
*The Gambia*

# Analysis of the Access to Information Bill 2019

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**Centre for Law and Democracy**
**info@law-democracy.org**
**+1 902 431-3688**
**www.law-democracy.org**

# *Introduction*[1]

The Gambia is one of a dwindling number of African countries that still does not have a law giving individuals a right to access information held by public authorities, or a right to information (RTI) law. In this context, it is very welcome that an Access to Information Bill (ATI Bill) has been prepared for the Gambia, including with the participation of the Gambia Press Union.

The Centre for Law and Democracy has done a quick assessment of the ATI Bill based on the RTI Rating, an internationally recognised methodology for assessing the strength of the legal framework for RTI.[2] According to this rapid assessment, the ATI Bill would earn 116 points out of a possible maximum of 150, putting it in 16th position globally out of the 124 RTI laws currently assessed on the RTI Rating. This is a very impressive position and score, of which those responsible for drafting the Bill can be proud. The table below shows the breakdown of the scores of the ATI Bill according to the seven main categories of the RTI Rating.

| Section | Max Points | Score | Percentage |
|---|---|---|---|
| 1. Right of Access | 6 | 1 | 17 |
| 2. Scope | 30 | 27 | 90 |
| 3. Requesting Procedures | 30 | 19 | 63 |
| 4. Exceptions and Refusals | 30 | 23 | 77 |
| 5. Appeals | 30 | 26 | 87 |
| 6. Sanctions and Protections | 8 | 7 | 88 |
| 7. Promotional Measures | 16 | 13 | 81 |
| **Total score** | **150** | **116** | **77** |

Despite its overall strength, the ATI Bill could still be further improved. It is important at the initial stages to put forward as strong a ATI Bill as possible, given that it is likely that various actors may try to weaken it as it goes through the formal process of being adopted into law, as we very much hope will happen in this case. This Note provides a quick analysis of the ATI Bill, arranged according to the categories on the RTI Rating. It is based on the Rating, as well as wider international standards and better comparative practice by other countries.



[2] The RTI Rating was prepared by the Centre for Law and Democracy (CLD) and Access Info Europe and is applied to all national RTI laws. See: www.RTI-Rating.org.

## *Right of Access and Scope*

The ATI Bill does poorly in the RTI Rating category of Right of Access, far worse than in any other category, garnering just one point out of a possible six, or 17%. In part this is because The Gambia lacks a constitutional guarantee for the right to information, something which is beyond the purview of this law reform effort but which should be addressed in due course.

However, the Bill also fails to provide for a strong guarantee for the right of access. Section 11 does provide that every person has a right of access subject to the law, which is positive. However, this is seriously undermined by section 12(1), which essentially excludes from the scope of the law cases where other laws provide for access to information. This is quite unnecessary and fails to take into account that other laws may provide for access on far less positive terms than this law, for example by providing for much longer delays, higher fees or even broader exceptions. Better practice in this respect is, where another law also provides for access, to allow those seeking information to choose which law they wish to use to gain access.

It is better practice for right to information laws to describe the external benefits which flow from this right – such as facilitating participation, promoting accountability, combating corruption and creating a better overall business environment – and then to require those tasked with interpreting the law – whether they are officials, members of the oversight commission or judges – to do so in the manner which best gives effect to those benefits. This is likely to result in more positive interpretation of the law. The ATI Bill fails to list any external benefits and then, perforce, fails to provide for its provisions to be interpreted so as best to give effect to those benefits.

The category of Scope is where the ATI Bill does best, scoring 90%. As noted above, section 11 provides that "every person" has a right of access. We assume that this means both citizens and non-citizens, although it would be preferable to make this explicit. It is also not clear whether the reference to "every person" includes legal persons, which it would again be useful to clarify.

The key provisions on the right of access, such as section 11 and the definitions in section 3, only refer to "information". Better practice is to make it clear that requesters may also ask for specific documents.

