Panama: Note on the Transparency and Access to Public Information Bill

January 2024

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A new Transparency and Access to Public Information Bill[1] (RTI Bill) has been presented to Panama's National Assembly. This would replace Panama's current right to information (RTI) law, which was first adopted in 2002.[2] This Note[3] contains an analysis of the proposed legislation based primarily on the RTI Rating methodology, which is overseen by CLD.[4]

An informal RTI Rating assessment was done of the RTI Bill and the results, as compared to the current legal framework, are shown in the table below.

Section	Max Points	Score - current	Score - Bill
1. Right of Access	6	6	5
2. Scope	30	29	28
3. Requesting Procedures	30	15	19
4. Exceptions and Refusals	30	16	21
5. Appeals	30	16	17
6. Sanctions and Protections	8	2	2
7. Promotional Measures	16	10	10
Total score	**150**	**93**	**102**

[1] Proyecto de Ley 1031 de 2023, De Transparencia Y Acceso A La Información Publica, https://www.antai.gob.pa/wp-content/uploads/2023/08/2023_P_1031.pdf.

[2] Ley N°6 de 22 de enero de 2002: Que dicta normas para la Transparencia en la Gestión Pública, establece la acción de Hábeas Data y dicta otras disposiciones, https://utp.ac.pa/sites/default/files/ley-6-22enero2002.pdf.

[4] See https://www.rti-rating.org/.

This shows that while the RTI Bill does introduce some improvements over the current situation, these are rather limited in nature and that far more is needed to really strengthen guarantees for this right in Panama. If the RTI Bill were adopted, Panama would rank in 37th position globally from among the 138 countries currently on the RTI Rating.[5]

Right of Access and Scope

Article 43 of Panama's Constitution provides:

> Every person has a right to ask for accessible information or information of general interest stored in data banks or registries administered by public servants or by private persons providing public services, unless access has been limited by written regulation or by legal mandate, and to request their lawful processing and correction.[6]

Although it is good that the right to information is enshrined in the Constitution, the guarantee is not very effective due to the broad clawback from the guarantee, namely that access can be limited by "written regulation or by legal mandate". This effectively greenlights any law or regulation providing for secrecy, instead of placing conditions on such laws (such as that they must be necessary to protect certain interests such as national security or privacy).

Article 3(9) of the RTI Bill provides a broader, unqualified statement of the right to information, albeit only as a definition, while Article 4(1) provides for a more operative "presumption of publicity".

Positively, the preamble to the RTI Bill refers to a number of external benefits of this right, while Article 4(10) provides for the law to be interpreted so as to favour the greatest scope of the right to information. The preamble could, however, refer to more external benefits, such as participation and accountability, while Article 4(10) could be made more specific by referring back to these benefits in the preamble.

In terms of scope, the RTI Bill is fairly comprehensive and receives 27 out of a possible 30 points in this category of the RTI Rating. It loses one point because the definition of information excludes, *prima facie*, exempt information. Better practice is to define information broadly and then provide that exempt information does not need to be made public. Otherwise, "exempt" information is excluded from the scope of the right of access from the beginning before, for example, the public interest override can be applied.

[5] See https://www.rti-rating.org/country-data/.

[6] Panama 1972 Constitution (Revised 2004), https://www.constituteproject.org/constitution/Panama_2004

A second weakness in terms of scope is that the RTI Bill, like the current RTI law, refers to the right to information but does not explicitly extend this to the right to obtain documents, as well, which is again better practice. Article 11 implies that documents may also be requested, by referring to requested documents, but this could be made more explicit. Finally, the coverage of private entities which perform public services is too limited. Under international standards, all such entities should be covered by RTI obligations. However, Article 5 of the RTI Bill only covers entities which provide such services on an exclusive basis ("con carácter de exclusividad").

Recommendations

- In due course, the Constitution of Panama should be amended to guarantee the right to information properly, only permitting exceptions which are necessary to protect legitimate interests.
- The definition of information should be amended to cover all recorded information, leaving the issue of exceptions to be dealt with exclusive via the regime of exceptions.
- The right of access should apply explicitly to both information and documents.
- The law should cover all entities which providing public services, rather than only those which provide them on an exclusive basis.

Requesting Procedures

The procedures for making and processing RTI requests are set out fairly clearly in the RTI Bill but they could be improved in several ways so as to bring them more fully into line with international standards.

