CENTRE FOR LAW AND DEMOCRACY

December 2023

Zambia

Analysis of the Access to Information Act, 2023

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Introduction[1]

The idea of drafting a law giving individuals a right to access information held by public authorities, or the right to information (RTI), has been under discussion in Zambia for a very long time. At this point, most of Zambia's neighbours have already adopted such laws. It is thus welcome to see that Zambia has finally adopted legislation in this area, in the form of the Access to Information Act (ATI Act),[2] which was signed into law on 15 December, bringing the total number of countries globally which have adopted RTI laws to 140.

The Centre for Law and Democracy (CLD) has done a detailed assessment of the ATI Act as against international standards and better national practices in this area, and the results are set out in this Analysis. As part of this, we conducted a separate RTI Rating (rti-rating.org) assessment. The RTI Rating, which is run by CLD, assesses the strength of legal frameworks for the right to information using sixty-one separate indicators derived from international standards and better national practices. The results of this assessment are provided in the table below.[3]

Section	Max Points	Score	Percentage
1. Right of Access	6	3	50%
2. Scope	30	21	70%
3. Requesting Procedures	30	13	43%
4. Exceptions and Refusals	30	15	50%
5. Appeals	30	17	57%
6. Sanctions and Protections	8	5	63%
7. Promotional Measures	16	11	69%
Total score	**150**	**85**	**57%**

[2] N.A.B. 24, 2023, 7 November 2023, https://www.parliament.gov.zm/sites/default/files/documents/related_documents/N.A.B%20%2024%20The%20Access%20to%20Information%20Act.pdf.

[3] We note that this is not yet a formal rating since that also involves a review by a national expert.

According to this RTI Rating, Zambia ranks in 70th position from among the 138 countries that are currently assessed on the RTI Rating, just in the bottom half of all countries. Clearly there is room for improvement. The strongest category for Zambia at the moment is Scope, at 70%, followed by Promotional Measures, at 69%, and Sanctions and Protections, at 63%, all of which are fairly strong. However, every other category is below 60% and nearly one-half are at or below 50%.

The ATI Act does have a number of very good features. For example, it covers the legislature and the judiciary, it has a very well-drafted rule on the public interest override for exceptions, it empowers the Human Rights Commission to impose administrative sanctions on officials for failing to comply with its rules and it imposes a joint mandate on the Commission and the ministry which is responsible for ATI to serve as central bodies for promoting this right. At the same time, as the RTI Rating scores show, there is, overall, a lot of room for improvement.

This Analysis describes the way the ATI Act addresses ATI features, compares this to international standards and better national practice, and then makes recommendations for reform. It is mostly organised around the categories in the RTI Rating, although it also includes a section on proactive publication.[4] We encourage the authorities in Zambia to review this analysis and to consider revising the Act based on our recommendations. This will not only ensure that Zambians enjoy this right in line with international standards but it will also help promote democracy and sustainable development in Zambia.[5]

1. Right of Access and Scope

Zambia only scores three out of the six points allocated under the category of Right of Access on the RTI Rating, which looks at whether the legal framework establishes strong guarantees for the right to information. This is largely due to the fact that the Constitution of Zambia does not include a guarantee of the right to information. The guarantee of freedom of expression in Article 20(1) of the Constitution only extends to the more traditional part of that right, i.e. expressing oneself. A couple of other provision do refer to the idea of the government having an obligation to disclose information, namely Article 173, setting out as one of the guiding values and principles of the public service as being to provide the public with timely, accessible and accurate information proactively, and Article 255, referring to access to environmental information as one of the principles governing the management and development of Zambia's environment and natural resources. Ultimately, however, neither

[4] Although this is an important feature of a modern ATI law, it was not included in the RTI Rating for various reasons.

[5] We note that Indicator 16.10.2 of the Sustainable Development Goals (SDGs) looks at whether countries have adopted and implemented ATI laws in line with international standards.

of these is sufficiently broad to warrant allocating a point to Zambia under Indicator 1. Obviously this goes beyond the scope of the ATI Act but it would be useful, in due course, to consider potentially amending the Constitution to guarantee this right.

