CENTRE FOR LAW AND DEMOCRACY

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Analysis of the Access to Information Bill

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org
fb.com/CentreForLawAndDemocracy
@Law_Democracy

The Centre for Law and Democracy a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy.

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Introduction[1]

Namibia's Access to Information Bill (ATI Bill), which gives individuals a right to access information held by public authorities, or the right to information (RTI), was drafted in 2016 and tabled in parliament in June 2020. It has since been referred to the Standing Committee on ICT & Technology for additional public consultations. Overall, the ATI Bill represents a strong draft law. Although there is room for improvement, it would represent an important step forward for the right to information and transparency in Namibia if passed.

The RTI Rating (rti-rating.org), which is run by the Centre for Law and Democracy (CLD), scores legal frameworks for the right to information according to a set of sixty-one indicators derived from international standards and better practices. CLD has completed an unofficial scoring of the ATI Bill, the results of which are provided in the table below.[2]

Section	Max Points	Score	Percentage
1. Right of Access	6	3	50%
2. Scope	30	22	73%
3. Requesting Procedures	30	19	63%
4. Exceptions and Refusals	30	23	77%
5. Appeals	30	28	93%
6. Sanctions and Protections	8	5	63%
7. Promotional Measures	16	14	88%
Total score	**150**	**114**	**76%**

This score indicates that the ATI Bill would fall into the top 20 laws worldwide, out of the 128 countries currently assessed on the Rating. Addressing some of the weaknesses in the law could push it into the top ten globally. Currently, the weakest categories are the Right of Access, Requesting Procedures and Sanctions and Protections, which focus on the legal guarantees for the right, the procedures for making and processing requests for information, and the system of sanctions and protections for releasing or refusing to release information. The first is partly due to the lack of a constitutional guarantee for RTI. The rules governing

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[2] We note that this rating is not equivalent to a formal rating since it has not been reviewed by a national expert.

requesting procedures could be improved in various ways and the protection for good faith disclosures under the law could also be strengthened. There are also other areas for improvement, such as providing for the ATI Bill to trump secrecy provisions in other laws, putting overall time limits (say of 20 years) on exceptions and removing the exclusion of some key categories of information from the scope of the Act, such as information related to the Cabinet and the judiciary. The imposition of criminal sanctions for accessing exempt information, which could apply even to accidental access or to journalists and others who receive leaked information, is also problematical.

This Analysis uses the categories established by the RTI Rating to evaluate the ATI Bill. It focuses on areas where additional changes could improve the law and makes recommendations for how this could be done.

1. Right of Access and Scope

Overall, the legal framework is rather weak in the RTI Rating category of Right of Access but scores strongly in terms of Scope. These categories look at whether the legal framework establishes strong guarantees for the right to information and applies to a broad range of individuals, information and public authorities. The right of access is well established in the ATI Bill, but points were lost in this category on two grounds. First, as noted above, the right is not guaranteed in the Constitution. Second, while the law has a strong interpretive clause, in section 3, which calls for it to be interpreted in light of the Constitution, the principles set out in section 4 and international instruments, section 4 itself fails to refer to the wider benefits of the right to information, such as controlling corruption, facilitating participation and fostering accountability. Including these references in the law as a guide to interpretation is an important way ensuring that the law delivers on its wider aims.

For the most part, the ATI Bill is broad in scope, including in terms of those who are empowered to make requests, the information it covers and the public authorities which are required to comply with its provisions. One area where it could be improved is by making it quite clear that requesters have a right to ask for both documents (such as the budget for a certain year) and information (such as how much money was allocated in the budget for the last five years to health care). The latter may mean that public authorities have to extract the information from existing documents or records but they should be required to do so unless this would take a disproportionate amount of time.