Best practice is for individuals not to have to provide any identifying information when making RTI requests. Ideally, the only information they should be required to provide is a description of the information sought and an address for delivery of that information (which could be an email or mailing address). In contrast to this, Article 10 of the RTI Bill requires excessive information to be provided, including the name and ID card number of the requester, the personal information of representatives of legal persons making requests, and a telephone number or email address to locate the person. While the latter could potentially help where there is a need to contact a requester, the other two requirements are clearly unnecessary.

A positive aspect of the RTI Bill is its allowance for individuals to make oral requests in addition to written requests. In addition, Article 8(2) of the Law No. 33 of 25 April 2013

(the 2013 Law), which establishes the oversight body, the National Authority of Transparency and Access to Information (Authority), imposes a general duty on information officers to assist requesters. However, it is useful to explicitly require public authorities to offer assistance to requesters who need it to clarify RTI requests which are unclear.

Articles 9(2) and 9(3) of the RTI Bill require receipts to be provided for written and oral requests, but this could be strengthened by setting out a timeframe for this, for example specifying that receipts must be issued as soon as possible and in any case within a set number of days.

The time limit for responding to requests is expeditious under Article 11 of the RTI Bill – namely 15 days, absent an extension – but it does not also indicate that information must be provided within this timeframe. In addition, best practice is to require public authorities to respond to requests as soon as possible to avoid situations where authorities wait until the deadline for simple requests which could be processed more quickly.

Article 8(1) of the RTI Bill provides that requesters are responsible for paying reproduction costs, stipulating that these should never impose a limit on access to information. The latter qualification is helpful but the RTI Bill fails to establish a concrete mechanism for putting this principle into effect. Better practice is to provide explicitly for fee waivers for impecunious requesters, defined in a concrete way (for example based on income levels or eligibility for State-administered income supports). In addition, while the RTI Bill notes that access to information, except for reproduction costs, is free (Articles 4(8) and 8), it would be helpful to make it explicit that no fee may be charged simply for lodging a request. Better practice is also to provide for a central body, such as the oversight body, to adopt a binding, central fee schedule and to provide for a certain number of pages of photocopies, such as 15 or 20, to be provided for free.

The RTI Act fails to set out any rules on the free reuse of information which has been obtained pursuant to its provisions (or otherwise). Better practice is to set out at least a general framework for the free reuse of information in the RTI law, or potentially in another law, and then to require the government to develop a set of reuse licences for different categories of documents. A licence should be attached to a document whenever it is disclosed publicly, including pursuant to the RTI Act.

Recommendations

- Article 10 should be amended to require only a description of the information requested and an address for delivery of the information (such as an email or mailing address).

- Information officers should be required to provide assistances to requesters where they need it to help them clarify requests which are unclear.
- Articles 9(2) and 9(3) should be amended to specify that receipts should be issued as soon as possible and in any case within a set number of days.
- The RTI law should clarify that the deadline it sets for responding to requests also encompasses the provision of the information, and a requirement to respond to requests as soon as possible should be added.
- Consideration should be given to adding an explicit provision to the RTI law stating that it is free to lodge a request for information.
- A central body, such as the Authority, should be tasked with adopting a central schedule of fees for reproducing information and a set number of pages should be required to be provided for free.
- Consideration should be given to adding into the law a specific system of fee waivers for people who are below the poverty line.
- The RTI Act should provide for a basic framework for the free reuse of information which has been made public pursuant it or otherwise.

Exceptions

The regime of exceptions is a key part of any RTI law as it governs when public authorities can refuse to disclose information. A proper regime of exceptions should have several elements. Key to this is the following core three-part test for refusing to provide information: 1) a list of which precise interests may justify non-disclosure – such as national security, privacy, public order and so on – which aligns with international standards; 2) a "harm test" which allows information to be withheld only where disclosing it would pose a real risk of harm to one of those interests; and 3) 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.

There are some positive features regarding exceptions in the RTI Law, such as a strong public interest override. However, several aspects of the regime of exceptions fall short of international standards.

It is important for RTI laws to supersede rules in other laws which do not conform to its standards, to the extent of the conflict, because otherwise the effectiveness of their regimes of exceptions will be compromised. Article 18 provides that access to information can only be denied pursuant to provisions in Chapter V. However, this could be strengthened by providing explicitly that the RTI law takes precedence over contrary secrecy rules in other

laws, so as to remove any ambiguity. Such a provision is found in Article 28 of the 2002 RTI Law, which is currently in force, but is absent from the RTI Bill.

