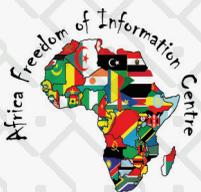


# LEAVING NO ONE BEHIND:

AN ASSESSMENT OF THE STATUS OF SDG 16.10.2 IMPLEMENTATION  
IN SIERRA LEONE, SOUTH AFRICA AND TUNISIA



# **LEAVING NO ONE BEHIND: AN ASSESSMENT OF THE STATUS OF SDG 16.10.2 IMPLEMENTATION IN SIERRA LEONE, SOUTH AFRICA AND TUNISIA**

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## LIST OF ABBREVIATIONS

ACHPR	<b>African Charter on Human and Peoples' Rights</b>
ATI	<b>Access to Information</b>
CSOs	<b>Civil Society Organizations</b>
FOInet	<b>Freedom of Information Advocates Network</b>
HLPF	<b>High Level Political Forum</b>
ICT	<b>Information and Communication Technology</b>
IDUAI	<b>International Day for Universal Access to Information</b>
IFEX	<b>The Global Network Defending and Promoting Free Expression</b>
INAI	<b>National Authority on Access to Information</b>
MDGs	<b>Millennium Development Goals</b>
PAIA	<b>Promotion of Access to Information Act</b>
RAI	<b>Right to Access Information</b>
RAIC	<b>Right to Access Information Commission</b>
RTI	<b>Right to Information</b>
SAHRC	<b>South African Human Rights Commission</b>
SDGs	<b>Sustainable Development Goals</b>
VNR	<b>Voluntary National Review</b>

## EXECUTIVE SUMMARY

In 2015, all 193 UN Member States agreed to adopt Agenda 2030, or the SDGs, an ambitious effort to improve the lives of the world's poorest people, globally, within 15 years. But the Agenda is not just about poverty: it sets out ambitious goals to tackle environmental degradation, gender inequality, corrupt governance, and barriers to healthcare, among the 17 goals agreed. One of the SDGs' most significant commitments is Goal 16, which calls for all countries 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." This includes important targets for fighting corruption, improving public participation, and public access to information.

Access to information empowers communities to better participate in their own governance and development. It also enables the people to participate in development processes of their countries and can hold their governments and leaders accountable for their actions.

Africa Freedom of information Centre with support from IFEX conducted a parallel assessment of the status of implementation of SDG Target 16.10 aims to "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" for Sierra Leone, South Africa and Tunisia. The selection of the countries was based on their intention to submit a VNR, their freedom of expression and media development track record, and the presence of partners on the ground.

The report is based on the assessment of the three dimensions by the FOIANet methodology - proactive disclosure, institutional measures, and processing of requests. Each of the three countries made different recommendations as follow;

### SIERRA LEONE

1. With regards to proactive disclosure, it should be prioritized for all ministerial departments and agencies. ICTs should be harnessed in encouraging access. Proactive disclosure has the potential to provide information to the community faster and at a lower cost. It reduces time and resources in processing individual information requests and demonstrates a commitment to openness, accountability and transparency, which in turn may increase the people's confidence in the government.
2. With regards to institutional measures, Public Information Officers should be recruited and trained for every ministerial department and agency. Currently, only a few of them have Public Relation Officers who double as Public Information Officers with very limited knowledge on the RAI law. Once Public Information Officers are provided with specialised training on the implementation of the law, it will increase their capacity and confidence to engage the public and be effective in their role.
3. With regards to strengthening the implementation of the RAI Law, the adoption and operationalization of the Right to Access Information Regulation should be fast tracked by the government. The Right to Access Information regulation serves as a complementary instrument to guide the full implementation of the provisions of the law.

4. With regards to countering the lack of public awareness, efforts need to be increased in public education on ATI for citizens. The RAIC should increase sensitization of citizens and government officials on the RAI Law so they know how to request for information and be knowledgeable about the work of the RAIC. Once there is increased awareness within the wider public, government officials will be more ready to disclose information when requested. Public lectures, town hall meetings, media et al. are the means to achieving this.
5. With regards to monitoring the implementation of the RAI Law, CSOs should organize and coordinate their monitoring activities. A robust advocacy strategy and monitoring tool needs to be designed and implemented to benchmark progress over time. This can also help to assess the relevance and effectiveness of the RAIC.