Otherwise, the core right of access is well established in the ATI Act, in particular in section 6(1), which sets out clearly the right to access information which is held by a public authority (or "information holder", in the language of the Act). The Preamble to the Act sets out its immediate or internal purposes, but fails to refer to the wider benefits or goals of adopting this sort of legislation, such as fostering participation in governance, promoting official accountability and countering corruption, although it does refer to the fact that the UN Convention Against Corruption calls on States Parties to adopt ATI laws. Section 2(2) calls for the law to be "interpreted and applied on the basis that an information holder has a duty to disclose information and nondisclosure is only permitted in the circumstances set out in this Act". And section 3(c) calls for the law to be interpreted in accordance with the presumption of disclosure. These are useful provisions, but a better approach here would be to set out the wider benefits of the right to information and then to call for the law to be interpreted so as best to give effect to those benefits.

As noted above, Scope is where the ATI Act does best, earning 21 of the total of 30 points or 70%. One weak area here is that the operative provisions of the Act only apply to citizens and residence permit holders. Better practice here is to guarantee this right to everyone, in accordance with international standards. Ultimately, this will also benefit Zambians since a large majority of foreign requesters can be expected to be making requests so as to engage positively with Zambia, whether this is by conducting research on the country or by making business investments.

There is a bit of confusion in the ATI Act about its scope regarding legal entities. Section 2(1) refers to the Constitution for the definition of a "person", and Article 266 of the latter defines a "person" as an "individual, a company or an association of persons, whether corporate or unincorporate". Section 3(a) of the ATI Act then indicates that "persons" have a right to access information. However, other provisions, including the section 2(1) definition of a requester and the main operative provision on making requests, namely section 6(1), all limit the scope to citizens and resident permit holders. Better practice is also to include legal entities within the scope of this sort of legislation.

Another weakness is that the ATI Act simply fails to define "information", although this is clearly an important operative term for such a law. Better practice here is to define it as including all information which imparts meaning and which is held in any recorded format, regardless of what that may be. It is also useful to make it 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, the ATI Act is quite strong, although there is still room for improvement and some confusion when it comes to private bodies. It starts out by defining an "information holder" as a public or a private body. It then defers to the Public Finance Management Act, 2018,[6] to define a public body and defines a private body as one which "utilises public funds or is in possession of information that is of significant public interest". The main operative provision on requests, section 6(1), then creates a right to access information held by an "information holder" (or public authority, for purposes of this Analysis). It is useful to cover information of significant public interest which is held by private bodies but better practice here is to cover all information held by private bodies which undertake public functions, such as private schools or hospitals.

In addition, some confusion is created by section 3(b), setting out principles, which provides for a right of access to information held by a private body which "may assist in the exercise or protection of any right". This appears to contradict the section 6(1) provision, since that grants an unfettered right to access information held by a private body, as part of the definition of an information holder, albeit private body is defined narrowly for this purpose. The language of section 3(b) appears to be derived from the South African Promotion of Access to Information Act,[7] and it is possible that section 3(b) intends to refer to a wider notion of "private body" that is actually defined in section 2 of the ATI Act.

In terms of public bodies, section 2 of the Public Finance Management Act defines these quite broadly. However, it expressly excludes professional associations. This is not consistent with international standards relating to the right to information, which should cover all bodies which are created by law, including professional associations (of course subject to the regime of exceptions). In addition, although it covers bodies which are appointed by the government or created by law, it is not entirely clear that this would cover all bodies which are owned or controlled by government. The definition explicitly includes parastatals, but it is again not entirely clear that this would cover all State-owned enterprises.

Recommendations

- In due course, consideration should be given to amending the Constitution so that it includes a guarantee of the right to information.

[6] No. 1 of 2018, https://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Public%20Finance%20Management%20ACT%202018.pdf.

[7] No. 2 of 2000.