In terms of coverage of public authorities, it covers all bodies established by the Constitution or statutes, which we understand to cover regional and local bodies as well as national ones. However, there are a few areas where the scope of coverage in terms of public authorities could be improved:

- Cabinet and its committees: According to section 2(2)(a)(i), the "proceedings and decisions of Cabinet and its committees" are completely excluded from the scope of the Act. It is legitimate to protect Cabinet decision-making and free discussion among Cabinet members, this should be addressed through a harm-based exception rather than a blanket exclusion for all Cabinet documents. For example, Cabinet decisions are normally released to the public.
- Non-statutory bodies controlled by public authorities: The definition of a "public entity" in section 1 covers bodies created by the Constitution or a statute, as well as private bodies that are owned or financed by the State. However, it fails to cover private bodies which, even if they are not created by statute, are controlled by the State, which might be the case in relation to a civil society organisation, for example. This might also be the case for a State-owned enterprise.
- Judicial functions and appointment of judicial officers: The Bill appropriately covers the Office of the Judiciary as one of the agencies listed in Schedule 3 of the Public Service Act. However, section 2(2)(a)(ii) excludes information relating to the judicial functions of course, while section 2(2)(a)(ii) excludes information relating to the appointment of judicial officers, neither of which is legitimate.
- Potential for exemption of non-profit bodies performing public functions: One strength of the ATI Bill is the fact that it covers private bodies that perform public functions or receive significant public funding (see section 1 definition of a public entity). However, section 29 permits the Information Commissioner to exempt certain classes of non-profit bodies which are performing public functions or services from their right to information obligations. This is potentially troubling although the fact that this power is exercised by the Commissioner mitigates our concerns here. If the concern is placing undue administrative burdens on small non-profit organisations, an alternative approach would be to empower the Commissioner to develop simplified rules or procedures for such entities. Similarly, if there are concerns about access to information tools being weaponised to harass non-profits or their staff, this can be dealt with through the exceptions, such as those addressing privacy or safety.

Recommendations

- Section 4 should include references to the key external benefits which are provided by the right to information such as fostering participation, reducing corruption and promoting accountability.
- Section 2(2)(a)(i), excluding information related to proceedings and decisions of cabinet and its committees, should be removed and the protection of cabinet secrecy should be addressed through an appropriately crafted exception to protect the free and frank provision of advice and the integrity of policy-making processes.
- The idea of control of a body by the State should be added to sub-section (c)(i) under the definition of a public entity in section 1.

- The section 2(2)(a)(ii) and (iii) exclusion of information related to judicial functions and the appointment of judicial officers should be removed.
- Consideration should be given to removing the section 29 power of the Commissioner to exempt classes of non-profits performing public functions from right to information obligations and replacing it with a power of the Commissioner to create simplified procedures or less onerous obligations for small non-profits.

Right of Access

Indicator		Max	Points	Section
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	0	
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	4(a), 30
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.	2	1	3-4
	TOTAL	6	3	

Scope

Indicator		Max	Points	Section
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	2	4(a), 30, 35(1); Interpretation of Laws Proclamation ,[3] 2
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	4	1, 2(1)
6	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).	2	1	1

[3] Interpretation of Laws Proclamation No. 37 of 1920, https://www.lac.org.na/laws/annoSTAT/Interpretation%20of%20Laws%20Proclamation%2037%20of%201920.pdf.

7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	8	5	1, Public Service Act,[4] Schedules 1, 2, 3
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	1, Public Service Act,[5] Schedule 3
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	1	1, 2(2)(a), Public Service Act Schedule.[6] 3
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	1	1
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	2	1, Public Service Act,[7] Schedules 1, 2, 3
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	2	2	1, 29
	TOTAL	30	22	

2. Requesting Procedures

It is free to make a request for information under the ATI Bill and the procedures for making and processing requests are generally straightforward. Among other things, it places an obligation on public authorities to assist those making requests, contains clear time limits for responding to requests and has good rules on the costs that may be imposed on requesters. However, this is the main category of the RTI Rating (i.e. from among those with a total of 30 points) where the ATI Bill does worst, scoring just 19 out of 30 points or 63%. This is

[4] Public Service Act No. 13 of 1995, https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=172#:~:text=To%20provide%20for%20the%20establishment,Service%2C%20and%20other%20incidental%20matters.