## **SOUTH AFRICA**

1. The Information Regulator should become fully operational in the immediate term.
2. Departments should ensure sufficient funding for PAIA implementation as an additional form of institutional support.
3. Civil society advocacy should focus on ensuring citizens are capacitated to navigate the bureaucratic process of requesting, but also empowered to access recourse given the challenges to the requesting process.
4. Authorities should ensure that formal compliance with PAIA extends to substantive compliance – for instance, ensuring the accuracy of PAIA manuals, and developing access procedures consistent with the lived experience of PAIA requesting.
5. The provision of better procurement related data should be prioritised across agencies.

## **TUNISIA**

1. A focus must be placed on enhancing the capacities of both institutions and society to identify, publish, and disseminate useful information. Training and capacity building of public agencies is needed to better implement the ATI law. INAI should receive increased funding and strengthen its human resource capacity for timely consideration and disposal of cases.
2. A culture of transparency needs to be developed and implemented through advocacy and awareness campaigns. Public officials and citizens must recognize that information belongs to the public. Civil society activists, journalists, and all citizens should play an effective role in the use of the ATI, through debates amongst all stakeholders (journalists, media organizations, trade unions, and the government). Partnerships between INAI and universities to organize awareness campaigns on ATI.
3. The development of progressive national indicators and targets about public access to information are needed in order to achieve the 2030 Agenda.

# | INTRODUCTION

## BACKGROUND

Following the expiration of the MDGs in 2015, there was greater recognition of the role that violence, conflict and insecurity plays in constraining development. The 2030 Agenda for Sustainable Development breaks new ground with its Goal 16 on Peace, Justice and Strong Institutions. The goal seeks 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 under which promotion of access to information is enshrined. Many targets under other SDGs, for instance those on inequality and gender, are also crucial for realizing the goal of peaceful, just and inclusive societies, that's the SDG 16 being termed as an enabler of all SDGs.

Access to information is crucial for individuals and groups to make informed choices, hold their governments to account and interact with their environment. It is also a key enabler in the context of people's access to development initiatives. Without access to information, individuals are not aware of services and programmes being provided and cannot participate in their development and implementation. The right of access to information is tightly linked to other fundamental rights such as access to education, health, agriculture, economic opportunities, etc. They are also necessary components for an inclusive, transparent and accountable governance.

Concomitantly, access to information is paramount when speaking about good governance, accountable and inclusive institutions. Without information, citizens have little or no reference on which they can hold their government accountable. They are unable to identify gaps, failures, monitor the effectiveness of their rights and ask for redress interventions when needed.

The Sustainable Development Goals commit governments to guarantee Public access to information. This is provided for by Goal 16: *Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*

*Target 16.10: Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.*

Indicator 16.10.2 seeks to establish the state of public access to information in terms of three key variables:

1. Whether a country (or at the global level, the number of countries) has constitutional, statutory and/or policy guarantees for public access to information;
2. The extent to which such national guarantees reflect 'international agreements' (e.g. Universal Declaration of Human Rights, etc.); and

3. The implementation mechanisms in place for such guarantees, including the following variables:

- Government efforts to publicly promote the right to information.
- The capacity of public bodies to provide information upon request by the public.
- Independent redress mechanism.<sup>1</sup>

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1 <https://sustainabledevelopment.un.org/post2015/transformingourworld>

## | ACCESS TO INFORMATION IN AFRICA

The African Union recognizes the right to information through different treaties including the African Charter on Human and Peoples' Rights Article 9 of the ACHPR states that, every individual shall have the right to receive information and the right to express and disseminate his/her opinions within the law. Other treaties include the Declaration of Principles of Freedom of Expression in Africa, the African Charter on Democracy Elections and Governance, the African Union Convention on Preventing and Combating Corruption, the Charter on Values and Principles of Public Service and Administration and the African Youth Charter. These instruments provide important opportunities for the advancement of the right to information on the continent.

Similarly, Since 2016 UNESCO marks 28 September as the "International Day for Universal Access to Information" (IDUAI), following the adoption of the 38 C/Resolution 57 declaring 28 September of every year as International Day for Universal Access to Information (IDUAI). IDUAI has particular relevance with the new 2030 Development Agenda, and in particular with Sustainable Development Goal (SDG) target 16.10(link is external) which calls for ensuring public access to information and protection of fundamental freedoms.<sup>2</sup>

Access to information empowers communities to better participate in their own governance and development. It also enables the people to participate in development processes of their countries and can hold their governments and leaders accountable for their actions.

