CENTRE FOR LAW AND DEMOCRACY

Pacific

Principles on Right to Information for Small Island Developing States: The Case of the Pacific

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Introduction[1]

The Pacific hosts some of the smallest countries in the world by population, including the three smallest UN Member States, namely Tuvalu, Nauru and Palau, all with a current population of less than 20,000 people.[2] And all but three Pacific Island States have a population of less than one million people. At the same time, the obligation to respect human rights does not stop once a State falls below a certain population; all States carry these obligations.

While Small Island Developing States (SIDSs) should be able to protect the right to life just as easily as larger States, ensuring respect for certain human rights places a special burden on SIDSs. This is the case as regards the right of individuals to access information held by public authorities, or the right to information. This right, which has been clearly recognised by United Nations human rights bodies and UNESCO, places positive obligations on States first to adopt right to information laws and then to implement them, including by putting in place appropriate administrative arrangements to deliver information to the public. With a bit of help, it is not necessarily very difficult to adopt a good right to information law, but implementation can be more challenging, especially if the design of the law does not take into account the human resource limitations that apply in SIDSs.

So far, almost nothing has been written about how to design right to information laws for SIDSs or how to go about implementation so as to minimise the burden on the small bureaucracies that these States maintain. The purpose of these Principles is to address that gap and, in particular, to put forward standards for legislation and key factors for implementation which build on accepted international standards in this area but adapt them by providing specific direction and options for SIDSs.

The first part of the Principles looks at right to information legislation, detailing areas where the legislation does not need to be altered based on the size of the State along with some areas

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[1] This Brief was authored by Toby Mendel, Executive Director, CLD. This work has been prepared by the Centre for Law and Democracy with the support of UNESCO. The views expressed herein are those of the Centre alone and do not necessarily reflect the views of UNESCO.

[2] For a list of UN Member States by population, see https://www.worlddata.info/alliances/un-united-nations.php.

where changes at the legislative level would be important. The second part looks at a number of particularly challenging implementation issues and puts forward ideas, in some cases based on the legislative adjustments recommended in the first part, for lightening the burden of implementation of right to information obligations on the government and bureaucracy while still meeting international human rights standards in this area.

1. Right to Information Legislation

1.1. *Areas where there is no or little need for change*

There are quite a few areas where right to information legislation does not need to be adapted simply because it is being applied in a small or even very small SIDS. Looking at this through the lens of the seven categories on the RTI Rating indicators,[3] there is no need for changes in the area of Right of Access. The legislation should create a clear presumption in favour of access (subject to exceptions) and should set out principles which underpin a broad interpretation of the law.

There is also no need to change the rules on scope, at least insofar as these define the information and public authorities which are covered by the legislation. Information should be defined broadly, as should public authorities, to include all three branches of government, bodies which are owned or controlled by those branches, including State-owned enterprises, other bodies which are established by law or the constitution, and even private bodies which are substantially funded by public authorities or which perform a public function. While this might appear burdensome, this should be largely offset by the fact that SIDSs have correspondingly smaller information holdings and fewer public authorities as well.

More thought should, however, be given to the rules on scope insofar as these apply to who may make a request. International standards suggest that, as a human right, this should apply to everyone, like most human rights. As such, the nationality or even residence of the applicant should not matter. In addition, legal entities should also be able to make requests for information. Part of the practical reasoning here is that the State should be able to absorb foreign requests relatively easily and, furthermore, it is a benefit to the State if even non-

[3] The RTI Rating, run by the Centre for Law and Democracy, is the world's leading methodology for assessing the strength of the legal framework for access to information or right to information (RTI) laws. It is based on 61 discrete indicators grouped under 7 separate categories. See: https://www.rti-rating.org/country-data/.

resident foreigners show an interest in it, whether of a research or more business nature. However, even one large request by a foreign academic, for example, could pose quite a burden on a very small bureaucracy. As a result, a more discretionary approach might be considered here whereby requests from non-citizen, non-residents would be considered but there would be discretion to refuse to process them where to do so would place an undue burden on the public authority.