The main substantive exceptions to the right of access are set out in Article 19 of the RTI Bill. While most of these refer to interests which are recognised under international law as potentially overriding the right of access, at least three are cast so broadly that they cannot be considered to be legitimate. Article 19(3) refers to information relating to pending legal processes which is only accessible to the parties to that process. This is unduly vague and broad, and ultimately fails to refer to a specific interest which should be protected against harm. Article 19(4) refers to information relating to arbitration, or judicial, administrative or investigative processes. This is again far too broad. What is needed to replace both of these is an exception which protects the fair administration of justice against harm, as well as criminal procedures such as investigations and so on, again against harm. Article 19(5) protects all information related to diplomatic or international negotiations of any kind. Here again, the way the interest is defined is simply too broad and what is needed is a different approach, namely to protect good relations between Panama and other countries/intergovernmental organisations, as well as Panama's commercial interests.

A major and more general weakness with the regime of exceptions is its failure to provide for a proper harm test. The idea of a harm test is reflected in Article 3(13), which defines "reserved" information[7] as information which can be kept confidential due to a clear, probable and specific risk of harm to public interest. It is also reflected in Article 21, which allows information to be classified only after assessing harm and applying the public interest override. However, neither of these apply directly to the list of interests in Article 19 (one because it is a definition and the other because it relates to classification). As such, the RTI Bill does not clearly subject withholding information falling within the scope of the items on the list in Article 19 to a harm test, apart from the first one in the Article 19 list, which refers to information the disclosure of which would compromise national security.

The RTI Bill also fails to provide for procedures for consulting with third parties where requests are made for information which they provided to a public authority on a confidential basis. Better practice is to consult with such third parties with a view to obtaining either their consent for the release of the information or their objections to its release. The RTI Bill should establish clear procedures for such consultations while

[7] The RTI Bill distinguishes between "reserved" information, which refers to protected public interests, and "confidential" information, which refers to protected private interests. See Articles 3(12) and 3(13).

ensuring that the normal timelines for responding to requests for information are not extended by such consultations.

Article 14 of the RTI Bill requires public authorities to provide substantive justifications for refusals to provide information. This is positive but it would be improved by also requiring refusal notifications to contain information on the relevant appeal procedures.

Recommendations

- The RTI law should provide for its provisions to override secrecy provisions in other laws, to the extent of any conflict.
- The regime of exceptions in Article 19 should be rewritten to refer to clear and narrow legitimate interests that might override the right to information and to subject those interests to a harm test as a condition for justifying non-disclosure.
- Clear procedures for consultations with third parties should be added to the RTI law while ensuring that the regular time limits for responding to requests are maintained.
- The notifications that are required to be provided when refusing to disclose information should also be required to contain information about the applicable appeal procedures.

Appeals

The 2013 Law provides for appeals, but these could be improved. Neither that law nor the RTI Bill provide for an internal appeal to the public authority responsible for the initial decision. Internal appeals should not be a replacement for external appeals but can be an efficient way to resolve straightforward errors.

The independence of the Authority could be improved in various ways. First, it should be required to report to the legislature, which is not currently specified. Importantly, the budget of the Authority is assigned directly from the State budget, rather than having to specifically be approved by parliament. While the 2013 Law contains some helpful prohibitions on politically connected individuals serving as director of the Authority, in terms of positive requirements of relevant expertise, it only mentions "moral solvency and recognised prestige", which is too general and limited.

The RTI Bill also fails to allocate sufficient investigative powers to the Authority, which should have power to review even classified documents, to require witnesses to appear before it and provide testimony under oath and to inspect the premises of public authorities. Currently, the Authority does not appear to have any of these powers. The

rules currently require public authorities to comply with the decisions of the Authority, which is positive, but they do not set out explicitly what remedies it may impose, such as ordering public authorities to disclose information they had previously withheld.

Although the RTI Bill provides for *habeas data* applications to the courts to obtain personal information where a public authority refused to provide it, it does not provide for a general right to appeal to the courts on information matters. A clear judicial appeal procedure is an important part of an RTI law and should be expressly provided for.

While this may already be the case in practice, it would be helpful for the RTI Bill to provide explicitly that appeals are free of charge and do not require the assistance of legal counsel. The law should also specify that, in information appeals, the government, which has full access to the information, has the burden of proving that it operated in conformity with the legal rules.

Better practice is to empower the oversight body to order public authorities which are systematically failing to respect the RTI law to put in place structural measures to address this, such as by appointing and training information officers or managing their records properly. While the Authority has some power to order public authorities to assign specialised staff, it does not have clear powers to order structural measures to be put in place.