- The Preamble should be amended to refer to the wider external benefits of the right to information and then section 2(2) should be revised so that it calls for interpretation so as best to give effect to those benefits.
- Everyone, including foreigners and legal entities, should have the right to make requests for information.
- A broad and functional definition of information should be added to the law, which should also make it clear that requesters have a right to ask for both information and specific documents.
- The law should apply to all information held by private bodies which undertake public functions.
- Professional associations which are established by law should not be excluded from the scope of the law, which should also cover all bodies which are owned or controlled by government, including 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	20, 173(1), 255 (of the Constitution)
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	3(a), 6(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	1	Preamble, 2(2), 3(c)
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	0	2(1), 3(a), 6(1)
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	2	
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	6(1)
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	8	6	Public Finance Management Act, s. 2

	care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.			
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	Public Finance Management Act, s. 2
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	Public Finance Management Act, s. 2
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	1	Public Finance Management Act, s. 2
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	Public Finance Management Act, s. 2
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(1)
	TOTAL	**30**	**21**	

2. Proactive Disclosure

Section 3(d) of the ATI Act, setting out its principles, provides very generally that public authorities must proactively disclose information. The main operative proactive disclosure provisions are found in section 8, which sets out ten main categories of information which is subject to proactive disclosure and then goes on to add any other information which the Commission may determine. Section 8 also includes provisions on ensuring that information reaches those who need it because they are likely to be affected by a decision or action of a public authority. It also calls for dissemination of information to the "widest extent possible", taking into account features such as local coverage area and the most effective means of communication there.

This is all positive. However, one category of information which is distinctly missing from the list in section 8(1) is budgetary and financial information about the public authority, something which is found in most modern right to information laws. In addition, while it is useful to provide for the Commission to extend the section 8 list, this is not reflected in the list of functions of the Commission in section 5. It is reflected in section 38(2)(c), referring to the power of the Commission to adopt guidelines, although it is not entirely clear from the wording whether or not these guidelines are intended to be binding on public authorities.

Recommendations

- The list of categories of information which are subject to proactive publication, set out in section 8(1), should be expanded to cover more budgetary and financial information about public authorities.
- The power of the Commission to expand the list of categories of information which are subject to proactive disclosure should be integrated more clearly into the functions of the Commission and it should be made clear that decisions by the Commission in this regard are binding.

* No excerpt is provided from the RTI Rating here since it does not address proactive publication.

3. Requesting Procedures

Zambia does rather poorly in the category of Requesting Procedures in the RTI Rating, earning just 13 out of a possible 30 points or 43%. This is unfortunate since it is relatively easy and normally not too controversial to do well here. One of the problems here is that the ATI Act fails to go into detail on a number of better practice procedures. For example, while it is quite explicit about not having to provide reasons for a request, which is positive, in relation to making requests it provides simply that these must be made "in the prescribed manner and form". Better practice would be to set out clearly in the law the details that are required to be provided when making a request – which should include only a description of the information sought and an address for delivery of it – as well as the modalities for lodging such a request – for example by email, fax or post.

The ATI Act is also very sparse when it comes to the issue of assisting requesters. It does provide, in section 9(2), that information officers shall offer assistance to requesters and also, in sections 10(2) and (3), for making requests orally, where the requester cannot do this in writing, and then for the information officer to reduce oral requests to writing and to provide a copy to the requester. This is positive but it would be preferable to place a more general obligation on public authorities to provide assistance to requesters who need it, including because they are having difficulty framing their requests for information clearly. Special provision for assistance to be provided to persons with disabilities and those who are illiterate would also be useful.

The ATI Act fails to place an obligation on public authorities to provide requesters with a receipt or acknowledgement of their request promptly and in any case within a set period of time, ideally of three to five days. This is important since, if a public authority otherwise fails

to respond to a request (called a "mute refusal"), this is the only document the requester has which proves that he or she made a request in the first place.

