Additional Reading Materials Focusing on Small Island Developing States to Accompany UNESCO's MOOC on Access to Information Laws and Policies and their Implementation

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on behalf of UNESCO

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These materials are designed to supplement the UNESCO Massive Open Online Course: Access to Information Laws and Policies and their Implementation, available for registration at https://unesco-ati-mooc.thinkific.com/courses/unesco-massive-open-online-course-access-to-information-laws-and-policies-and-their-implementation, which was developed for UNESCO by the Centre for Law and Democracy (CLD). The Course is designed to give participants an introduction to the right to access information held by public authorities, often called access to information or the right to information (RTI).

Since CLD developed the Course, UNESCO has developed additional materials on how to adapt RTI laws and their implementation for Small Island Developing States (SIDSs), in the form of the *Principles on Right to Information for Small Island Developing States: The Case of the Pacific*. The Principles are divided into two sections, one looking at RTI legislation and one looking at Implementation Measures. These materials follow the same approach.

The Course is divided into eight modules, covering: 1. International Standards, 2. ATI, Development – Including the SDGs – And Other Benefits, 3. Principles of Good ATI Legislation, 4. Proactive Disclosure, 5. Reactive Disclosure, 6. Exceptions, 7. Oversight, and 8. Implementation: Steps and Challenges. We recommend that these materials be read between the 7th and 8th modules if they are being read in conjunction with the Course (which is also recommended).

1. Right to Information Legislation

There are a number of areas where there is no need to change the legislation just because it is being adopted by a SIDS. This is because not everything needs to be adapted based on population. For example, the types of legitimate exceptions and the way that the regime of exceptions should work does not depend on the size, geographic nature or population of a State. All States need to protect the same types of information, such as information which is sensitive on national security, public order or privacy grounds. Different countries have different privacy values, to be sure, whether this is based on size and the fact that people tend to know a lot about each other or more cultural attributes. But that will not require a change to the language in the law about protection of privacy. For example, the privacy exception in Article 8(1)(f) of the Indian Right to Information Act, 2005 (i.e. the largest country in the world), exempts:

> [I]nformation which 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.

This language would work just as well in the law of a small Pacific Island State as well.

The areas where the RTI law does not need to be adapted based on the size of the country are:

- The primary guarantees of the right to information.
- The scope of the law in terms of types of public authorities and information covered.
- The rules on making and processing requests. Note that the obligation to provide assistance is, in many countries, qualified by the idea that such assistance need only be such as is reasonable, thus providing a built-in adaptation for smaller bureaucracies. Thus, Article 5(3) of the Indian RTI Act calls for public authorities to "render reasonable assistance to the persons seeking such information". This language would work equally well in a SIDS.
- The rules setting out the regime of exceptions.
- The sanctions (for those who wilfully obstruct access to information) and protections (for those who release information in good faith).

Despite this, in the area of scope it might make sense for very small SIDSs not to grant everyone, citizens, residents and foreigners alike, the right to make requests. One significant request by a foreigner, for example, could place quite a burden on the government. At the same time, there are benefits to having foreigners ask for information, including that they might be considering investing in the country or doing research on it that would be of value to those living there. As a result, it might be useful to implement a somewhat discretionary approach here whereby instead of giving non-citizen, non-residents a right to make requests, the law could provide for consideration of these requests, with discretion to refuse to process them where to do so would be unduly burdensome.

There are, however, a number of areas where size does matter and it would be prudent to make adjustments to the law to accommodate this. There are two main institutional structures for better practice RTI systems and both will need to be adapted for SIDSs so as to take into account their much smaller bureaucracies and hence overall capacity. The first is in relation to appeals. As Module 7 of the Course makes clear, it is very important indeed to provide applicants who do not feel that their request for information has been dealt with in accordance with the law with access to an independent, administrative level of appeal.

Better practice here is to create a dedicated administrative oversight body, such as an information commission. Many countries also combine this function with oversight of data protection and/or privacy laws, given that this is a very closely related, information-focused function. However, it is not realistic to expect a very small SIDS to set up a new administrative body simply to oversee the right to information (even if data protection were added to its mandate). This requires both financial and human resources, both of which will be limited, and the volume of work would very likely simply not justify it. It may be noted that many jurisdictions with populations of just 1,000,000 people or even 500,000 people have set up dedicated information commission offices, so medium-size SIDSs will need to think carefully about this.