[5] Public Service Act No. 13 of 1995, https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=172#:~:text=To%20provide%20for%20the%20establishment,Service%2C%20and%20other%20incidental%20matters.

[6] Public Service Act No. 13 of 1995, https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=172#:~:text=To%20provide%20for%20the%20establishment,Service%2C%20and%20other%20incidental%20matters.

[7] Public Service Act No. 13 of 1995, https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=172#:~:text=To%20provide%20for%20the%20establishment,Service%2C%20and%20other%20incidental%20matters.

somewhat counter-intuitive since this is a relatively easy category to score well on and also an area where it would be easy and probably less controversial to improve the draft.

Section 35(6) states that "a requester must provide a reason for requesting access to information". The specific sorts of information that must be provided where a requester is asking for rapid processing of an urgent request or making a request to a private body are elaborated on in section 35(7) and Section 37(1) indicates that a request is not affected by any reason the requester gives. However, a plain reading of the language of section 35(6) suggests that requesters must give reasons for all requests, and not merely in the special cases referred to in section 35(7), although this may just be poor legislative drafting.

International standards dictate that requesters should never be mandated to give reasons for requests. This has no legal bearing on how exceptions are applied and, instead, is likely to lead to the authorities improperly denying requests. The exceptions to this are where reasons are needed to justify special processing of a request, such as when expedited processing is being asked for on the basis that the information is needed to safeguard someone's life or liberty or where a request is put to a private body on the basis that access is needed for the exercise or protection of a fundamental right.

The ATI Bill fails to indicate what information requesters need to provide when making a request for information. As a result, this could be left to the discretion of different public authorities and even central forms developed for making requests could ask for inappropriately detailed personally identifying information. Better practice is for the RTI law to indicate directly that requesters should only be asked to provide the contact information necessary for communicating with them and delivering the information to them, along with a clear description of the information they are seeking when making a request.

In terms of how to make a request, section 35(1) provides that requests may be made in writing or orally, while section 35(2) provides that requests made orally shall be reduced to writing by the information officer. These are positive provisions. However, the Bill is otherwise silent as to how requests may be lodged. Better practice is to indicate that this may be done by mail, in person, by fax and electronically, as long as the public authority has the technology to receive requests that way.

The provisions on assistance in sections 35(2) and 36 are, taken together, positive, providing for the lodging of requests orally, for assistance both generally and specifically for the disabled. Section 35(3) requires requesters to be given a receipt "immediately" after submitting their request. This is useful but it would be better to set an absolute maximum number of days for this. "Immediately" works well for in person requests, for example, but may be ambiguous for mailed requests.

Section 40(1) provides for requests to be transferred to another public authority where the original authority does not hold the information or the information is more closely connected

with the work of another authority. Better practice here is to allow transfers only where the original public authority does not hold the information. For cases where the information is merely more closely related to another public authority, the original authority can consult with that other authority. Section 40(1) requires the original public authority to transfer a request only "after inquiry with the other public entity". No explanation of why this should be necessary, or what its purpose is, is given. Such an inquiry has not been found to be necessary in other countries and, since transfers must happen within five days, this could be difficult to achieve.

Section 44 requires public authorities to accommodate requesters' preferences in terms of the format for receiving information. However, the exceptions to this requirement – which include endangering national security or jeopardising a criminal investigation – weaken it considerably. The format in which information is released cannot of itself pose a threat to national security or ongoing criminal investigations; only the content of the information could do that.