### **VOLUNTARY NATIONAL REVIEWS AND THE HIGH LEVEL POLITICAL FORUM: SDGS UNDER SCRUTINY**

As part of its follow-up and review mechanisms, the 2030 Agenda encourages member states to "conduct regular and inclusive reviews of progress at the national and sub-national levels, which are country-led and country-driven" (paragraph 79) of the 2030 Agenda. These national reviews are expected to serve as a basis for the regular reviews by the HLPF. As stipulated in paragraph 84, regular reviews by the HLPF are to be voluntary, state-led, undertaken by both developed and developing countries, and shall provide a platform for partnerships, including through the participation of major groups and other relevant stakeholders.<sup>3</sup>

For the HLPF 2019 a total of 17 African countries are scheduled to present voluntary national reviews (VNR) of status of implementation of six other SDGs including SDG 16. The VNR reporting countries from the African Group are: Algeria; Burkina Faso; Cameroon; Central African Republic; Chad; the Republic of the Congo; Côte d'Ivoire; Eswatini; Ghana; Lesotho; Mauritania; Mauritius; Rwanda; Sierra Leone; South Africa; Tanzania; and Tunisia.

Out of the 17 African Countries, the Africa Freedom of information Centre with support from IFEX conducted a parallel assessment of the status of implementation of SDG Target 16.10 aims to "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" for Sierra Leone, South Africa and Tunisia.

<sup>2</sup> <https://en.unesco.org/commemorations/accesstoinformationday>

<sup>3</sup> <https://sustainabledevelopment.un.org/hlpf>

## | PURPOSE

One of the SDGs' most significant commitments is Goal 16, which calls for all countries 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." This includes important targets for fighting corruption, improving public participation, and public access to information. The purpose of the assessment was to produce the shadow reports produced by civil society as part of the process, are an important opportunity to check states progress, and find out if they are really living up to their commitments on guaranteeing people's right to information for the HLPF 2019. The countries were chosen on the basis of their intention to submit a VNR, their freedom of expression and media development track record, and the presence of partners on the ground.

## FOIANet METHODOLOGY

FOIANet Methodology<sup>4</sup> has been designed as a simple tool to help civil society organizations conduct parallel assessments of the extent to which States have met SDG 16.10.2. The methodology is based on an assessment of the performance of individual public authorities, as the main duty-holders under ATI laws. As it is not possible to assess the ATI performance of every single public authority, the methodology limits itself to a maximum of ten public institutions per application. Stakeholders implementing the methodology are encouraged to choose from a diverse spectrum of public authorities in order to measure a cross-section of performance.

The methodology reviews three substantive areas:

1. the extent to which public authorities are proactively disclosing information;
2. the extent to which institutional measures have been put in place to assist with implementation;
3. and the extent to which requests for information are being responded to properly.

The first two areas are evaluated through a predetermined set of questions, where data is collected via desk research and, if needed, on-site visits. The third area evaluates the actual implementation of ATI laws and regulations via the submission of testing requests for information and tracking their progress.

The gathered data is analyzed and interpreted through a three-point grade of red, yellow or green, per area in general, for each public authority separately and overall for the country. This allows for some comparison between the assessed authorities as well as an indication of how well SDG Indicator 16.10.2 has been implemented within the country. Given its limited scope, gathered data does not constitute a full assessment of a country's ATI performance. In addition, one needs to be careful when comparing results between countries due to the random selection of public authorities and the absence of a fully standardized approach to evaluating results. Nevertheless, the methodology provides useful insight into the implementation of ATI laws within countries, and policymakers and other relevant stakeholders should take stock of its findings. It also supports the creation of a baseline, upon which further assessments can be built. Consequently, the following country assessments can serve as the foundation of future endeavors in this regard.