If a new body is not to be set up for this function, it would probably make sense to allocate the role to an existing independent, administrative oversight body. Which body, exactly, to use will depend on the country and what bodies already exist but some options include a human rights commission or commissioner, an ombudsman or potentially another body, such as an ethics commissioner or even possibly an elections commissioner.

To be able to serve effectively in the information oversight role, this body will need to have a number of features, as follows:

- It should be robustly independent of government, which it is overseeing. The key metrics for protecting such independence are described in Module 7 of the Course. The same principle applies to most of the alternative options for this set out in the previous paragraph, such as a human rights commission.
- It needs to have the necessary powers to investigate appeals, including to call witnesses, to review even classified documents and to inspect the premises of public authorities if necessary. Some of the other bodies have these powers while some do not.
- It needs to have clear procedures in place for processing appeals. Many of the other bodies listed above have the power to adopt their own procedures but this is not always the case. Among other things, appeals should be free and not require legal assistance.
- It needs to have the necessary powers in relation to remedies. For access to information matters, it is essential that the oversight body have the power to order public authorities to disclose information (and to implement other remedies, such as lowering the fee). Experience in other countries has shown that merely making recommendations is not enough in the area of information. Many of the other bodies listed above are, however, limited to making recommendations.

Where an existing body which is to be granted an information oversight function does not have the independence or powers listed above, this should ideally be integrated into the RTI law. For example, it is reasonable to grant an ombudsman the power to order the disclosure of information even if he or she does not have that power in relation to his or her other functions.

It is also better practice, in relation to appeals, to grant an internal appeal to a more senior official within the same public authority which decided the original request. This does not make sense with central processing (as proposed below) and also likely does not make sense in a very small bureaucracy where everyone would likely hear about requests for information which had been made.

The second main institutional structure is in relation to who will be tasked with receiving and processing requests for information. It is necessary to have officials who have dedicated responsibilities in this area, often referred to as information officers. Many RTI laws require each public authority to appoint its own information officer. This makes sense in a large administration where each public authority has both the capacity and can expect to have the information demand to justify this approach. It does not, however, make sense in a very small bureaucracy where human resources are limited and the number of requests simply does not make it practical for each public authority to have its own, trained, information officer.

Instead, some smaller jurisdictions have one central unit which processes requests on behalf of all public authorities, or a central information access service. An example of this is the province of Nova Scotia in Canada, which currently has a population of just over one million people. The task of processing requests on behalf of government is allocated to a central unit called the

Information Access and Privacy Services (IAP Services) (see https://ns.211.ca/services/information-access-and-privacy-services/).

A central information access service, which may only have a one to three people in a very small country, can represent a significant efficiency since the staff involved can be trained reasonably effectively (as opposed to training one officer at each public authority). It needs to have the authority to compel all public authorities to provide it with any information which is subject to a request, so that it can review that information and decide whether or not it should be released. It may also need to consult with the authority which originated or holds the information, so as to form a better opinion about its sensitivity. It also needs to have the authority to release information where this is warranted. In Nova Scotia, the system was layered on top of an existing RTI law, using regulations, but it would make more sense to wire such a system directly into the legislation if this were the approach which was agreed upon at the beginning.

Having a central information access service can also create other efficiencies, as follows:

- It is typically considered to be good practice to require each public authority to report annually on what it has done to implement the RTI law and then to have a central authority, often the oversight body, produce a consolidated report for the whole jurisdiction. Because all requests will flow through the central information access service, it can report on all of that side of implementation while the oversight body can address the issue of appeals.
- It is also good practice to task a central body with raising public awareness about the right to information, since if the public are not aware of this right they are unlikely to use it. This task could be allocated to either the central information access service or the oversight body.
- Modern RTI laws require public authorities to disclose information on a proactive basis, usually by providing a list of categories of information which must be disclosed proactively. This is, ultimately, a time saver because it takes a lot longer to respond to even one request for information than to disclose that information proactively. Depending on administrative arrangements, it could be an efficiency to have the central information access service lead on this issue, or at least provide advice and oversight to public authorities on it. Another way to limit the burden of the proactive obligations is to give public authorities a period of time, say five years, to meet their full proactive publication obligations, ideally with interim targets, such as having 30% of the information online after two years and 50% after three years.