Section 37(2) requires requests to be responded to within a maximum of 21 days, while section 37(3) provides for expedited responses within 48 hours when information is needed to safeguard someone's life or liberty. The former is reasonably good practice, but a shorter time frame of 15 days or 10 working days represents best practice and would earn an additional point on the RTI Rating. As a result, if a shorter timeframe is realistic for Namibia, taking into account that extensions for up to 14 days are provided for under section 39, it should be considered.

Section 39, as noted above, allows for extensions for up to 14 days, while section 39(3) provides that notice of the extension should be provided "within the 14 day extension". Better practice is to require notice of an extension to be provided within the initial time limit, in this case the original 21 days.

Overall, the rules on fees in the ATI Bill are progressive, including by providing for fee waivers for indigent requesters (section 46(3)(e)). Section 85(b) empowers but does not require the Minister to issue regulations on fees. Better practice here is to require fees to be set centrally, including so as to avoid a patchwork of different fees among different public authorities. Better practice is also to provide for a set number of pages, say 15 or 20, to be provided for free.

Recommendations

- Requesters should not generally be required to provide a reason for their request, outside of certain special circumstances. Section 35(6) should be removed and section 35(7) should be rewritten to make it clear that requesters only have to providing reasons for their requests where this is necessary to show that the request relates to protection of life or liberty (so needs to be processed

within 48 hours) or is to a private entity and relates to the exercise or protection of any fundamental right or freedom.

- Section 35 should include language clarifying that requesters are only required to provide whatever contact information is necessary for communicating with them and delivering the information, along with a description of the information when making a request.
- The law should stipulate that requests may be lodged in different ways including in person, by mail, by fax and electronically.
- A maximum time limit in terms of number of days for issuing receipts under section 35(3) should be added to the law.
- Section 40(1) should only allow for transfers of requests when the public authority with which the request was originally lodged does not hold the information and the reference to inquiring with the other public authority should be removed.
- The references to national security and criminal investigations in sections 44(4)(d)-(e) should be removed.
- Consideration should be given to shortening the deadline for responding to requests to ten working days if this seems feasible in the Namibian context.
- Where an extension is claimed, the requester should be notified of this within the original time limit of 21 days.
- The law should require fee rates to be set centrally and provide for a set number of pages of photocopies to be provided for free.

Indicator		Max	Points	Section
13	Requesters are not required to provide reasons for their requests.	2	0	35(6), 37
14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	0	
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	1	35
16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.	2	2	36
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	2	2	35(2), 36, 44(5)
18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	1	35(3)

19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	1	40, 43
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	1	44
21	Public authorities are required to respond to requests as soon as possible.	2	2	35(4), 37(2)-(3)
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	1	37(2)
23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	2	39
24	It is free to file requests.	2	2	46(1)(a)
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	1	1, 46, 85(b)
26	There are fee waivers for impecunious requesters	2	2	46(3)(e)*
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	2	78
	TOTAL	30	21	

**This appears to be a typo in the version of the ATI Bill obtained by CLD: it is listed as s. 46(2) but as this follows s. 46(2), it must mean s. 46(3)*

3. Exceptions and Refusals

The regime of exceptions is a key part of any RTI law as it governs when public authorities can refuse to disclose information. A proper regime of exceptions should have several key elements, including the following three core elements: a list of which precise interests may justify non-disclosure which aligns with international standards; a "harm test" which states that information may be withheld only where releasing it would pose a real risk of harm to that interest; and a "public interest override" so that where the public interest in accessing

the information is greater than the harm from disclosure, the information should still be released.

Part 9 of the ATI Bill sets out the regime of exceptions. Generally, this aligns with better practice internationally, earning the Bill 23 points or 77% on this category of the RTI Rating. Section 3(3) provides that, in case of conflict between the ATI law and any other law, the law which is more favourable to granting access to information shall prevail. This is useful. However, section 65 provides that information which is classified under any other law is exempt. This essentially means that secrecy provisions in other laws which enable classification override the exceptions in the ATI law, regardless of whether or not the protect legitimate interests, or include a harm test or public interest override. Better practice in this regard is for the section 3(3) rule to apply to such cases (so that any particular secrecy rule in another law would be preserved only if it aligned with the standards in the ATI law).