The scope of the ATI Bill in terms of the bodies covered appears to be very broad. However, there is a problem with the way the Bill is set up in this regard. Section 2 provides that the law shall apply to all "public bodies" as well as a range of non-State bodies (which later on the Bill refers to as "relevant private bodies"). However, in practice, the key access provisions – both in terms of proactive disclosure, as provided for

in section 7, and reactive disclosure, as provided for in section 11 – only apply to "public bodies", thereby effectively excluding "relevant private bodies". In effect, then, despite section 2, the law only applies to public bodies.

Less problematical but still not reflecting better practice is that the ATI Bill vacillates between referring to "public bodies" and "information holders". Technically these two terms are the same, since section 3 defines "information holders" as "public bodies" (i.e. the two terms are identical). At the same time, it can be confusing and is unnecessary.

The definition of public bodies includes constitutional and statutory bodies and so would presumably cover both the legislature and the judiciary. It would, however, be preferable to state this explicitly so as to avoid any possible confusion. Similarly, this definition covers bodies which are "owned, controlled or financed by the government", which would presumably cover State-owned enterprises, but again it would be preferable to make this explicit so as to avoid any confusion.

**Recommendations:**

- In due course, efforts should be made to add a guarantee of the right to information to the human rights protections in the Constitution.
- The part of section 12(1) which limits the scope of the law to cases where other laws do not provide for access to information should be removed.
- Consideration should be given to adding a reference to the wider benefits of the right to information law and to requiring the law to be interpreted in the manner which best gives effect to those benefits.
- The right to make requests should explicitly extend to both citizens and non-citizens, as well as to legal entities.
- The law should make it clear that requesters have a right to ask for both information and documents.
- Section 2 should be removed from the ATI Bill and, instead, the bodies it covers should all be incorporated into the definition of a "public body". In addition, the term "information holders" and all references to it should be removed, and relevant references should consistently be to "public bodies".
- The definition of "public bodies" should explicitly include legislative and judicial bodies, as well as State-owned enterprises.

## 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 | 1 | 11, 12(1) |
| 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 | 0 | |
| | **TOTAL** | **6** | **1** | |

## Scope

| Indicator | | Max | Points | Section |
|---|---|---|---|---|
| 4 | Everyone (including non-citizens and legal entities) has the right to file requests for information. | 2 | 1 | 11 |
| 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 | 3 |
| 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 | 3 |
| 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 | 8 | 3 |
| 8 | The right of access applies to the legislature, including both administrative and other information, with no bodies excluded. | 4 | 4 | 3 |
| 9 | The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded. | 4 | 4 | 3 |
| 10 | The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State). | 2 | 2 | 3 |
| 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 | 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 | 1 | 2, 3 |
| | **TOTAL** | **30** | **27** | |

## *Requesting Procedures*

The ATI Bill does relatively poorly in this category of the RTI Rating, earning just 63% of the available points, making it the second worst performing category after Right of Access. Part of the problem here is that the Bill simply omits to mention many details. In terms of making requests, section 12(5) sets out what must be provided. While this is all appropriate, the Bill fails to indicate explicitly that this is all of the information that may be asked from a requester, potentially leaving it open to public bodies to request additional information. The Bill also fails to indicate the ways in which requests may be lodged, in particular that they may be lodged electronically, by mail, in person and so on.

Section 13(2) requires assistance to be provided to those who are disabled, but fails to extend this obligation to those who are illiterate, which is far from a theoretical possibility in The Gambia.

Section 16 covers cases where the public body with which a request is lodged does not hold the information, and provides for transfers of the request in various cases. Section 16(1)(b) covers cases where the subject matter of the information is more closely connected with another public body. Technically, this applies only where the original body does not hold the information but there is risk that, in practice, bodies may apply this (i.e. by transferring requests) even where they do hold the information but it seems to be more closely related to the work of another body. This is not appropriate; in such cases the first body can consult with the other body but should process the request itself since this is easier for requesters.

