

## ACCESS TO INFORMATION:

Enabling Legal Environment and  
Appropriate Implementation







# **ACCESS TO INFORMATION:**

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AND APPROPRIATE IMPLEMENTATION

# Preface

This Policy Brief on Access to Information (ATI) is a product of Panos Institute Southern Africa, with input from our partners in civil society, the media and cooperating partners. This Policy Brief has been produced as part of Panos' ongoing efforts to influence an enabling policy and legal environment for the enjoyment of the right to freedom of expression, access to information. Zambia has been on a long and winding journey towards the enactment of an access to information law.

The Policy Brief is expected to contribute to the production of quality, relevant content, strengthen the enabling environment for independent media, and advance social and online platforms that allow for free expression and access to information.

This Policy brief defines Access to Information (ATI), and attempts to demonstrate why ATI is important in the context of modern and democratic societies. The Brief further highlights the fundamental elements of an ATI law, based on international standards and best comparative practices, highlights key issues that may affect the implementation of ATI laws; and recommends practical steps for addressing them.

Finally, the Policy Brief also different possibilities for institutional arrangements for the effective implementation of an ATI law.

The contents of this Policy Brief may not be exhaustive, but we trust it will be a useful resource for decision makers like government line ministries and Members of Parliament, the media, lawyers, civil society, and other stakeholders.

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# What is access to information (ATI)?

The right to ATI is a fundamental right that encompasses two main aspects:

- a) The **positive obligation** of public (and some private) bodies to provide, to publish, and to disseminate information about their main activities, budgets, policies, and plans.
- b) The right of all persons to **ask public officials for information** about what they are doing and any documents they hold and the right to receive an answer.

The right to ATI is also denominated the Right to Know or the right to Freedom of Information (FOI). This right is founded on the broader right to freedom of expression, protected under international and regional human rights law (Universal Declaration on Human Rights<sup>1</sup>, the International Covenant on Civil and Political Rights<sup>2</sup>, the African Charter on Human and Peoples Rights<sup>3</sup>, the Declaration on the Principles of Freedom of Expression in Africa<sup>4</sup>). These provisions are based on article 19 of the Universal declaration, which states that:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds”

The right to freedom of expression thus encompasses not only the right to impart opinions and information, but also the right to **seek** and **receive** such content. ATI as a right is related to the possibility to obtain official information held by public authorities or under their responsibility<sup>5</sup>.

In 2015, the UN General Assembly adopted 17 Sustainable Development Goals (SDGs)<sup>6</sup>. Goal 16 calls on all UN member states to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels, and target 16.10 refers to “ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”.

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1 Available at: [https://www.ohchr.org/en/udhr/documents/udhr\\_translations/eng.pdf](https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf)

2 Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

3 Available at: <https://www.achpr.org/legalinstruments/detail?id=49>

4 Available at: <https://www.achpr.org/pressrelease/detail?id=490>

5 See the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on access to information and secrecy legislation of 6 December 2004 (available online at <https://www.article19.org/resources/joint-declaration-access-information-secrecy-legislation/>) and the report by the UN Special Rapporteur on Freedom of Opinion and Expression A/68/362 on the right to access to information (available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/464/76/PDF/N1346476.pdf?OpenElement>).

6 <https://sustainabledevelopment.un.org/>

Therefore, according to the mentioned international and regional standards, national Government and agencies, legislators, and the judiciary must take all the necessary measures and steps to effectively guarantee both the active disclosure of information of public interest under the direct or indirect control of the State, and the right of any individual to request such information.

The right to ATI does not only encompass the obligation of States to adopt a proper, relevant legislation and regulations (including constitutional provisions, legislation and regulation and administrative decisions), but also to put in place all the relevant institutional and organisational instruments that would guarantee the effective implementation of the mentioned regime.

Sweden was the first country to enshrine this principle into law, in 1766, with the Ordinance Relating to Freedom of Writing and of the Press, which abolished censorship of books and newspapers and required authorities to provide public access to official records. In 1966 the U.S. Congress enacted its Freedom of Information Act, which can be considered as one of the first modern ATI laws.