Furthermore, classification procedures should be entirely separate from an evaluation of whether information contained in a record can be released under an RTI law, which should involve an individual assessment of whether releasing the information would harm a legitimate interest and the public interest balancing.

The section 66 exception for personal information is also problematical. International standards allow for an exception to protect private information. But personal information is not the same as privacy; not all personal information is necessarily private or would harm privacy if it were released. This problem is evidenced in the broad definition of personal information given in section 1, which includes "personal opinions, views or preferences" of an individual as well as opinions of one individual about another. Such a definition could encompass non-private information, such as public statements, and could cover important public interest information, such as the views of public officials on policy matters from disclosure. While section 66 clarifies that the exception for personal information does not include information relating to the position or functions of a public official, this is not sufficient to cure the overall problems with this exception.

Section 64 of the ATI Bill contains a public interest override. This applies to require disclosure of information whenever it reveals evidence of corruption, a serious contravention of the law, or an imminent and serious public health, safety or environmental risk (section 64(a)) AND the public interest in disclosure "demonstrably outweighs the resulting harm" to the protected interest (section 64(b)). Sections 61(3)(b) and 79 also refer to the public interest, in the context of the burden of proof. In each case, they set up a simple balancing so that the burden is of proving that the harm to the protected interest from disclosure is greater than the public interest in accessing the information. For purposes of this Analysis, we treat section 64 as the main provision setting up the nature of the public interest override but the inconsistencies between these various references to the public interest override should be resolved.

Section 64 is flawed in three key respects. First, it only applies in limited circumstances, as noted above, such as corruption and so on. There are a lot of other public interests that might be served by disclosure of information, such as facilitating public participation, growing the economy or helping to address human rights abuses. Second, in most cases, it requires a risk of serious harm to the public interest, such as a breach of the law or public health. This fails to take into account the possibility that the harm to the protected interest may be very minor in nature, such as a minimal intrusion into privacy or a minor impediment to law enforcement. Given that the right to information is a human right, it is not appropriate to set up such an uneven weighing of interests (i.e. by requiring a serious harm to a public interest versus a potentially minor harm to a protected interest). Third, the standard used for balancing, namely "demonstrably outweighs", further tilts the playing field in favour of the protected interest and against the public interest. Once again, this is inappropriate given that the right to information is a human right. It should be enough for the information to be disclosed if the benefits from this merely outweigh the harm.

Best practice internationally in this regard is to have both a general public interest override, which applies whenever the overall public interest favours disclosure, on a simple balancing (i.e. where the interest in disclosure outweighs the harm that will cause), and then a hard override for certain key public interests, like human rights abuse or harm to the environment, which applies automatically whenever the information concerned reveals evidence of these issues. It may be noted that by substituting the "and" between section 64(a) and (b) for an "or" would leave the list of issues mentioned in section 64(a) as a set of hard overrides and then section 64(b) would serve as a general override (albeit still with the problematical standard of "demonstrably outweighs".

A final problem with the regime of exceptions is that it fails to recognise that any risk to a protected interest of a public nature – such as national security or public order – will diminish over time. As a result, exceptions which protect public interests should cease to apply after a set period of time, for example of 20 years.

Recommendations

- Section 65, providing for an exception for classified information, should be removed.
- Ideally section 66 should be redrafted to protect privacy instead of personal information. At a minimum, the overly broad provisions in the definition of personal information in section 1, especially clauses (e) and (g), should be removed.
- Change the "and" between section 64(a) and 65(b) to an "or" and amend the reference to "demonstrably outweighs" to simply "outweighs", or otherwise create a broad and balanced public interest override that applies whenever the overall public interest is served by disclosure. In addition, the potential confusion arising from the varying references to a public interest override in sections 61(3)(b), 64 and 79 should be resolved.