Section 11 of the ATI Act provides for transfers of requests to other public authorities. Section 11(1) provides for such transfers where another public authority holds or even could hold the information, even if the original authority also holds it. This is very problematical. Under this regime, it would be fairly simple for public authorities to keep handing around a request, claiming merely that they thought another public authority might hold it. The mere fact that another public authority might hold the information is clearly not a sufficient basis to transfer it. Better practice here is to allow for transfers only where the original public authority does not hold the information. Where it does, it may wish to consult with other authorities which have an interest in that information, but it should not transfer the request to them. At the very minimum, transfers should be allowed only for good reason, i.e. where another public authority not only holds the information but also has a closer connection to it, such that it would be better placed to process the request. Then, under the ATI Act, the public authority which receives the transfer is only required to inform the requester about this within seven days. This does not make any sense since this can easily be done immediately and, in any case, seven days is the normal time for the entire processing of a request.

Section 6(3) refers in a very general sense to the idea of providing information expeditiously, but this idea is not reflected in the provisions on time limits for responding to requests in sections 12 and 13. Better practice would be for the latter to require requests to be responded to "as soon as possible", with the time limits set out there being understood as maximums. Section 12(1) provides for requests to be responded to within seven days, which is excellent, and even the rules on delays for information which is about to be published are capped at 30 days (see sections 15(1)(a) and 15(2)). However, section 15(1)(b) provides very broadly for delays for information which is "in respect of judicial proceedings pending before a court or tribunal". This ground for delays is not justifiable, as reflected in the fact that it is not found in other right to information laws, and it is especially problematical given its potentially extremely broad scope. Furthermore, there is no time cap on this delay.

The rules on fees in the ATI Act are extremely sparse. It is clear that fees are envisaged, as there are references to them in a couple of places in the Act, but then, pursuant to section 40(2)(b), this matter is left to the minister, including as to any exemptions from paying fees. It is useful to require fees to be set centrally, including so as to avoid a patchwork of different fees among different public authorities, but the main framework of rules governing fees should be set out in the primary legislation.

Better practice here is to provide explicitly that no fee may be charged simply for lodging a request for information and that fees may only be charged for the reasonable costs of reproducing and sending the information to the requester (and not for time spent by staff at a public authority for working on a request). Better practice is also to provide for a set number of pages, say 15 or 20, to be provided for free. Finally, those who cannot afford to pay even

the fees which are allowed should be granted fee waivers (again, this should be set out clearly in the law rather than just allowing the minister to adopt regulations on this).

It is now very clear that society benefits enormously from open reuse of information which has been made public by public authorities, whether proactively or pursuant to a request. Rules on reuse should grant information recipients broad rights to reuse information, potentially with some conditions (such as acknowledging the source of the information), and require information to be provided in open, machine-readable formats. In many cases, laws covering this provide for the adoption of more detailed reuse licences setting out in more detail reuse conditions for different categories of public information (for example, adaptation of the information might be denied for certain categories of information, such as judicial decisions or official policies, as adaptation of these might distort their meaning). The ATI Act is silent as to the right to reuse public information.

Recommendations

- The law should set out clearly what information is required to be provided when making a request – which should only include a clear description of the information sought and an address for delivery of that information – as well as the modalities for making a request – which should be able to be done by email, post, fax or in person.
- The law should set out more clearly the obligations of public authorities to assist requesters, including where they are having difficulty framing their requests clearly, along with specific obligations to assist persons with disabilities or who are illiterate.
- Public authorities should be required to provide requesters with a receipt or acknowledgement of their request promptly and within a set maximum time limit of three to five days.
- Public authorities should be allowed to transfer requests to other authorities only where they do not hold the information which is being requested or, at a minimum, only where the other authority has a closer connection to the information, such that it would be better placed to process the request.
- The provisions on time limits for responding to requests should require this to be done "as soon as possible", with the time limits being understood as maximums. Section 15(1)(b), on delays for information regarding judicial proceedings, should be removed.
- The law should incorporate a clear regime for fees which, in addition to providing for fee rates to be set by the minister, should provide that it is free to lodge a request for information, that only the reasonable costs of reproducing and sending the information may be charged, for a set number of pages of photocopies to be provided for free and for fee waivers for those who cannot afford the fee.
- The law should incorporate a regime for the open reuse of public information.