In 1990, only 13 nations had enacted access to information statutes while in 2022 around 130 countries have ATI laws, 22 of them in Africa. It can thus be said that the adoption of this kind of statutes has become an important priority in the field of human rights and public accountability both at the national and the international level.

## **Why is ATI important in the context of modern and democratic societies?**

ATI facilitates the exercise of the right to freedom of information, particularly by journalists and the media. When ATI becomes a right enshrined and protected by applicable legislation and regulations, journalists have improved and fairer access to information held by public officials or under the control of public institutions. This also facilitates relations between public officials and all media outlets on the basis of objective and transparent criteria.

ATI is a fundamental instrument in promoting the proper knowledge and understanding of public policies and the legitimacy of the respective Government. ATI information requests and proactive transparency facilitate the maximum disclosure of public decisions, internal practices, expenditures, and other relevant information.

Governments and other public bodies are also direct beneficiaries of ATI obligations, since they are requested to systematise their own documents, archives and other information sources and supports. This shall improve the quality of public performance and enhance the identification of societal needs as well as the definition of public policies.

ATI facilitates legal certainty and therefore promotes investment and improves efficiency of private businesses. Public disclosure of requirements, forms, and other requisites to undertake any commercial activity provides a clear economic stimulus as well as a more interesting environment for private initiatives to flourish.

ATI is a tool to enhance gender equality policies. According to a recent report by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression<sup>7</sup>, ATI is key to women's empowerment and agency. Firstly, it can facilitate access to information of particular interest to women, e.g., data on workplace inequalities or violence against women. Secondly, it is an important instrument to grant access to gender-related information including reproductive and sexual health, and sexual education.

ATI improves justice transparency and accountability. The judiciary is a fundamental power of the State. Public access to decisions and legal proceedings is a key instrument to guarantee accountability, legitimacy, as well as legal certainty.

ATI protects vulnerable groups. ATI is essential for people to know their rights and how they can be exercised and protected, particularly vis-à-vis those sectors of society that are marginalized or excluded and do not have systematic and dependable ways of acquiring information on the scope of their rights and how to exercise them.

ATI is a key tool to prevent and report human rights violations. The so-called "right to the truth" in the context of serious and systematic violations of human rights encompasses the right to know and enables victims to access all State repositories, in order to get to be able to know and understand everything that happened.

The COVID-19 pandemic situation also provided a specific example on how ATI is important and may also save lives. The World Health Organization (WHO) has emphasised that "the right message at the right time from the right messenger through the right medium can save lives", and thus "misinformation or mixed messages can cost lives"<sup>8</sup>.

ATI can also support policies in the field of public education by facilitating the monitoring of education standards and students' performance, providing information about enrolment and possible discriminatory practices, improve oversight of schools' expenditures and facilitate online education.

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<sup>7</sup> A/76/258. Available at: <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Report-Gender-Justice.aspx>

<sup>8</sup> <https://www.who.int/teams/risk-communication/infodemic-management>

# What are the fundamental elements of an ATI law based on international standards and best comparative practices?

## *ATI as a fundamental right*

ATI is a universal human right. This means that all individuals have the right to access to information. Legislation and enforcement shall not establish or implement any form of restriction or discrimination based on age, origin, nationality, legal status, place of residence or any other similar criteria.

## *ATI as the right to request and obtain information and the obligation of proactive transparency*

ATI requires recognising and protecting the right of any individual to request access to information as well as incorporating a series of positive obligations for the State regarding transparency and active disclosure of public information.

## *ATI applies to all types of documents in all formats*

Individuals must be granted access to any record containing information, no matter the support used (paper, electronic, audio/video recording, discs, USB drives...). Individuals have the right to obtain access through different means, including obtaining copies, accessing originals, making reproductions, getting transcripts...