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<sup>4</sup> The methodology is available at: [http://foiadvocates.net/?page\\_id=11036](http://foiadvocates.net/?page_id=11036)

# | COUNTRIES

## SIERRA LEONE

### Background

The Right to Access Information (RAI) Law of 2013<sup>5</sup> guarantees public access to information in Sierra Leone. However, over the course of the last six years, the public has yet to exercise this right in full. The majority of Sierra Leoneans are not aware of their right to information and how to exercise it. Furthermore, the government has been very slow to adopt complementary instruments to the law which could encourage its full implementation and actualization of its legal provisions.

The Right to Access Information (RAI) law is among the most fundamental legislation geared towards promoting inclusive and open governance in Sierra Leone. It seeks to achieve this objective by enhancing transparency, accountability and good governance, through facilitation of active demand and supply of information by all citizens, whether literate or not. Nevertheless, its implementation and potential gains remain a huge challenge for both the government, CSOs and citizens across the country.

Public bodies, private sector and Civil Society Organizations (CSOs), are required to provide information on demand by any member of the public when that information is necessary for the enforcement or protection of any right. However, sections 12 to 26 of the RAI Law also recognize that there are certain types of sensitive information whose release may cause harm and are therefore exempt from being released.

The extent to which ATI is enjoyed in Sierra Leone is limited. This is mainly due to the lack of awareness by the general public of both the existence of the RAI law and how to apply it. Public officials also lack the awareness of their obligations regarding the implementation of RAI. Some efforts have been made towards its implementation but they remain limited in scope.

### Application

The choice of the entities was based on the bigger picture of SDG 16. In this context, researchers picked public bodies that directly impact the social service delivery. The following public entities were selected:

1. Ministry of Finance, Planning and Economic Development
2. Environment Protection Agency
3. Freetown City Council
4. Ministry of Health
5. Ministry of Information and Communications
6. National Public Procurement Authority

<sup>5</sup> <http://www.sierra-leone.org/Laws/2013-02.pdf>

7. Right to Access Information Commission

8. Sierra Leone Police

9. Statistics Sierra Leone

10. House of Parliament

### **Overall Analysis**

At the moment, the Sierra Leone government has not established an ATI nodal agency. In 2014, the Right to Access Information Commission (RAIC) was established to facilitate ATI, and has the mandate to enforce it in the country. However, being a new institution and with resource challenges the impact of RAIC in overseeing and enforcing the implementation RAI is yet to be felt by ordinary women and people on the ground.

The results of the study reveal that public institutions have yet to provide adequate and timely public access to information facilities, recruit and train public information officers and pass robust RAI regulation. It further revealed that the RAIC is weak in coordinating ministerial departments and agencies and to facilitate training opportunities for the few Public Information officers that have so far been designated.

### **Analysis by Result Area**

#### ***Proactive Disclosure***

Even though the RAI law is very clear about proactive disclosure, it is very weak with ICTs rarely being utilized to facilitate access. Most ministerial departments and agencies have not been proactively disclosing information, through a lack of designated, or insufficiently trained, Public Information Officers as well as the norm that approvals are always necessary before information can be published.

The administrative complexities and bureaucracy involved in the proactive release of information affects the incentive of the public to demand information. Citizens perceive access to information requests as a waste of energy and time, as governments can be slow to respond adequately to queries.

Nonetheless, an average score of 68% for the 10 assessed ministerial departments and agencies was calculated. This can be considered as a positive sign of political will. However, some are still grappling with ICT challenges such internet connectivity and website domain issues. Almost all provided information on the functions of the ministry/authority and its powers, the organisational structure, names and contacts of key officials, and the laws governing the institutions' operations. Partial information was available about the projected budget, actual income and expenditure, and audit reports.

In January 2019, the Right to Access Information Commission (RAIC) facilitated a workshop for relevant ministerial departments and agencies. A proactive publication scheme was developed for 10 pilot institutions to promote transparency, accountability, and good governance, as well as facilitate efficient service delivery.

During a follow-up workshop in March 2019, four of the pilot institutions had demonstrated efforts towards proactive disclosure and were further encouraged. These were the Statistics Sierra Leone, Environment Protection Agency, Ministry of Basic and Senior Secondary Education and the Sierra Leone Police. They completed and submitted the RAIC's scheme on the agreed date. A new deadline was set for May 2019 for the pilot institutions to comply.

### ***Institutional Measures***

The overall score for institutional measures is 50%. Most of the assessed institutions do not have an ATI implementation plan nor have they developed or issued guidelines for receiving and responding to information requests. Only some of the public bodies have Public Information Officers, with most of them lacking ATI training.