- Add a provision which clarifies that information should be released as soon as an exemption ceases to apply.
- A provision should be added to the law so that exceptions based on the protection of public interests cease to apply after a set period of time, such as 20 years (exemptions based on private interests, such as privacy or commercial interests, should not be subject to this limit).

Indicator		Max	Points	Section
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	1	3(3), 65
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.	10	9	1, 65-75
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	4	1, 65-75
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	3	61(3)(b), 64, 79
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	0	
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	2	37(4)(c), 38, 66
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	2	77

35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	2	37(7), 49(3)(c)
	TOTAL	30	24	

4. Appeals

Overall, the rules on appeals in the ATI Bill score the highest from among any category of the RTI Rating, earning 28 points or 93%. The rules provide for internal appeals, external appeals to an independent Information Commissioner and judicial appeals, along with reasonably detailed procedures for both internal and external appeals. There are also detailed rules governing the appointment, removal and conditions for the Information Commissioner, which are likely to protect the independence of this important office.

The Information Commissioner also has a fairly broad mandate and powers. Section 9 lists general powers of the Information Commission, while sections 21(3) and 60 address, respectively, the Commissioner's powers in relation to audits and matters which are "before him" (presumably mainly appeals). As a result of the way this is set up, it is not clear whether the general powers listed in section 9 also apply in the context of audits and appeals or whether sections 21(3) and 60 should be read as setting out comprehensively the powers in those respective contexts. For example, section 9(1)(a) gives the Commissioner the power to enter and search premises and seize information, but this is not listed under section 60. Clarity on these points is important. The Commissioner should have the power to conduct inspections and to order the production of classified documents when deciding appeals.

Section 53(1)(c) provides that an appeal should set out the "particulars of the decision and the grounds for appeal in the prescribed manner". The form or requirements for doing this should be simple enough that a requester can file an appeal without legal assistance. The law should also make it clear that it is free to file an appeal with the Commissioner; this is implied but never explicitly stated.

Section 54(3) provides that the Information Commissioner must give the requester "actual access to the information" after deciding that access should be granted. This is not appropriate. The Commissioner may not hold the information in the first place. However, even if he or she does, it is not his or her role to provide the information to the requester. Rather, the public authority should do this, unless it wishes to lodge an appeal against the decision of the Commissioner.

Recommendations

- The relationship between sections 9, 21(3) and 60 should be clarified, ensuring that key powers such as the ability to inspect premises and order the production of documents are preserved during the appeals process.
- The law should state explicitly that appeals to the Information Commissioner are free of charge and do not require a lawyer.
- Section 54(3) should be amended to clarify that the Commissioner's role is to order the public authority to provide the information to the requester rather than providing it directly him- or herself.

Indicator		Max	Points	Section
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	2	47-50
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	2	51(2), 52-53
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	2	2	5-6, 12-15
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	2	10(1)(b), 16, 18
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	2	7, 8, 11
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	1	9, 21(3), 60
42	The decisions of the independent oversight body are binding.	2	2	9(1)(f), 9(2)(d), 54
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	2	9(1)(f), 9(2), 54
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	55
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	1	53
46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to	4	4	

	provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).			47(1), 49(3)(c), 52
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	2	54, 56059
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	2	61
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	2	9(1)(f), 21(4)
	TOTAL	30	28	

5. Sanctions and Promotions

Section 81 of the ATI Bill contains a fairly robust system of criminal sanctions for acts such as destroying information or obstructing implementation of the Act. While the strong sanctions can reinforce the importance of the right to information, the penalties may be disproportionate for some of the acts listed. Heavy criminal penalties may incentivise cover-up of misconduct out of fear of the sanction rather than cultivating an administrative culture that moves towards openness. A better approach for less serious offences is to impose administrative or professional sanctions, which are provided for in section 82.