Indicator		Max	Points	Section
13	Requesters are not required to provide reasons for their requests.	2	2	6(2)
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	10(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	1	10(1)
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	1	9(2)
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	10(2), (3)
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	0	
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	11
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	18
21	Public authorities are required to respond to requests as soon as possible.	2	1	6(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	12(1), 15(1)(b)
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	13
24	It is free to file requests.	2	1	
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	2	0	40(2)(b)

	inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.			
26	There are fee waivers for impecunious requesters	2	0	40(2)(a)
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**	**13**	

4. Exceptions and Refusals

The regime of exceptions is a key part of any RTI law as it establishes the dividing line between what information is open and what is closed. A proper regime of exceptions should have several key elements, including the following core three-part test for determining whether information may be withheld: a list of which precise interests may justify non-disclosure which aligns with international standards; a "harm test" which allows information to be withheld only where releasing it would pose a real risk of harm to one of the protected interests; 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.

Most of the specific exceptions are set out in Part IV of the ATI Act, although a few relevant rules are found in other provisions. Zambia earns only 15 out of a possible 30 points on this category of the RTI Rating, or 50%.

A first concern is that the ATI Act is not clear on how it relates to other laws. Section 2(2) provides that non-disclosure is permitted only in accordance with its provisions. However, section 6(1), a key operative provision for requests, conditions the right of access on "this Act and any other written law". The exceptions themselves do not refer generally to secrecy provisions in other laws, which would essentially provide for a run-around of section 2(2). However, section 27 exempts information which is "privileged under any written law" and the exact scope of this is not clear.

If other laws are preserved, this essentially means that secrecy provisions in other laws may extend the exceptions in the ATI law, regardless of whether or not they protect legitimate interests, or include a harm test or public interest override. Better practice in this regard is for the right to information law to set overriding rules for secrecy provisions, including the three-part test, and then to preserve any particular secrecy rule in another law only to the extent that it conforms to those standards.

It may be noted that section 21 of the ATI Act, which sets up the regime of exceptions, indicates that public authorities shall not publish the information in that part, notwithstanding section 8, on proactive disclosure. This is a rather technical point but the

regime of exceptions should apply to both proactive and reactive (responding to requests) information obligations.

Looking at the specific exceptions in the ATI Act, a number fail to conform to international standards, as follows:

- Pursuant to section 20(3), third parties are given a veto over a request for information which "relates" to them, however this might be interpreted. Indeed, the veto extends to cases where they simply fail to respond to a notification informing them about such a request. This fails to conform to international standards in a few respects. First, third parties should be notified only where a request relates to information which was either provided in confidence by them or appears to refer to their privacy. Second, while a serious effort should be made to contact such third parties, no consequences should flow from cases where they fail to respond to a notification. Third, where a third party objects to the disclosure of the information, that should be taken into account by the public authority, but it should not be a veto. Rather it should simply be one factor and the decision as to whether or not to disclose the information should be made by the public authority.
- Section 21(b) provides for non-disclosure of information where the public authority determines that disclosure is not in the public interest. This essentially grants an open, highly discretionary power to public authorities to deny access to information. This simply cannot be justified. The first part of the three-part test runs directly counter to this idea (i.e. it allows for non-disclosure of information only to protect one of a list of clear, pre-defined legitimate interests). Furthermore, other right to information laws do not provide for such a discretionary exception, demonstrating that it is not necessary.
- Section 23 is based on the idea of not disclosing "confidential personal data" about third parties. Better practice here is to focus on the unreasonable disclosure of private information. This is because personal data is normally defined very broadly such that it includes information that is not private in nature. This section does include exceptions to this exception which help to mitigate the problem but it would be preferable to focus in the first place on privacy rather than personal data.
- Section 28(2)(g) exempts, under the general category of national security, information "relating to proceedings of the Cabinet". We note, as a drafting consideration, that this is quite a different issue than national security. More importantly, this fails to identify any interest at all, let alone a legitimate interest which needs to be protected by secrecy. As such, it also inevitably fails to incorporate a harm test since these can only apply to interets.
- Section 29 refers to information the disclosure of which would be likely to jeopardise national economic interests. This is not legitimate. For example, information about high crime rates might discourage tourism, but this fact could never justify the non-

disclosure of such information. In other countries, this exception is limited to the ability of the government to manage the economy.