There would also seem to be little reason to change the rules on Requesting Procedures, which address issues relating to how to lodge requests and then how public authorities are required to process such requests. One element here is the requirement to provide assistance to applicants who need it, but this is commonly qualified by the notion of reasonableness (i.e. the obligation is to provide reasonable assistance). This may have slightly different practical implications in SIDSs but would not require a change of language.

Similarly, there is no reason to adjust the rules on Exceptions. The legitimate grounds for refusing to disclose information – such as national security, privacy, public health and safety, and the fair administration of justice – do not depend on the size of a State, although they are sometimes fact dependent and the size of the population may be relevant at that level (for example, as to what constitutes a threat to security or health in a SIDS). At a practical and sometimes also cultural level, what qualifies as private is also often different in SIDSs, where people tend to know a lot more about each other than in larger States. But, again, this is not so much an issue for legal drafting as for how the legal provisions will be interpreted (i.e. the law should still protect privacy but what is deemed to be covered by that might be different than in a larger State with a different culture).

Once again, there is no need for major changes to the system of Sanctions and Protections that a right to information law should establish. Individuals who wilfully obstruct the right to information should be subject to sanctions, just as is the case for the breach of most other laws, while those who act in good faith to release information should be protected against sanctions. The latter is necessary both to give individuals the confidence to disclose information without fear that they may be sanctioned later on and for reasons of fairness since no one should be punished if they acted in good faith even if, later on, it is decided that the information should not have been disclosed. It is also important to protect those who release information on wrongdoing, as a sort of information safety valve. There is no need to change these rules simply based on the size of the State concerned.

1.2. Areas where change is more imperative

It is, however, different with the other two categories on the RTI Rating, namely Appeals and Promotional Measures. While these two categories do set out substantive standards, they also refer to administrative arrangements for delivering the right to information, and it is here that SIDSs will need to adjust to reflect the reduced size of their bureaucracies. When it comes to appeals, a first adjustment relates to the idea of an internal appeal (i.e. an appeal within the same public authority which processed the request in the first place). While providing such an appeal is considered better practice in general, it probably does not make sense in a tiny bureaucracy given that the "gap" between an original decision and an appeal is small, and difficult requests could be expected to be discussed widely internally anyway. In any case, providing for an internal appeal certainly does not make sense given our proposal for the primary processing of requests (on which see below).

More importantly, international standards call for applicants to have a right to make an appeal to an independent administrative body. The literature on this, as well as experience in practice, strongly endorses the idea of such an appeal going to a dedicated body such as an information commissioner or possibly an information and privacy commissioner, and there are good reasons for this. At the same time, it is clearly not realistic to set up an entirely separate administrative body to process information appeals in a SIDS. Instead, it makes more sense to allocate this function to an existing independent oversight body, where one exists. This could be a human rights commission or commissioner, an ombudsman or potentially another body, such as an ethics commissioner or even possibly an elections commissioner. The specifics really depend on what is available in the jurisdiction.

There is no exact figure for the population size at which this approach becomes justifiable – i.e. the size of population below which it makes sense to allocate oversight functions to an existing body rather than to create a new, dedicated information body – and this will depend on a number of different factors. However, it may be noted that many jurisdictions around the world with populations of between 500,000 and 1,000,000 people have established dedicated information commissions.

Regardless of the approach taken, there are certain features which are essential for an oversight body to be effective. A first issue is that, regardless of the specific body which undertakes this function, it is essential that its independence from government is well protected. Its role is to review decisions made largely by government actors and it is clear that independence from the original decision makers is essential to the proper performance of this role. This principle of independence also applies to bodies like human rights

commissioners and ombudsmen so these bodies should already manifest that quality (i.e. have legal and practical protections for their independence). In terms of independence, the RTI Rating looks at issues like how the individual or members are appointed, security of tenure, prohibitions on individuals with strong political connections being appointed and requirements of expertise, and independence of the budget process. If the independence of the selected body is not robustly protected, consideration should be given to enhancing this, which could even be done through the right to information law.