### ***Processing of Requests***

Out of 10 assessed institutions, only 3 attempted to respond to information requests. They are the Ministry of Planning and Economic Development, Ministry of Health and Sanitation and Statistics Sierra Leone. It demonstrates the very weak implementation and the lack of capacity with regards to ATI.

In Sierra Leone, information is only released upon request, which sometimes requires justification for why the request was tabled. It is against this background that some people believe that information is released with restrictions and conditions on its use.

Some public authorities affirmed that citizens have the responsibility to request for information by submitting information requests, which rarely happens because of the lack of public awareness. An information request needs to be made in writing, in English or Krio, by any medium that the applicant has access to. Contact details and sufficient information on what is being requested need to be included. According to the RAI Law, public authorities need to provide the applicant with a receipt documenting the request and have to maintain records of all received information requests.

### **Recommendations**

6. With regards to proactive disclosure, it should be prioritized for all ministerial departments and agencies. ICTs should be harnessed in encouraging access. Proactive disclosure has the potential to provide information to the community faster and at a lower cost. It reduces time and resources in processing individual information requests and demonstrates a commitment to openness, accountability and transparency, which in turn may increase the people's confidence in the government.
7. With regards to institutional measures, Public Information Officers should be recruited and trained for every ministerial department and agency. Currently, only a few of them have Public Relation Officers who double as Public Information Officers with very limited knowledge on the RAI law. Once Public Information Officers are provided with specialized training on the implementation of the law, it will increase their capacity and confidence to engage the public and be effective in their role.
8. With regards to strengthening the implementation of the RAI Law, the adoption and operationalization of the Right to Access Information Regulation should be fast tracked by the government. The Right to Access Information regulation serves as a complementary instrument to guide the full implementation of the provisions of the law.

9. With regards to countering the lack of public awareness, efforts need to be increased in public education on ATI for citizens. The RAIC should increase sensitization of citizens and government officials on the RAI Law so they know how to request for information and be knowledgeable about the work of the RAIC. Once there is increased awareness within the wider public, government officials will be more ready to disclose information when requested. Public lectures, town hall meetings, media et al. are the means to achieving this.
10. With regards to monitoring the implementation of the RAI Law, CSOs should organize and coordinate their monitoring activities. A robust advocacy strategy and monitoring tool needs to be designed and implemented to benchmark progress over time. This can also help to assess the relevance and effectiveness of the RAIC.

## SOUTH AFRICA

### Introduction

South Africa has a long history of access to information implementation by regional standards. The main legislative instrument to facilitate access – the Promotion of Access to Information Act (PAIA) – was passed in 2000. In many ways, the law has stood as an example of good drafting: it ranks 14 out of the 123 country laws rated at RTI-rating.org.<sup>6</sup> However, civil society have consistently complained about poor implementation of the legislation, buoyed by the feedback and reporting on compliance from the former<sup>7</sup> oversight entity, the South African Human Rights Commission. A group of civil society organizations, which regularly submit requests under the law, have annually released a “shadow report” on the practice of implementation. In the 2017 version of this report, it noted:

“It has been 16 years since the Promotion of Access to Information Act, 2000 (PAIA) was enacted. The age of 16 is often associated with a coming of age. It is time to reflect on whether the coming of age of a piece of legislation that was enacted to give effect to the constitutionally enshrined right of access to information should be celebrated or castigated. The feeling on whether there should be some celebration is mixed as, while there has been some improvement with respect to some aspects of compliance with PAIA since its enactment, compliance in general remains poor to average. ... Over the [reporting] period, 408 PAIA requests were submitted by network members, the largest data-sample forming the basis of a Shadow Report to date. The key findings from this period were:

- The number of ignored requests and appeals is still far too high and shows apathy of requestee bodies (i.e. the holders of the information sought), in particular public bodies;
- The number of responses received outside the statutory timeframe is astronomical and needs immediate addressing; and
- Only 22 of the total 408 requests were submitted to private bodies, potentially a result of the complexity of the private body request process’.<sup>8</sup>

6 See further <https://www.rti-rating.org/country-data/>

7 This term is described further under implementation

8 PAIA Civil Society Network Shadow Report 2017, available at: <http://psam.org.za/wp-content/uploads/2019/02/2017-ATIN-Shadow-Report.pdf>, p 3

While this historical context to the implementation of the access to information environment matters, Sustainable Development Goal (SDG) Indicator 16.10.2 states particularly that it seeks to identify the: “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information.” Every country is expected to implement all of the SDGs, but given the length of enactment of the law, implementation remains a greater concern than ever before as it impacts the lived reality of the SDG’s.