- Section 30(1)(a) exempts all information containing an opinion, advice, report or recommendation that is prepared for the purpose of formulating a policy or taking a decision. There is no justification for exempting this information. Indeed, a key purpose of a right to information law is precisely to show citizens how decisions and policies are arrived at. As stated, the exception fails to identify any interest that needs protection and, once again inevitably, then fails to incorporate a harm test. In contrast, sections 31(1)(b) and (c) refer to legitimate interests in this general area and protect them against harm.

A number of exceptions also fail to incorporate harm tests, even though they do refer to a legitimate interest, including the following:

- Most of the list of types of information found in section 28(2) do refer to national security-type interests, but none of them incorporate a harm test. As such, the information covered may or may not be sensitive on national security grounds. For example, section 28(2)(b) refers to weapons capabilities, but these are for the most part well-known such that it is not legitimate to deny requests for information about them.
- In contrast to the above, section 28(2)(h) and (i) refer to international relations, only a small part of which falls under the heading of national security. These provisions fail to incorporate a harm test, instead defining a class of information (such as diplomatic correspondence), only part of which will be sensitive.
- Section 30(2)(c) covers draft documents. This fails to refer to a legitimate interest, although this might be the free and frank exchange of views within government, and, as such, also fails to incorporate a harm test.

We note that, positively, the ATI Act provides for a strong public interest override, in section 22.

Another 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, these exceptions should be subject to sunset clauses so that they cease to apply after a set period of time, for example of 15 or 20 years. A special procedure could be put in place to extend this where, exceptionally, the information was still sensitive

Section 20, providing for consultation with third parties, in addition to giving them a veto over the disclosure of information, also provides for excessively long time limits. Public authorities are given seven days merely to notify third parties about a request for information relating to them, whereas normally they must complete the processing of a request within this time. Then, third parties are given fully 21 days to respond. This is unnecessarily long and would take the processing of these requests well beyond not only the initial 7-day period for responding to requests but also beyond the 14 additional day extended period.

Recommendations

- The right to information law should set the overriding standards for secrecy rules, including the three-part test, and then only allow provisions in other laws to extend this insofar as they conform to that test (i.e. the right to information law should override inconsistent provisions in other laws).
- The regime of exceptions should apply to both the proactive and reactive disclosure obligations in the law.
- The exceptions noted above which are cast too broadly, do not refer to a legitimate interest or fail to incorporate a harm test should be amended to remedy these defects.
- A sunset clause 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 (exceptions based on private interests, such as privacy or commercial interests, should not be subject to this limit).
- The time limits in section 20 for consulting with third parties should be substantially reduced, including so that this process can be completed at least within the extended time limit for processing requests.

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	2(2), 6(1), 27
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	4	Part IV and other provisions
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	1	Part IV
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	22

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	1	20
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	32
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	12(2)(b)
	TOTAL	**30**	**15**	

5. Appeals

The rules on appeals in the ATI Act earn 17 out of a possible 30 points or 57%. Many of the scores here are based on the Human Rights Commission Act, 2023,[8] which, along with rules in the Constitution, establishes the Human Rights Commission which serves as the complaints body for the right to information under the Act.

A first issue here is that the ATI Act fails to provide for an internal appeal to a higher authority within the public authority which first processed the request. While this can be a helpful way to give the public authority a chance to reconsider its initial response to a request, it can also simply provide for further delays in the processing of requests, if the chance of a proper reconsideration of the matter is remote.

As noted above, oversight functions for the ATI Act, including appeals, are allocated to the Human Rights Commission. It is very important to have an independent administrative body such as this perform an appellate function. Indeed, it is one of the key features which distinguishes successful from less successful right to information systems. At the same time, extensive experience around the world has demonstrated that it is far more effective to allocate this function to a dedicated body, such as an information commission, which may also deal with personal data protection issues. In recognition of the fact that it is expensive to

[8] Available at https://www.parliament.gov.zm/sites/default/files/documents/related_documents/N.A.B%208%20The%20Human%20Rights%20Commission%20Bill%202023-1.pdf.

create these bodies, some countries, such as Kenya, have allocated this function to an existing body. However, in Kenya, one of the members of the Commission on Administrative Justice, which is the relevant body there, is given special responsibility for oversight of right to information issues, so that there is a clear locus of responsibility for this function.