## *ATI refers to public documents held by public bodies or referring to matters of public interest*

ATI encompasses, as a matter of general principle, all types of public information in all types of storage and support since it is held or custodied by public bodies according to their functions and competences. ATI is not circumscribed to specific types of documents or formal decisions. ATI may also encompass information held by private bodies owned totally or partially or controlled or financed, directly or indirectly, by public funds, and those financing or carrying out a statutory or public function or a statutory or public service, to the extent of that statutory or public function or that statutory or public service, or those that engage in activities directly related to citizens' rights or the public interest.

## *All public bodies have ATI responsibilities*

All public bodies in the executive, the judiciary, and the legislative branch, as well as bodies of other nature, such as constitutional bodies and institutions, are subjected to ATI obligations. Legislation,



regulation, and enforcement cannot exclude a complete branch or specific bodies based on the overall nature of their responsibilities or attributions (public security, anti-terrorism, defence, etc.).

### *Proactive disclosure obligations*

Bodies subjected to ATI legislation must be transparent, and proactively disclose information using various and accessible supports. For these purposes, these bodies must gather, compile, systematise, and update public information on a regular basis and as part of their responsibilities.

### *Principle of maximum disclosure*

ATI legislation and practice must be based on a presumption of maximum disclosure. This presumption implies that all information must in principle be disclosed and rendered accessible to the public, with the only exception of specific and narrowly tailored limitations, clearly established by law.

### *ATI requests*

Public bodies must respond in a timely, complete, and accessible manner to any ATI request. Requests must not be compelled to fulfil any specific formal requirement or motivation. As a general principle, requests must be honoured on a no fee basis.

In cases of denial of requests, citizens shall count on an accessible and free legal recourse, through an independent oversight body (freedom of information commissioner/commission). This body must count on all the necessary resources and be granted access to all relevant information to be able to adopt its decisions on a timely, independent, and effective manner.

Citizens must also have access to an adequate and effective legal remedy before independent judiciary institutions.

### *Restrictions to ATI*

Any restrictions to the right to ATI must meet the three-part test established under international and regional human rights standards: they must be established by law, be based on the necessity to protect and overriding public interest, and the information retained from the public, when appropriate, should be reduced to its minimum possible expression, only including information strictly necessary to achieve the compelling aim set forth in a law.

### *Oversight body*

An independent and impartial review body is to be established with the power of ensuring the protection of FOI and the proper application of all the ATI guarantees established by law, receiving

and deciding on appeals against ATI denials, monitoring of ATI and proactive transparency regimes by all the bodies subjected to legal obligations, as well as carrying out specific activities to reinforce FOI and promote its exercise: annual reports, implementation guidance and trainings for public bodies, public awareness campaigns, elaboration of statistics.

## What are the legitimate limitations to ATI?

Legal exceptions to ATI must be based on clear and certain criteria.

They must be clearly and precisely justified when applied to a singular case, after following a due administrative process.

The application of exceptions needs to be determined through the respect of all human rights, including the right to freedom of expression. In particular, the deciding official or body are obliged to consider whether there is an overriding public interest in disclosing the information.

The establishment and implementation of ATI exceptions based on national security interests must follow and incorporate existing guidelines on the appropriate limits of secrecy, protections for whistle-blowers, the parameters of the public's right to information about human rights violations and other issues, as already developed by initiatives such as "The Tshwane Principles"<sup>9</sup>.

Exceptions based on related to law enforcement must be exclusively oriented towards protecting ongoing or upcoming investigations, the identity of certain sources or informants as well as the life and physical integrity of those involved in them.

Exceptions related to legal professional privileges must exclusively target the information that is directly affected by such privilege.

Exceptions related to the protection of personal privacy are only acceptable when the disclosure of personal data is not justified for purposes of dissemination of information on matters of public interest. They particularly apply to cases of personal third-party information which would require the consent of the affected individuals to be disclosed.

Exceptions related to trade secrets or commercial interests must only focus on the protection of demonstrable harms to clearly identified commercial or financial interests.