2. Implementation Measures

In addition to the legal measures highlighted above, public authorities will need to conduct a number of implementation measures. These are outlined in Module 8 of the Course. This section of these materials is designed to supplement that content, specifically where special implementation considerations apply in SIDSs.

It is a great efficiency to have a central information access service. While this needs to be set out in the law, the efficiencies largely apply at the level of implementation. As a first point here, it is necessary to train the officials who are tasked with receiving and processing requests. Clearly this is much easier to do with just a few central officials than if it involves one official from each public authority. The UNESCO Course is a key starting point for training but it might also be possible to obtain additional, more in-depth training from others. The central information access service will also need to develop a simple protocol for processing requests,

setting out the sequence of steps, along with time limits, which must be taken after a request is received. It might be useful for SIDSs to consider using a protocol which has already been adopted somewhere else, and just adapting it a bit for their own purposes.

Either the central information access service or the oversight body should undertake some sort of public awareness raising, already mentioned above. Experience in other countries has shown that profiling successful requests, which led to concrete benefits for the applicant, is one of the easiest and most impactful ways of promoting awareness. Basically, people pick up very quickly on an issue where they see being it put to good use by their peers. An effort also needs to be made to ensure that awareness raising efforts target all segments of the population. This means reaching out to men and women, different islands or island groups which form part of the country, non-gender conforming people and persons with disabilities.

Experience in other countries has demonstrated that putting in place an online requesting system, which could potentially also be used for appeals, is a massive efficiency over time. These systems allow applicants to track their requests, guide the central information access service in processing requests (for example by sending warnings as the deadline approaches) and provide a simple way to disseminate the information to the applicant. These systems can also do most of the work needed to produce an annual report on an automated basis (for example by generating all of the statistical material about how many requests were lodged and what the results were). In better case scenarios, they can also automate some part of the proactive disclosure system, including by publishing certain documents automatically when the appropriate time comes and by publishing information which has been released in response to a request.

The main challenge with these systems is the often very high costs of setting them up in the first place. Fortunately, a number of free, open-source options for this already exist. One is Alaveteli, which was designed precisely for this (and is available at: http://alaveteli.org). The Mexican oversight body, the Institute for Transparency, Access to Information and Personal Data (INAI by its Spanish acronym), also runs a very sophisticated platform, the Plataforma Nacional de Transparencia (https://www.plataformadetransparencia.org.mx). It has made this platform available for free to others and has English-language guidance on using it.

Above, we talked about the idea of integrating information oversight into the duties of an existing oversight body, such as a human rights commission or ombudsman's office. While this is less than optimal, it does make sense for SIDSs. One way of helping to ensure that these bodies are as effective as possible in terms of the right to information is by having a relatively senior dedicated person within the body who is specifically responsible for leading on the information file. This can help ensure leadership and focus on this issue. It is also important to make sure to allocate additional resources to the body to take on this additional function. While it is an efficiency to allocate this work to an existing body, it cannot take that work on without being allocated any additional resources.

A final issue to consider here is records management, or how the files and documents held by public authorities are organised. This is a complicated matter. However, it can be simplified for SIDSs in a few ways. First, they can opt for relatively simple records management systems, taking into account the relatively smaller volume of records they hold. Second, they can focus on forward-looking records management instead of trying to bring all of the records held into a modern system. Third, they can focus on digital systems for managing records. While these have their risks and need to be implemented carefully, they also bring considerable efficiencies.

Overall, a relatively modest amount of adaptation is needed at both the legislative and implementation levels to ensure that right to information laws and systems are adapted to SIDSs and even very small SIDSs. At the same time, it is important to get this right, so as both to ensure the integral provision of the right to information to citizens and to take maximum advantages of the needed efficiencies, so that this right does not place an impossible burden of the small bureaucracies that exist in SIDSs. These materials, if read in conjunction with the UNESCO Course and the *Principles on Right to Information for Small Island Developing States: The Case of the Pacific*, should provide solid guidance to legislators and officials in SIDSs on how to do this.