Section 14(1) provides for responses to requests to be provided as soon as possible and in any case within 21 days. It is not clear whether this is working or calendar days. In any case, it is not unreasonable but better practice is to require public bodies to respond within ten working days. Furthermore, section 18(1)(b) allows for requests to be deferred for up to 35 days where the request relates to information which constitutes a report that has been prepared "for the purpose of reporting to an official body or a person acting in their capacity as an officer of the state". It is not clear why such a deferral should be necessary and, as worded, this would appear to cover a potentially very wide range of documents (i.e. any report prepared for an official).

The ATI Bill neither provides for a fee for lodging a request nor explicitly rules this out. Furthermore, section 12(2) provides that a request shall be accompanied by any applicable "reproduction fee". This is completely impractical since it is impossible to determine the reproduction fee at the time a request is made, in advance of processing the request, since the number of pages involved would not be known at that time. Section 22 addresses the question of fees. It rules out charging for the time spent searching for the information and examining it for purposes of exceptions. While this is useful, better practice is to limit fees to the costs of reproducing the information and sending it to the requester (with the possible exception of the fee provided for in section 22(3), relating to the cost of transcription). The ATI Bill also fails to provide for a certain number of pages,

for example 10 or 20, to be provided for free. Best practice is also to provide for fee waivers for poorer requesters.

The ATI Bill also fails to establish a right freely to reuse information disclosed in response to a request.

**Recommendations:**

- The law should limit the information that requesters are required to provide to a description of the information they are seeking and an address for delivery of that information.
- The law should also make it clear that requesters may lodge requests electronically, by mail and in various other ways.
- The law should place an obligation on public bodies to provide assistance not only to requesters who are disabled but also those who are illiterate.
- Section 16(1)(b) should be removed from the law.
- It should be clarified whether section 14(1) refers to calendar or working days and consideration should be given to reducing the time limit for responding to requests to ten working days.
- Section 18(1)(b) should be removed from the law.
- Section 12(2) should be amended to remove the reference to requests being accompanied by the reproduction fee and to make it clear that it is free to lodge requests.
- The law should make it clear that requesters may only be charged for the costs of reproducing and sending information.
- Consideration should be given to requiring public bodies to provide a certain number of pages of photocopies – for example 10 or 20 pages – for free and to waive fees for poorer requesters.
- Consideration should be given to providing for free reuse of information disclosed pursuant to a request.

| Indicator | | Max | Points | Section |
|---|---|---|---|---|
| 13 | Requesters are not required to provide reasons for their requests. | 2 | 2 | 12(4) |
| 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 | 1 | 12(1) |
| 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 | 0 | |

| | | | | |
|---|---|---|---|---|
| 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 | 13(1) |
| 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 | 1 | 13(2) |
| 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 | 2 | 12(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 | 2 | 16 |
| 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 | 2 | 3, 20 |
| 21 | Public authorities are required to respond to requests as soon as possible. | 2 | 2 | 14(1) |
| 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 | 14(1), 18(1) |
| 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 | 15 |
| 24 | It is free to file requests. | 2 | 1 | 12(2) |
| 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 | 22, 79(2) |
| 26 | There are fee waivers for impecunious requesters | 2 | 0 | |
| 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 | 0 | |
| | **TOTAL** | **30** | **19** | |

## *Exceptions*

The ATI Bill does averagely well in this category of the RTI Rating, scoring 77% which is exactly the same as its overall score. One of the key reasons for this relatively weaker score is section 38, which allows the Minister to extend the regime of exceptions. This is a truly remarkable provision which is, to the best of our knowledge, not found in any other right to information law. While some laws allow other laws to extend the regime of exceptions, which is in any case not better practice, placing this power in the hands of a minister essentially grants the government broad powers to totally undermine the law in practice, without any apparent protections.

Otherwise, in terms of relations with other laws, section 4(1) provides for this law to override the "Official Secret Act, General Orders of the government, regulations and bye-laws of any public body". This is positive but does not go far enough. Better practice in this regard is to override every inconsistent legal provision, including any other law they are found in or derived from.