It is of the greatest importance that the oversight body be robustly independent of government, given that its main role is to assess whether or not government refusals to disclose information were legitimate. There are a number of ways in which the independence of the Human Rights Commission could be enhanced, as follows:

- Pursuant to section 7(5)(g) of the Human Rights Commission Act, the President can remove a Commissioner, with apparently no conditions being imposed on the exercise of this power. This seriously undermines the independence of the Human Rights Commission.
- The rules on how the Commission is funded are not very clear. According to Articles 238 and 239 of the Constitution, the budget for all commissions in Zambia is provided by the Minister of Finance from the Consolidated fund. However, pursuant to section 23(1) of the Human Rights Commission Act, funds for the Commission should be appropriated by Parliament. Another weakness in terms of the financial arrangements is that according to section 10 of the Human Rights Commission Act, the level of remuneration of Commissioners is set based on a recommendation of the President. It is also not clear which body the Commission reports to, Parliament or the government.
- Pursuant to section 7(3) of the Human Rights Commission Act, there are requirements of expertise and related matters for individuals to be appointed as commissioners, but no prohibitions on individuals with strong political connections from being appointed.

Like most national human rights institutions, the Human Rights Commission can only make recommendations and not order public authorities to take action. This is a particular problem in the context of information appeals, since experience in different countries shows that where this is the case, many of the recommendations simply get ignored by public authorities.

Sections 21(1)(b) and 21(2)(d) of the Human Rights Commission Act give the Commission broad powers to make recommendations as they see fit and as needed to remedy any violation that they find. This is positive. But it would be helpful for the ATI Act also to spell out specific remedies in the context of information appeals, most obviously to provide the requester with the information he or she is seeking but also compensation where a failure to provide the information has incurred costs for the requester. It is also good practice for the oversight body to be able to order public authorities to make structural changes to the way they process requests for information where they are systematically failing to meet their obligations under the right to information law. This would appear to be included within the scope of recommendations that the Commission can made but, here again, it would be useful

to make this explicit in the context of information appeals, including by indicating what some of those structural measures might be (such as training an information officer or managing its records better).

The Human Rights Commission Act does not appear to stipulate that appeals to the Commission are free, although we assume that this is in fact the case. It is also useful to stipulate in the law that appeals do not require a lawyer although, again, we assume that this is the case in practice.

Pursuant to section 33(1) of the ATI Act, individuals who are not satisfied with a decision of a public authority can lodge an appeal with the Commission. This is broad but it does not formally cover cases where a public authority has failed to come to a decision. Thus, better practice is to provide for appeals whenever a requester believes that his or her request has not been dealt with in accordance with the law.

The ATI Act is largely silent as to procedures for matters before the Commission but section 39 grants the Chief Justice the power to make rules covering a wide range of procedural matters, such as the manner and form for lodging appeals and the "mode of summoning" before the Commission. It seems odd, and is certainly not common, to allocate this sort of power to a judge, rather than just letting the Commission adopt its own procedural rules, which is far more common. It is also better practice to include at least a framework of procedural rules in the primary legislation.

Better practice is to place the onus on the government (the public authority) to bear the burden of proving its case in information appeals. The reasons for this are, firstly, that the government should have to do this in human rights cases and, secondly, that it is unfair to ask the requester to prove that information which he or she has never seen is not exempt.

Recommendations

- Consideration should be given to the idea of providing for an internal appeal to the public authority which initially processed the request, if this would be a useful way to expedite reconsideration of the initial processing.
- If Zambia does not establish a dedicated information oversight body, it should at least ensure that one of the members of the Commission has dedicated responsibility for oversight of information matters.
- The rules on the appointments and funding of the Commission should be strengthened so as to improve the independence of this body, in line with the comments above.
- At least for purposes of access to information appeals, the Commission should have the power to issue binding orders to public authorities.