One of the reasons why there is a general preference for dedicated bodies to serve as information oversight or appellate bodies is that many of the alternative bodies mentioned above do not have the necessary powers to serve as effective information oversight bodies. They should, for example, have the power when investigating an appeal to call witnesses to testify before them, to review classified documents or documents claimed to be secret, and even to inspect the premises of public authorities where necessary (for example because they believe the public authority is hiding information). If a pre-existing body does not already have these powers, it should be given them, at least for information appeals.

The alternative bodies mentioned above are often limited to making recommendations. While this may be appropriate for an ombudsman and even a human rights commission, experience around the world demonstrates clearly that it is not enough in the right to information context and that, if the powers are limited in this way, many of the recommendations will simply be ignored. In essence, granting access to information is often more contentious than the sorts of issues that ombudsmen, for example, typically deal with. The body should thus have the power to order public authorities to disclose information and to provide applicants with other appropriate remedies, such as to lower the fees for providing information or to respond to a request in a timely manner. Where an existing body does not already have these powers in relation to its pre-existing work, the right to information law should provide for them in the information context.

In many cases, the alternative bodies mentioned above already have procedures in place for processing complaints or appeals and these may also serve well in the information context. However, these should be reviewed to make sure that they are indeed properly tailored for information appeals. Among other things, these should be decided in a timely fashion, should be free and should not require the assistance of a lawyer.

When it comes to Promotional Measures, a first issue is the idea, as set out in international standards on the right to information, that each public authority should appoint and then train properly an information officer or staff member with dedicated responsibilities for

receiving and processing requests for information. Otherwise, it would be very difficult for members of the public to know where to lodge such a request and there may not be any locus of responsibility for ensuring that such requests were processed in accordance with the law. This is, however, impractical in very small SIDSs and even in smaller SIDSs since there is normally quite a large number of public authorities such that this approach would involve appointing and training a lot of people.

A more practical approach here is to have a central information access service which receives requests on behalf of all public authorities and which takes charge of processing those requests, in discussion with the public authority which has custody over the information which has been requested. For this to work properly, such a central service needs to have the power to compel all public authorities to provide them with records which are responsive to a request, as well as the power to process and disclose those records, where appropriate. For States which have in place data protection laws, there may also be a need to provide for a right for the central information access service to access personal data. Another issue here is that while it is relatively simple to impose, as it were, a central information access service on public authorities which form part of the executive, this may be more difficult for other bodies, such as independent oversight bodies, State-owned corporations and universities. One option here would be to allow these bodies to opt into the system (i.e. allow them to participate in the central information access service system without requiring them to do so). There would presumably be a strong motivation for non-executive public authorities to join such a system given that this would save them a lot of effort. All of these issues can be addressed effectively via the right to information law.

An example of a jurisdiction which has a centralised information processing unit is the province of Nova Scotia in Canada. With a current population of just over one million people, Nova Scotia has a dedicated Information and Privacy Commissioner,[4] but the processing of requests for information which are made to the executive is done by what is called Information Access and Privacy Services (IAP Services). The latter operates under a ministry known as Service Nova Scotia, which looks after a number of services provided to residents, as well as central issues like technology. Because this system was put in place only in 2015, long after the Freedom of Information and Protection of Privacy Act (FOIPOP)[5] was adopted, the legal framework for it was layered on top of the law. Under section 44 of the FOIPOP, the

[4] See https://oipc.novascotia.ca.