There are a few potential issues with section 82. First, it applies only to information officers and not to others who may have obstructed access to information. Administrative sanctions are a good way to ensure that all staff comply with right to information obligations, not only information officers. Second, the sanctions are not tied to negligence or misconduct. Information officers may be unable to fulfil their duties through no fault of their own, for example if another staff member refuses to share information with them. Third, a range of lesser sanctions, such as warnings, may provide more nuanced tools for addressing minor failures, especially early in a law's implementation when public authorities are still adapting to the new law.

One sanction is particularly troubling and could result in negative consequences for the work of journalists and for freedom of expression more generally. Section 81(f) imposes sanctions on any person who accesses information which is exempt from disclosure under the ATI Bill without relevant authorisation, subject to up to five years' imprisonment and/or a fine. This provision is not restricted in application to officials who are responsible for safeguarding information. As a result, it could potentially be applied to ordinary citizens who accidentally access information or to journalists and civil society groups who publish information which has been provided to them by an official. Sanctions for this should fall on the officials who are responsible for keeping the information confidential, not on others who access the information after it has already been leaked.

Protection for public officials acting in good faith to release information pursuant to the right to information law is also important to ensure they do not refrain from disclosing information out of fear of facing sanctions. Section 84 provides such protection but only against civil damages or employment-related sanctions. Section 4(g) provides more general protection against any sanction but includes a claw-back "except where a relevant law provides otherwise". This again effectively means that there is no protection against legal sanctions under other laws for good faith disclosures under the ATI law.

Finally, the ATI Bill fails to provide for sanctions against public authorities as a whole, where they are systematically failing to discharge their obligations under it, as opposed to just measures against individuals. While such sanctions would normally be imposed only rarely, it is important for the law to provide for them, including to signal that the right to information is considered to be important and that failures to respect it will not be tolerated.

Recommendations

- Section 81(f) should be removed or limited in application to officials.
- Section 82 should cover all officials and should incorporate a requirement of negligence or misconduct, and consideration should be given to providing for a broader range of more minor possible administrative sanctions.
- The law should provide broad protection against employment-related sanctions and legal penalties for good faith disclosures pursuant to it.
- The law should provide for sanctions for public authorities, as such (i.e. not just individual officials), where they are systematically failing to respect their obligations under it.

Indicator		Max	Points	Section
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	2	81, 82
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	1	4(g), 84
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2	2	Whistle blower

				Protection Act[8]
	TOTAL	8	5	

6. Promotional Measures

The ATI Bill also does very well in terms of the promotional measures category of the RTI Rating, scoring 14 out of the 16 available points or 88%. A strong point here is that the Bill empowers the Information Commissioner to engage in a range of promotional efforts, mandates authorities to appoint information officers and requires both individual public authorities and the Commissioner to prepare annual reports on implementation of the law.

A few provisions could be further improved, however. Sections 24(2)(e) and 32 require public authorities to manage their records so as to facilitate access, and section 85(e) empowers the minister to enact regulations on this, this falls short of a proper records management system. That would involve a central authority develop records management standards which were binding on each public authority, then providing training to public authorities so that they could meet those standards and then monitoring performance in this area.

Section 33(2)(d) requires each public entity to publish a list of the categories of information it holds. Better practice is to require public authorities to public lists of the actual documents they hold and not merely the categories of information.

Recommendations

- The law should put in place a proper records management system, as described above.
- Section 33(2)(d) should be amended to require public authorities to publish a list of the records they hold.

Indicator		Max	Points	Section
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	2	22
55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	2	5(1), 31
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	2	9(2)(g), 25, 31

[8] Act No. 10 of 2017, https://laws.parliament.na/cms_documents/6450-0064c372ce.pdf.

57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	1	24(2)(e), 32, 85(e)
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	1	25(3)(g), 33(2)(d)
59	Training programmes for officials are required to be put in place.	2	2	31(2)(c), (d), 24(2)(g)
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	2	20, 26
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	2	18
	TOTAL	**16**	**14**	