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<sup>9</sup> The Tshwane Principles were finalized in Tshwane, South Africa, and issued on 12 June 2013. They were drafted by 22 civil society organizations and academic centres, facilitated by the Open Society Justice Initiative, in order to provide guidance to those engaged in drafting, revising, or implementing relevant laws and policies. They are based on international and national law and practices, and more than two years of consultation around the world with government actors, the security sector and civil society. Available at: <https://www.justiceinitiative.org/uploads/45d4db46-e2c4-4419-932b-6b9aadad7c38/tshwane-principles-15-points-09182013.pdf>

# What are the main implementation issues of ATI laws?

Principal obstacles to full implementation include:

- a) The majority of the population is not aware of the protection of the right to ATI, including applicable legislation, mechanisms, and oversight bodies.
- b) A significant number of journalists and media companies are not familiar and/or use ATI tools. In some cases, this is due to mistrust vis-à-vis public institutions in general or negative experiences (it took too long or was too cumbersome).
- c) Oversight bodies are formally established but they either do not have sufficient resources, technical capacity or are politically controlled and non-independent in practice.

From a general point of view, these are the challenges to take into consideration regarding the proper implementation of ATI legal provisions:

- a) ATI legislation must be explained in an understandable way and publicly disseminated among media, civil society, and citizens in general via different mechanisms (Government campaigns, media campaigns, CSO campaigns, activities in rural areas and targeting vulnerable groups, ...). It is particularly necessary that implementation considers the specific characteristics of vulnerable groups, particularly women, minorities and people with disabilities, to allow them to benefit from all the advantages of the law and to improve their participation in the management of public life.
- b) ATI law provisions must be acknowledged and incorporated into the practice of all affected bodies. This may imply organisation changes, adaptation of procedures, or creation of specific internal structures and positions (particularly public information officers or PIOs).
- c) The independent oversight body must be effectively created and put in operation. Apart from respecting and preserving in practice the actual independence of the commission, it is also necessary that the Government and other political and institutional actors guarantee its financial viability. It is also necessary that this body counts on sufficient and properly trained staff, as well as the capacity and legitimacy to interact with bodies and officials subjected to the law.
- d) ATI-focused legislation needs to be complemented with proper and consistent whistle-blower provisions.

- e) A good practice of Governments to guarantee and commit to proper implementation of ATI legislation is to join the Open Government Partnership (OGP)<sup>10</sup>. This is a multilateral initiative, launched in 2011, that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.

## The oversight body

The already mentioned oversight tasks may be performed by different possible types of bodies, including:

- a) Information Commission/Commissioner.
- b) Data Protection or Privacy Commission/Commissioner.
- c) Human Rights Commission.
- d) Ombudsman.
- e) Other agencies/bodies.

Independence of oversight body or bodies is a fundamental requirement. This task cannot be performed by a body subjected to the hierarchical authority of the Government or any other political institution. Independence of regulatory/oversight bodies in general is legally guaranteed via a series of constraints and requirements regarding appointment of the members of the body, dismissal, mandate, financial resources, and separated structures. Independent regulatory/oversight bodies are held accountable through specific mechanisms, particularly via parliamentary hearings and reports, as well as by the courts (via appeal mechanisms of their decisions).

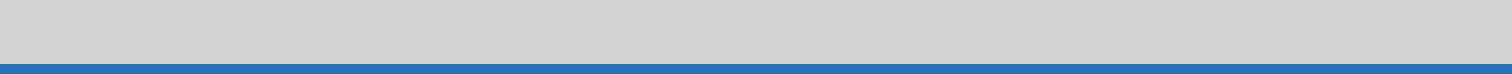
ATI oversight functions can be either concentrated on one single entity or distributed among several bodies.

ATI oversight functions can be either attributed to new bodies created by FOI legislation (Information Commission/Commissioner) or to already existing bodies exercising oversight/regulatory bodies in areas such as human rights, privacy, data protection, etc.

Courts shall be considered, in any case, a last resource for the protection of FOI once all previous administrative redress and appeal mechanisms have been exhausted.

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<sup>10</sup> <https://www.opengovpartnership.org>





Communication for Empowerment

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