[5] See https://nslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf.

head of each public authority is authorised to delegate responsibility for processing requests to one or more information officers. The Freedom of Information and Protection of Privacy Regulations[6] were amended in 2015 to provide that, for purposes of section 44 of the Act, and for executive bodies, that delegation could be to Service Nova Scotia. In addition, section 46EB(g) of the Public Service Act[7] was amended to allocate responsibility for information access services to the Minister of Service Nova Scotia. In practice, IAP Services concludes Memoranda of Understanding with each ministry to set out the rules relating to requests for information (such as time limits for ministries to provide information to IAP Services and so on).

While this system works well in Nova Scotia, and has led to significant efficiencies in the running of the system both for the government (such as less staff time, including training, being needed to process requests for information) and requesters (such as a reduction in the average time taken to respond to requests), it would make more sense for countries which are just adopting laws or revising their laws to build it into the very design of the law. This would involve establishing the system in the law, both by creating the unit and by setting the rules for how it relates to other public authorities.

It is also important for the right to information law to require public authorities and a central body to report annually on the actions that have been taken under the law. This refers most obviously to the processing of requests – including statistical data about how many have been received, how long it has taken to respond to them, what those responses where, how many were refused and on what grounds, and so on – as well as any other measures taken, such as public awareness raising, training and so on. Having a central information access service very substantially simplifies this whole process, since it should track the receipt and processing of all requests and then be in a position to report on this. Whereas most right to information laws require reporting to be done first by each public authority and then by a central body, having a central information access service avoids the need for this double-tier approach to reporting.

Better practice is also to place a responsibility on some central actor to engage in public awareness raising so that members of the public are aware of their rights under the right to information law, including their right to make requests for and receive information. Under the model being proposed here, that responsibility could lie with either or both of the independent oversight body and the central information access service. This is one area

[6] See https://novascotia.ca/just/regulations/regs/foiregs.htm#TOC2_19.
[7] https://nslegislature.ca/sites/default/files/legc/statutes/public%20service.pdf.

where SIDSs actually have a distinct advantage, since it should be comparatively easier to raise awareness about the right to information among a smaller population.

The issue of proactive publication of information is not addressed in the RTI Rating but it is covered by the right to information and reflected in almost all modern right to information laws. This is something that bears thinking about in the context of SIDSs. On the one hand, robust proactive disclosure, especially online, is a huge information efficiency. It takes vastly less time to put a document on a website, where everyone can right it, than to process even one request for that document, following which only the applicant has right to it. Putting documents which may be the subject of a request online, one might even say pre-emptively, thus makes a lot of sense. Indeed, Article 4(2) of the Indian Right to Information Act specifically calls on public authorities to engage in robust proactive disclosure "so that the public have minimum resort to the use of this Act to obtain information".[8] On the other hand, it does still take time and effort to put documents online and to maintain this information up-to-date, especially in the early days of new obligations to do this via a right to information law.

One partial solution here is to place responsibility for this function in the hands of the central information access service, which will centralise expertise in this area and create a reliable locus of responsibility for it. A second partial solution is to set out reasonably ambitious minimum requirements in this area in the right to information law, but to give the central information access service some time to meet those standards, for example by providing that 30% of the information must be online after two years, 50% after three years and all of it after five years. It also makes sense to require information which has been released pursuant to a request to be put online in case anyone else might be interested in it. This is fairly simple to do and may save quite a bit of time in due course.

2. Implementation Measures

There is a close relationship between the law and implementation but they take place sequentially – a country has to pass the law first and then implement it although there is no reason why preparatory implementation measures should not start before the law comes into effect – and involve different considerations.

[8] The Indian Right to Information Act, 2005, is available at: https://www.rti-rating.org/wp-content/uploads/India.pdf.

Having a central information access service has a number of implementation-side benefits, of which an important one is avoiding a situation where every public authority needs to nominate and then train an information officer, which significantly reduces the training burden on the government. However, the staff working in that service will still need to be trained in the area of the right to information. Initially, at least, this will likely need to be supported by external actors, given that a small country which has just passed a new right to information law will probably not have that capacity internally. UNESCO has a very good online training programme for this, developed in collaboration with the Centre for Law and Democracy.[9] There may also be other opportunities to take advantage of donor support in this area.

