that personal data that is being processed shall be kept in a form which permits identification of data subjects only for such period as may be necessary or required for the purposes for which such personal data is processed:***

Provided however, subject to the provisions of section 10 of this Act, a controller may store personal data for longer periods in so far as the personal data shall be ***processed further for archiving purposes in the public interest, scientific research, historical research or statistical purposes.***”

Under Section 7 (3) of the RTI Act all public records are to be maintained for a period not less than 10 years while new records (after the RTI Act coming into force) will have to be maintained for a period not less than 12 years.

While the PDPA under Section 9 mandates that personal details should only be maintained for a period that is necessary or required for specific purpose, the RTI Act mandates 10 / 12 years as the case may be.

Another provision that deserves attention is Section 16 of the PDPA. The said provision reads as follows:

16. “Every data subject ***shall have the right to make a written request to the controller to have his personal data erased,*** under the following circumstances where (b) the data subject ***withdraws his consent upon which***

the processing is based, in accordance with item (a) of Schedule I or item (a) of Schedule II;”

This right of the data subjects i.e., individuals to ask for erasure of information, is referred to as the right to be forgotten. There have been case laws across the globe analysing the right to be forgotten vis-à-vis freedom of information, while they have given importance to the former, it has always been stated that the balance between the two would depend on the facts and circumstances of each case⁴⁷.

There can be a potential scenario where the PA may seek to not maintain certain records containing personal details under grounds of Section 9 or erase such personal details under Section 16. In this scenario, can the PA be permitted to delete details of an inquiry report where the concerned person has withdrawn consent or even fail to maintain the inquiry report relying on the PDPA. Even if such deletions are limited to personal data, this could impact RTI as disclosure devoid of such personal details maybe meaningless without such information. To avoid these potential conflicts and to ensure transparency is maintained, it is essential that some guidelines are issued under the PDPA.

Another important difference is that the PDPA protects personal data of natural persons whether alive or dead. In *Tharindu Jayawardena v. Divisional Secretariat, Aranyaka*⁴⁸ the exemption clause under Section 5 (1) (a) has been interpreted to apply to persons who are alive and not the deceased or disappeared⁴⁹. Here again, the RTIC did not pedantically take a narrow view in interpreting the statutory exemption. The RTI appeal requested information on names of individuals deceased and missing by landslides in Aranyaka. This information is pivotal and such details cannot be refused on grounds of privacy protection.

47 'Right to Erasure ("Right to Be Forgotten"): The Operator of a Search Engine Must Dereference Information Found in the Referenced Content Where the Person Requesting Dereferencing Proves That Such Information is Manifestly Inaccurate' <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/cp220197en.pdf> accessed 12 August 2023 ; Niko Härting, 'Can a Search Engine be „Private by Default“?' (CR-online.de Blog, 14 May 2014) <<https://www.cr-online.de/blog/2014/05/14/can-a-search-engine-be-private-by-default/>> accessed 12 August 2023.

48 RTIC Appeal 1889 /2020.

49 *Tharindu Jayawardena v. The National Building Research Organization Sri Lanka RTIC Appeal / 1890/ 2020* and *Tharindu Jayawardena v. Divisional Secretariat, Aranyaka RTIC Appeal 1889 /2020*.

It is noteworthy that when a PA pleads an exception in refusing disclosure of information on the ground of “privacy concerns” under Section 5 (1) (a) of the RTI Act, it would not suffice to claim so by mere ipse dixit but would be incumbent upon such a claim as statutorily decreed by Section 32 (4) and Section 5 (1) of the RTI Act to be duly established in terms of the burden of proof as envisaged in those provisions⁵⁰. While the PDPA seeks to protect all personal information and ensure that they are processed only when one of the conditions for lawful processing are satisfied⁵¹.

2. Lessons from other jurisdictions

The GDPR, for example, highlights that *“personal data in official documents held by a public authority (...) may be disclosed in accordance with Union or Member State law in order to reconcile public access to official documents with the right to the protection of personal data”*.

A more specific provision such as the above can lead to better clarity. The DPA may through regulations bring in further clarity on the nature of personal data that can be obtained through RTI Act.

Another approach can be through building synergy between both the RTIC and DPA. In several jurisdictions, recognizing the need for synergies, governments have pushed to centralizing these areas through a single institution or adopt a single act.⁵² This allows for common definitions and internal consistency and for limiting conflict and establishing a balance from the start.⁵³ For example, in Canada, Bill C-43, adopted in 1982, contained both the Access to Information Act and the Privacy Act. The two sections then became separate laws with separate commissions to enforce them, but with common definitions and relationships. The Canadian Supreme Court has described the two laws as

50 Legal Commentaries to Selected Orders of the Right to Information Commission of Sri Lanka (2019-2021); RTIC Appeal (In- Person) 113 / 2018

51 Schedule I of the PDPA.

52 Banisar (n 2).

53 *ibid*

a “seamless code with complementary provisions that can and should be interpreted harmoniously.”⁵⁴ Many Canadian provincial laws also address both rights in a single law⁵⁵.

There have been several cases where there are separate legislative enactments but a single authority for both personal data and information access. This is the case, for instance, in the UK,⁵⁶ Argentina, Belgium, and Mexico⁵⁷. In the United Kingdom, the Data Protection Commission evolved into the Information Commission. It was considered that having a single body can reduce the possibility of institutional conflict. In practice, many requests for information under RTI legislation will relate to personal information; having this dual expertise will allow for better balancing⁵⁸. Elizabeth France (1999), the U.K. data protection registrar, commented during the legislative process in June 1999:

“The possibility of institutional conflict which would exist were there to be separate Commissioners for freedom of information and data protection matters is avoided. Working within one institution should allow more focused and effective consideration than working across institutional boundaries. Any tension will be contained within the institution.”