The detailed regime of exceptions, set out in sections 24 to 37 of the ATI Bill, is very progressive. Only one exception – namely the one found at section 33(1) covering information submitted to Cabinet and the minutes and decisions of Cabinet – is not in line with international standards. While it is legitimate to protect the free and frank provision of advice, including within Cabinet, this blanket exclusion is not justifiable.

Section 24(1) provides for an exception for the "unreasonable disclosure of personal information about a natural third party". "Personal information" is defined in section 3 as any information from which a third party can be identified. This is problematical because much personal information is not private and hence should not be prevented from being released. Section 24(1) largely guards against this problem by being limited to the "unreasonable" disclosure of such information, but better practice here is to limit this exception to the unreasonable disclosure of private information about a natural third party.

Section 31(a) excludes confidential communications between medical practitioners and patients. Formally, this is unnecessary since these would already be covered by the exception in favour of privacy. Including it explicitly may unnecessary expand the scope of the exceptions, for example to include communications which are not actually covered by confidentiality.

Otherwise, all of the exceptions protect legitimate interests, are harm tested (i.e. apply only where the release of the information would harm the protected interest) and are subject to a public interest override (i.e. apply only where the harm to the protected interest is greater than the overall public benefit of releasing the information).

The ATI Bill fails to provide for an overall time limit – for example of 20 of 30 years – for exceptions or requirement that exceptions must be assessed a the time a request is

made (so as to avoid old classification stamps from preventing disclosure even though no harm was present).

Section 37 of the ATI Bill sets out a detailed regime for consultation with third parties either to obtain their consent for release of information they provided to a public body on a confidential basis or to allow them to object to the release of information. This is appropriate. However, there are two weaknesses with this regime. First of all, in addition to applying to private and commercially sensitive information provided by a third party, this regime also covers "confidential information of a third party". This is included in the definition of "third party information" in section 3 but is reflected at various points in the ATI Bill. This is not defined and in any case is not appropriate since the only third party interests that should be protected in this way are private and commercially sensitive information. Fortunately, this is not incorporated into the body of the regime of exceptions, but it is still not good practice.

Second, the ATI Bill allows a third party to delay disclosure, even after the information officer has decided that the information is not sensitive, until after all of the appeal options of the third party have been exhausted. This is not reasonable. In practice, as demonstrated in countries around the world, information officers almost never wrongly decide to release sensitive third party information. Rather, they almost always err on the side of caution in protecting third parties. Certainly they would be extremely unlikely to release very sensitive third party information. In contrast, it is very simple for third parties to keep lodging appeals, thereby denying the release of even entirely non-sensitive information for a very long time. The balance of interests lies in allowing for the release of this information, as decided by the information officer, while still allowing a third party to appeal against this decision; in that case the appeal would claim compensation rather than a denial of release of the information.

Finally, section 14(5) of the ATI Bill states that information provided to a requester shall be presumed to be "true and accurate in content and in form". It is not clear why this has been included. It would seem to set up the potential for liability on the part of public bodies, which may often hold or even produce information which is not in fact accurate. And it does nothing to actually enhance the accuracy of the information.

**Recommendations:**

- Section 38 should be removed from the law.
- Section 4(1) should be amended to provide for the right to information law to override inconsistent provisions in all other laws.
- Section 33(1) should be removed from the law and replaced by an exception protecting the free and frank provision of advice within government.
- The reference to "personal information" in section 24(1) should be replaced by a reference to a reference to "privacy".