The central information access service will need to set up a procedure for receiving and processing requests in line with the law (another huge efficiency since, otherwise, the information officers at each public authority would need to do this). There are established protocols for this which have been developed in other countries which could be adapted relatively easily to SIDSs, especially if, as recommended above, the procedures are substantially in line with international standards in this area.

It is now very clear that creating a central, digital requesting platform is a massive efficiency in the area of receiving and processing requests. These should, however, operate alongside more traditional ways of receiving requests, such as via mail or in person, for those who are not comfortable using digital platforms or who do not have access to an appropriate digital device.

At the same time, the cost and effort of putting in place such a platform may be out of reach for some SIDSs. The heavy costs associated with these platforms are upfront development costs and, after that, they will generate very significant efficiencies in the area of receiving and processing requests. Fortunately, open-source options for these platforms are available, ranging from Alaveteli to a very sophisticated platform developed by the Mexican oversight body, the Institute for Transparency, Access to Information and Personal Data (INAI by its Spanish acronym). The Mexican platform also extends to appeals such that the efficiencies are also carried over to that part of the right to information system.

These online platforms can also undertake, on an automated basis, much of the background work required to prepare annual reports on requests. For example, they can generate automatically most of the statistical metrics that would be required to be included in these

[9] This is available in various languages here: https://unesco-ati-mooc.thinkific.com/collections.

reports, such as how many requests were lodged that year, how long on average it took to process them, how many resulted in information being provided, which exceptions were relied upon to refuse requests and so on. Some of these platforms can also automatically upload information which has been disclosed pursuant to a request to a publicly-facing website, another significant efficiency.

In addition to online requesting platforms, we are starting to see the development of other automated and even artificial intelligence (AI) driven tools that support the bureaucracy in terms of implementing these laws. For example, some oversight bodies use automated programmes to compare the way exceptions are used to deny access to information, with the aim of helping to ensure that they are not abused or interpreted overly broadly. SIDSs should take advantage of these tools as they become available to support more efficient implementation of right to information laws.

The issue of who should be legally required to conduct public awareness activities has been discussed above. Whoever that is, at a practical level the means of outreach should obviously be adapted to take advantage of how information actually travels in each country, which will likely be different in SIDSs than in other, larger States. Experience in other countries suggests that profiling a successful requesting experience – for example where an ordinary person got very real benefits from requesting and receiving information – is one of the most powerful and yet relatively simple ways of spreading the word about this right. While these examples mostly involve larger countries, there is nothing about them that suggests that they would not be equally if not more effective in small countries.

One particular issue here is ensuring equal access for different groups, including women, men and non-binary individuals and persons with disabilities. It was noted above that there is no need to amend the legal rules regarding assistance, since these are already conditioned by being "reasonable", but an effort should be made both in terms of public awareness and assistance to ensure that everyone benefits equally from the right to information. This may, for example, require special outreach to different genders and special assistance for persons with disabilities. Online requesting platforms should also be designed to be compliant with international Web Content Accessibility Guidelines (WCAG).[10]

Records management is another challenging area, even for larger States. It is a truism that a public authority cannot provide information to an applicant if it cannot locate that information. It is also the case that if public authorities do not manage their records well and,

[10] See https://www.w3.org/WAI/standards-guidelines/wcag/.

as a consequence, need to spend a lot of time to locate records which are responsive to requests, this is a massive inefficiency. At the same time, sophisticated records management systems, including for digital records, are complex and require substantial resources to manage. As such, it may make sense for SIDSs to aim for robust but relatively simple records management systems, taking advantage of some of the models which have been developed elsewhere. It may also make sense to start out by focusing on forward-looking records management (i.e. by trying to ensure that the records which are currently being created are managed well and only turning to historic records later on).