- Consideration should be given to adding provisions to the right to information law setting out the specific remedies that the Commission can impose in information appeals, which should cover both remedies for individual requesters and structural measures for public authorities.
- The law should state explicitly that appeals to the Commission are free of charge and do not require a lawyer.
- Appeals to the Commission should be allowed whenever a requester feels that his or her request has not been dealt with in accordance with the rules.
- The approach of allocating the power to the Chief Justice to adopt procedural rules for the Commission should be reconsidered in favour of letting the Commission adopt its own rules, and a basic framework of procedures should be included in the primary legislation.
- The government should bear the burden of proof in information appeals.

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	0	
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	33(1)
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	1	Const. 240, HRC Act, 7(1), (4), (5)
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	1	Const. 238-9, HRC Act, 10, 23(1)
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	1	HRC Act 7(3)
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	2	HRC Act 17, 18(2)
42	The decisions of the independent oversight body are binding.	2	0	HRC Act 21(1)(b)
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	HRC Act 21(1)(b), 21(2)(d)
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	33(2)
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	4	3	

	provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).			33(1)
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	1	HRC Act, various, ATI Act 39
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
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	1	HRC Act 21(1)(b), 21(2)(d)
	TOTAL	**30**	**17**	

6. Sanctions and Promotions

The ATI Act contains a fairly robust system of sanctions for obstructing the right to information. This includes granting the Human Rights Commission the power to impose administrative fines on officials for failures to respect the Act, pursuant to section 35, as well as criminal sanctions for more serious breaches of the Act, pursuant to section 36. However, it fails to provide for sanctions for public authorities which systematically fail to respect their obligations under the Act.

It is important for a right to information law to provide protection for public officials who act in good faith to release information pursuant to its provisions, to ensure they do not refrain from disclosing information out of fear of facing sanctions. Section 37 provides such protection but only for information officers and public authorities and not for other officials. Zambia does have a whistleblower protection law in the form of the Public Interest Disclosure (Protection of Whistleblowers) Act, 2010.[9]

Recommendations

- The law should provide for sanctions for public authorities which are systematically failing to respect their legal right to information obligations.
- The protections in section 37 should be extended to all officials.

[9] No. 4 of 2010, https://www.parliament.gov.zm/sites/default/files/documents/acts/Public%20Interest%20Disclosure%20%28Protection%20of%20Whistleblowers%29%20Act%202010.PDF.

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	35, 36
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	37
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2		
	TOTAL	**8**	**3**	

7. Promotional Measures

Zambia does comparatively well on this category of the RTI Rating, earning 11 out of the 16 available points or 69%. Section 7 places a very general obligation on public authorities to "organise and maintain information in a manner which facilitates the right to access information". This is helpful but it falls far short of a fully developed records management system. That would involve having a central authority develop records management standards which are binding on public authorities, provide training to public authorities so that they are able to respect those standards and then monitor performance in this area and impose sanctions on poor performers.

Section 8 requires public authorities to publish quite a wide range of categories of information proactively, but it fails to require them to publish lists of the records they hold or even of the categories of records they hold.

Section 34 requires public authorities to submit annual reports on what they have done to implement the law to the Commission. This is helpful but it should also require them to publish these reports. Pursuant to section 26 of the Human Rights Commission Act, the Commission is required to produce a general report on its activities. There is no mention in the ATI Act, however, of specific reporting requirements in relation to the right to information. This should cover both what the Commission has done to support the right and also a central overview of all of the activity under the law, drawn from the reports provided on this by each public authority.

Recommendations

- The law should put in place a proper records management system, as described above.
- Public authorities should be required to publish a list of the records they hold.
- Public authorities should be required to publish their annual reports on right to information performance, in addition to providing them to the Commission.
- The Commission should be under a specific obligation to report annually on what it has done to support the right to information, as well as to provide an overview of wider efforts to implement the right to information law.

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
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	4, 5, 38
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	5(c)
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	1	7
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	0	8
59	Training programmes for officials are required to be put in place.	2	2	5(d), Sched. 2
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	1	34
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	1	HRC Act, 26
	TOTAL	**16**	**11**	