- Consideration should be given to removing section 31(a) from the law.
- An overall time limit for exceptions should be added to the law and the question of whether information falls within the scope of the exceptions should be required to be assessed at the time of a request, rather than through relying on any classification mark a document may have.
- The reference to "confidential information of a third party" in the definitions in section 3 and elsewhere in the law should be removed and third parties should not be able to delay the release of information simply by lodging appeals.
- Consideration should be given to removing section 14(5) from the law.

| 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 | 0 | 4(1), 38 |
| 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 | 24-33 |
| 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 | 24-33 |
| 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 | 4 | 35 |
| 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 | 14(7), 37 |
| 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 | 34 |

| | | | | |
|---|---|---|---|---|
| 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 | 14(8) |
| | **TOTAL** | **30** | **23** | |

## *Appeals*

This is another RTI Rating category where the ATI Bill does well, obtaining a score of 87%, based on the fact that it establishes an independent oversight body, the Information Commission, with strong powers to review refusals to disclose information. A minor technical point is that while the ATI Bill normally refers to the oversight body by its formal name – i.e. the Information Commission – in some places, such as section 59(1), it is referred to as the "oversight mechanism". This could create some confusion.

The appointments process for the members of the Commission, as set out in section 42, is positive inasmuch as it involves the Minister, President and National Assembly, given that involving more actors helps avoid control by one player. However, there is no role for civil society, which is unfortunate. This could be addressed in various ways, such as by allowing civil society to nominate candidates or by requiring the Minister to publish a long-list of candidates and allowing members of the public to comment on their suitability for this position.

The Commission has extensive powers in different areas, including to require the production of information and to summon and administer oaths to witnesses. At the same time, it seems to lack the power to inspect the offices of public bodies. This is an important power to have, even if most Commissions rarely use it, to address cases where public bodies deny holding certain information which in fact they do have (which an inspection can reveal).

Requesters, and probably also public bodies, can presumably appeal from a decision of the Commission to the courts, based on general principles of law. At the same time, it is useful to mention this directly in the right to information law, among other things so that the public are aware of it.

The procedures by which the Commission addresses appeals could also be strengthened. Although we assume that such appeals are free and do not require a lawyer, this is not mentioned explicitly in the ATI Bill. Furthermore, although strong procedures are set out for such appeals, for example in sections 56 and 71, the Commission does not appear to be under an obligation to process such appeals within a set time limit. This is important to ensure that the processing of appeals does not get unduly delayed. Finally, section 39(2) provides for the internal review of "any decision of an Information Officer" and an appeal then lies to the Commission from this. While this would appear to be very broad in

scope, it might be clearer to indicate explicitly that appeals may relate to any claimed failure to apply the legal rules relating to requests.

**Recommendations:**

- The oversight body should consistently be referred to as the "Information Commission" or "Commission", rather than the "oversight mechanism".
- Consideration should be given to providing for a role for civil society and/or the general public in the appointments process for members of the Commission, so as to further bolster its independence.
- Consideration should also be given to adding the power to inspect public bodies to the list of powers of the Commission already set out in the ATI Bill.
- The law should state explicitly that requesters have a right to lodge appeals before the courts if they do not agree with the decisions of the Commission on appeal.
- More detailed procedures relating to appeals should be put in place, including by stating clearly the broad grounds for lodging appeals, by making it clear that requests are free and do not require legal assistance and by including time limits for the processing of appeals by the Commission.

| 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 | 39, 40 |
| 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 | 67 |
| 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 | 42, 44, 45 |
| 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 | 47, 48, 77, 79 |
| 40 | There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise. | 2 | 2 | 43 |
| 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 | 54(4) |
| 42 | The decisions of the independent oversight body are binding. | 2 | 2 | 73(1) |
| 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 | 73(1) |

| | | | | |
|---|---|---|---|---|
| 44 | Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body. | 2 | 1 | |
| 45 | Appeals (both internal and external) are free of charge and do not require legal assistance. | 2 | 1 | |
| 46 | The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.). | 4 | 4 | 39 |
| 47 | Clear procedures, including timelines, are in place for dealing with external appeals. | 2 | 1 | 56(1), 71 |
| 48 | In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules. | 2 | 2 | 36 |
| 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 | 73(1) |
| | **TOTAL** | **30** | **26** | |

## *Sanctions and Protections*

The ATI Bill again does well on this category of the RTI Rating, earning 88% of the points. This is particularly impressive as only eight of the 124 countries which have been assessed on the RTI Rating do as well in this category.[3]

The one area where the ATI Bill could be further improved in this category is in terms of protection for whistleblowers. Section 53 provides protection against employment related sanctions for staff members of the Commission for releasing information about wrongdoing within the Commission, while section 68 provides for officials to contact the Commission about wrongdoing without having exhausted any relevant internal procedures. Section 53, while welcome, is very limited in scope, to just staff of the Commission and wrongdoing within the Commission. For its part, the actual import of section 68 is not clear.