54 Canada (Information Commissioner) v. Canada (Commissioner of RCMP), 2003 SCC 8, October 29, 2003.

55 Banisar (n 2).

56 <https://ico.org.uk/>

57 The future of access to information: Ensuring complementarity between the right to information and personal data protection- OECD

58 Banisar (n 2).

3. Road Ahead for Sri Lanka

Considering the different technical capabilities and know-how needed, and since the PDPA has already been passed, there cannot be one centralized institution / regulatory body for both RTI and personal data in Sri Lanka. Therefore, in the Sri Lankan context other options may be considered. The PDPA requires that every “ministry, government department or public corporation” appoint a Data Protection Officer (“DPO”), since many of these institutions already have appointed IO/DO, the IO or the DO can be entrusted with the role of DPO under the PDPA. The Board of Directors have been appointed under the PDPA. It has been indicated that public consultations and awareness campaigns would be conducted⁵⁹. During these consultations and subsequent framing of rules/regulations some of these conflicts can be addressed. Particularly those on record keeping and erasure of data. These trainings and consultations could lead to building a synergy.

Public interest test

The author is of the view that when awareness campaigns are being conducted for PDPA⁶⁰, the PAs, particularly the IOs / Dos should be given an understanding of these potential conflicts and the importance of public interest.

Where there is personal information in an information request, the public interest override is applied under the RTI Act (Section 5 (1) (a) and Section 5 (4))

Similarly, Schedule 1 of the PDPA also allows for processing of personal data on grounds of public interest, i.e. such data can be processed even without consent. Schedule 1 clause (g) reads as follows:

“(g) for the purpose of item (e) of this Schedule, “public interest” includes- (iii) processing of personal data is necessary by official authorities for achieving the purposes or objects laid down by law.”

59 'Personal Data Protection Authority Progresses with Board Appointment | Daily FT' <<https://www.ft.lk/front-page/Personal-Data-Protection-Authority-progresses-with-Board-appointment/44-753871>> accessed 11 October 2023.

60 *ibid.*

Since both the RTI Act and the PDPA make provision for public interest, and there is a right to information exemption under Section 40 of the PDPA, it is strongly recommended that guidance be issued, whereby personal data can be disclosed for public interest, including illustrations of circumstances where such "public interest" would override protection of personal data. A plethora of RTIC Orders have been discussed above ranging from information about public officials such as salaries, travel, employment information, education qualification of elected members of parliament., etc. to information held by the State of private individuals such as information of victims of landslide, prisoner information, interview results., etc. These are possible illustrations. A broad guidance to all PAs in this would aid the implementation of both RTI Act and PDPA with better clarity and certainty. The observations in an Irish case involving disclosure of expenses by judges are noteworthy *"It is clear that any right of privacy in this area has to be greatly circumscribed by one essential component of the public good viz. accountability for the use of public funds in a democracy."*⁶¹

Other conflicts

As discussed in this section there are other potential areas for conflict, it is hoped that these tensions are resolved without compromising or undermining larger public good and better transparency. The International Monetary Fund (IMF) has highlighted this concern of potential conflict and stated in its report that "It will be important to establish policies and rules that properly balance protection of vital information rights with the state's equally justifiable interest in protecting its security, the privacy of individuals, and the confidentiality of its investigations. If not, there is a significant risk that this outstanding example of transparency is stripped of its effectiveness."⁶² It can also be expected that the RTIC will consider ways to strengthen the RTI framework and address these conflicts, in light of the recommendations of the IMF in this regard.⁶³

61 'XX and the Courts Service, [2014] IEIC 130140 | Irish Information Commissioner, Judgment, Law, Casemine.Com' (<https://www.casemine.com>) <<https://www.casemine.com/judgement/uk/5da04be44653d0053b353261>> accessed 11 October 2023.

62 'Sri Lanka: Technical Assistance Report-Governance Diagnostic Assessment' (IMF) <<https://www.imf.org/en/Publications/CR/Issues/2023/09/29/Sri-Lanka-Technical-Assistance-Report-Governance-Diagnostic-Assessment-539804>> accessed 26 October 2023.

62 *ibid.*

Concluding thoughts

From their different vantage points, the institutional actors on the information and privacy stage play their parts in maintaining a viable balance between government accountability and conflicting rights and interests, for the greater benefit of democracy⁶².

RTI Act and PDPA both are aimed at bringing about more accountability, the former is limited to PAs (State entities and some non-State entities), the latter extends to private organisations as well. While there are overlaps, in their objectives and protections afforded, the tensions and conflicts are also writ large. There are no simple solutions in ironing out these conflicts. It is essential that there is a multi-layered dialogue within government agencies (including State PAs), in the offices of the RTIC and DPA, and eventually in courtrooms⁶³. Notwithstanding the many challenges that lie ahead in the implementation of the RTI Act vis-à-vis the PDPA, it is not an insurmountable task to harmoniously interpret both. There is no question that these issues and concerns need coordinated efforts, effective dialogue and clear policy. The road ahead can seem challenging but effective implementation and regulations can aid in balancing these conflicts.

62 Canada (n 1).

63 Banisar (n 2).