Recommendations

- Consideration should be given to providing for a simple and free internal appeal in the RTI law.
- The Authority should be required to report to the legislature and the legislature, not the government, should approve directly the budget of the Authority.
- More explicit requirements of expertise should be required of directors of the Authority.
- The Authority should expressly be given the powers to review classified documents, to order witnesses to appear and testify before it, and to inspect premises of public authorities.
- The Authority should also have clear and explicit powers to impose information-related remedies on public authorities, such as to disclose information which is being withheld.
- The law should provide for a right to appeal to the courts against the decisions of the Authority.
- The law should clarify that appeals are free of charge and do not require legal counsel.
- The law should place the burden of proof on the government in appeals before the Authority and courts.
- The Authority should be allocated clear powers to order public authorities which are systematically failing to meet their RTI obligations to put in place structural measures to address this.

Sanctions and Protections, and Promotional Measures

Both the 2013 Law and the RTI Bill provide for fines of up to 50% of an official's monthly salary to be imposed by the Authority for violations of their provisions. Pursuant to Article 26 of the RTI Bill, this applies to officials who fail to meet their duties under Article 15 (which covers proactive disclosure obligations) and other "applicable provisions". Presumably other "applicable provisions" refers to the other provisions of the RTI Bill, including in relation to the processing of requests, although ideally this should be made explicit.

Neither law, however, provides for sanctions to be imposed directly on public authorities which are seriously failing to respect the law. This is important since often the real source of the problem is not the information officer but a wider cultural issue within the public authority as a whole.

While sanctions are an important part of ensuring the proper implementation of RTI obligations, these should be combined with sufficient protections for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Articles 18 and 24 of the 2013 Law grant limited immunity to officials of the Authority, but only until a legal case against them has been decided (i.e. the protection is more procedural than substantive). And even this protection is not extended to officials of public authorities. Panama also lacks a whistleblower protection law, which would prohibit the imposition of sanctions on individuals who, in good faith, release information which discloses wrongdoing. Consideration should be given to adding general protection for whistleblowers into the RTI law until such a time as more comprehensive whistleblowing legislation is enacted.

In terms of promotional measures, the 2013 Law grants the Authority the power to promote transparency and publicity of information (Article 16(9)), and to provide training to unions, civic clubs and civil society on ethics, civics and moral values (Article 16(20)). However, it falls short of better practice by not specifically requiring the Authority to raise public awareness about RTI, for example through publishing a guide on RTI or introducing awareness of RTI in schools. The RTI Bill fails to remedy this shortcoming.

Article 8 of the 2013 Law imposes a general obligation on information officers to promote best practices in relation to records management. While this is useful, it falls far short of a proper records management system, which would involve the setting and monitoring of mandatory central standards, as well as the provision of training on those standards.

Pursuant to Article 15 of the RTI Bill, public authorities are required to publish information about the location of documents by category. While this is useful, better

practice in this area is to require public authorities to publish full lists of the documents they hold or at least of the categories of documents they hold.

Article 6(11) of the RTI Bill requires public authorities to publish, periodically, statistics on the fulfilment of their obligations under the law, in particular on requests received and responded to. It would be preferable for these reports to be published annually rather than just "periodically", whatever that might mean, although the obligation of the Authority to publish a consolidated annual report, in Article 39, suggests that in practice this information will need to be prepared at least annually. Article 26 of the 2002 RTI Law, in contrast, imposed a clear obligation on public authorities to publish annual reports. In addition, it would be helpful to specify in more detail what kinds of statistics should be included in these reports, such as response times to requests, percentages of requests granted and which exceptions were invoked and how frequently.

Article 39 of the RTI Bill requires the Authority to prepare an annual report, and sets out the kinds of information which this must contain. It would be helpful to specify that it must be presented formally to the legislature.

Recommendations

- The reference to other "applicable provisions" in Article 26 should be revised to make it explicit that this includes the processing of requests under the RTI Bill.
- The law should provide for sanctions to be imposed directly on public authorities which are in serious breach of their RTI obligations.
- Protections for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law, as well as for whistleblowers, should be added to the law.
- The Authority should be required to raise awareness about RTI among the general public, for example through informational guides and educational programmes directed at students.
- Public authorities should be required to publish annual reports with detailed statistical information about their processing of requests and other steps taken to implement the RTI law.
- Consideration should be given to requiring the annual report of the Authority to be presented formally to the legislature for discussion.