Ideally, The Gambia should adopt a fully developed and separate law on whistleblowing, given that this is a complex matter which warrants detailed legal treatment. But, in the interim, it would be useful to include more general rules on this issue in the right to information law. These could, for example, provide protection against any sort of retaliation – criminal, civil, administrative or employment related – for staff who expose a range of types of wrongdoing.

[3] See https://www.rti-rating.org/country-data/by-section/sanctions-protections/.

**Recommendations:**

- In due course, a fully developed law on whistleblowers should be adopted. In the meantime, the right to information law should set out at least a general framework of rules protecting whistleblowers.

| 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 | 54(2), 73(1), 76(1) |
| 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 | 2 | 63(2), 66(1), 73(1) |
| 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 | 2 | 4(3), 53(1) |
| 53 | There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers). | 2 | 1 | 53(2), 68(3) |
| | **TOTAL** | **8** | **7** | |

## *Promotional Measures*

The ATI Bill again does fairly well in terms of promotional measures, earning 13 points out of a possible 16 or 81%. While full points were awarded for the requirement to appoint information officers, pursuant to section 9, it is unfortunate that this must be done "in consultation with the Minister responsible for that public body". That would be likely to politicise the matter.

Section 6 places a general obligation on public bodies to maintain their records in good condition, including so as to facilitate access to information. This is useful but better practice is to give the power to a central body – which could be the Information Commission or another body – to set minimum records management standards, which might be enhanced over time, and to require public bodies to bring their practice into conformity with those standards within a set period of time, say six months. To help public bodies achieve this, it is also important for the central standard-setting body to provide training and assistance on records management to public bodies.

Both sections 7(2)(d) and 62(2) require public bodies to publish a list of the categories of information that they hold. This is good practice but best practice in this area is to require them to go beyond this and publish a list of the actual documents they hold.

Section 58(2) gives the Commission a role in terms of both monitoring the provision of training by and providing training to public bodies. Section 61(2)(e), for its part, requires public bodies to report annually on the training they have provided. While both of these are welcome, they fall short of actually requiring public bodies to provide appropriate training to their staff.

Section 57 provides that the Commission shall prepare and send to the National Assembly each year an annual report, including information about appeals, investigations and any audit it has undertaken. This is useful but more detail on what should be included in the report could be added into the law, along the lines of the extensive detail for the annual reports by public bodies, set out in section 63(1). It would also be useful for the law to require the Commission to make these reports public (i.e. in addition to sending them to the National Assembly).

**Recommendations:**

- Consideration should be given to removing the requirement for the head of public bodies to consult with the relevant minister when appointing information officers.
- The law should put in place a proper records management system, as described above.
- Consideration should be given to requiring public bodies to publish full lists of the documents they hold.
- Public bodies should be formally required to provide appropriate training to their staff and, in particular, their information officers.
- Consideration should be given to provided in more detail for what needs to be included in the annual reports to be prepared by the Commission and the Commission should be required to make these public.

| 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 | 9, 10 |
| 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 | 58 |
| 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 | 56(2), 58, 61 |

| | | | | |
|---|---|---|---|---|
| 57 | A system is in place whereby minimum standards regarding the management of records are set and applied. | 2 | 1 | 6 |
| 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 | 7(2), 62 |
| 59 | Training programmes for officials are required to be put in place. | 2 | 1 | 58, 61 |
| 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 | 7(2), 63 |
| 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 | 57 |
| | **TOTAL** | **16** | **13** | |