Some of the reasons for the overall preference for dedicated information oversight bodies (information commissioners) are outlined above. Another one is that experience has shown that, in many cases, where information is added to an already broad pre-existing mandate – which will be the case for a human rights commissioner or ombudsman – it is often not given much priority, sometimes being treated as an unwelcome additional burden for the body. One way to help avoid that is to have a relatively senior dedicated lead person within the body who is specifically responsible for leading on the information file. For example, in Kenya the Commission on Administrative Justice has three members, one of whom is designated as the Access to Information Commissioner.[11] This provides a locus of leadership and responsibility for this issue and avoids it being ignored or treated as an add-on function. Another issue here is budget and human resources. While it is an efficiency to allocate the information oversight function to an existing body, this does not mean that it can take on this task without being allocated any additional human resources. SIDSs obviously have fewer such resources to allocate but, at the same time, they should also expect a correspondingly lower volume of appeals.

Recommendations

- Consideration should be given to providing for some discretion to allow public authorities to refuse to answer requests from non-resident foreigners where this would place an undue burden on them.
- Where the human and financial costs of appointing a dedicated information commissioner are deemed to be prohibitive, a right to appeal to an existing independent administrative body, such as an ombudsman or human rights commission, should be provided for, subject to the following:

[11] See here: https://test.ombudsman.go.ke/team-members/commissioner-lucy-kamunye-ndungu-ebs/.

  - If the existing body is not sufficiently independent of government, this should be addressed, potentially through the right to information law.
  - Where this is not already the case, the body should be allocated the necessary powers both to investigate appeals and then to order appropriate remedies for the applicant.
  - The decisions of the body should be binding on public authorities.
  - A senior person within the body should be allocated responsibility for leading on right to information issues.
- Rather than have each public authority appoint its own information officer, a central information access service should be established. This should cover the executive and other public authorities should have the power to opt in to use it.
- The central information access service should be required to report annually on activities undertaken to implement the right to information law, including by providing statistics on the number of requests and how they were responded to.
- A central body – either the central information access service or the oversight body – should be tasked with raising public awareness about this right, using means of communication that are appropriate to the country in question.
- Consideration should be given to providing for a robust proactive disclosure regime in the right to information law while also giving those responsible, likely the central information access service, a period of time to meet progressive targets under that regime.
- Training should initially focus on the staff of the central information access service, using the existing UNESCO online training course and potentially other training provided by international actors.
- The central information access service should adopt a simple protocol on processing of requests, perhaps adapted from a protocol being used elsewhere.
- A multi-functional online requesting platform should be put in place as soon as possible, taking advantage of free, existing models for this that already exist.

3. Conclusion

All States, regardless of their size or other factors, are required to respect human rights. This is true of the right to information just as it is to be free of torture or discrimination. At the same time, given its positive nature as a human right (i.e. a right which requires States to take action as opposed to refrain from taking action), implementing the right to information can be challenging for SIDSs.

Despite this, there are a few practical steps which SIDSs can take to mitigate this challenge, both in terms of the law establishing the right to information and steps taken to implement it. Some of the more important of these are institutional in nature. It is reasonable for SIDSs to allocate oversight (appeal) roles to pre-existing bodies, such as an ombudsman or human rights commission, albeit it may be necessary to tweak their powers in the context of information appeals. Establishing a central information access service rather than requiring each public authority to appoint its own information officer is another very practical institutional step.

In terms of implementation, perhaps the most important efficiency is to invest in a powerful online platform for the receipt and processing of requests. Although this requires an upfront investment, the longer-term cost savings will substantially outweigh that. Indeed, the more powerful, multi-functional the online system is, the greater the longer-term benefits will be. And international support may well be available in this area – including through open-source online platforms – as well as in other areas – such as training.

It can be daunting for SIDSs to initiate the process of adopting and then implementing right to information laws. Hopefully these Principles will help reduce the initial barriers to this and provide very practical advice about the sorts of efficiencies that SIDSs can take advantage of in this area.