**Methodology**

The sample of authorities selected was essentially random, in that they were selected based on the research interests of civil society partners within South Africa – rather than consistently based on any externally selected methodology. For interest, two local authorities were included as well:

1. Department of Justice and Constitutional Development (DOJCD),
2. South African Police Services (SAPS),
3. Department of Telecommunications and Postal Services (DTPS),
4. Department of Basic Education (DBE),
5. Department of Water and Sanitation (DWAS),
6. Department of Health (DOH),
7. City of Cape Town, and
8. Tshwane.

It is expressly worth noting that the two local authorities selected could not be considered to be a representative sample of local authorities in South Africa. Both the City of Cape Town and Tshwane are notably well resourced local authorities, making their context different to many.

The agencies were identified in collaboration with selected Civil Society Organizations in South Africa.

In undertaking the methodology prescribed, some shortcomings were noted. The shortcomings are specifically referenced within the analysis section, as it provides necessary context for interpreting any results provided.

**Proactive Disclosure**

**Summary Table**

Dept. of Justice	South African Police Services	Dept. of Telecommunications & Postal Services	Dept. of Basic Education	Dept. of Water and Sanitation	Dept. of Health	City of Cape Town	Tshwane
87.5	87.5	71	89.5	79	85.5	96	98
<b>Overall Score</b>	87						

South Africa's overall proactive disclosure performance was good, in spite of weaknesses in the legislative prescriptions for proactive disclosure within PAIA (particularly when compared to the suggested drafting of the African Union Model on Access to Information). It is worth contextualising the strength of the proactive disclosure with South Africa's open data ranking on the international 'Open Data Barometer, which is far more moderate.<sup>9</sup> However, while open data is a form of proactive disclosure, not all proactive disclosure is met merely through the provision of open data.

In terms of the categories, there is some difficulty in implementing the methodology provided as it requires an assessment of 'completeness' of disclosure not really possible to assess, given we have not definitive knowledge of the total available for release. So for instance, while we are asked to assess whether functions and powers are published – while information may be proactively disclosed, it is difficult to assess externally whether that which is released represents a significant portion of that which should be released.

By far the weakest category across the authorities selected was that relating to 'Public Procurement and Contracts'. This is particularly given the low levels of transparency at the point after tenders are awarded. So, consistently across authorities, tender information was provided to facilitate commercial bidders – but very seldom do the public have proactive access to contracts and implementation information after a tender has been awarded. Contextually it is worth noting, however, that National Treasury has created an Open Budgeting Portal, named "vulekamali", (<https://vulekamali.gov.za/>). Importantly, the next phase of development scheduled to begin in 2019 will start the inclusion of expenditure and performance related data. Not only will this require broadening the government departments included, but it is an exceptional opportunity for specifically driving open contracting data sets for inclusion and, consequently, broad public access.

The development of Vulekamali is also why all authorities (except the local authorities) scored so well in relation to 'Budget' information. While it may be unorthodox to source individual compliance with proactive disclosure from a centralized National Treasury initiative, it was felt in this case that national departments – given the importance of that project – may defer their proactive practice to the portal, and thus shouldn't be scored down for their participation in that collaborative effort.

Public participation also scored consistently badly across authorities, with notably positive examples in both of the local authorities. This can in part be attributed to the fact that local authorities, given their service delivery imperatives, are more front facing with citizens – this both requires them to focus on public participation, but also means they are probably more exposed to public pressure to ensure adequate public participation given their mandates.

In totality, both local authorities were the top ranking entities in terms of their provision of open information. This is notable for advocacy moving forward, but was also a result of their strong scores in the 'Public Participation' category in particular.

## **Institutional Measures**

The institutionalization of access to information is an area of particular challenge. In undertaking this research, the assessment of the institutional measures has identified the most severe challenge as the current lacuna created by being in-between the transfer of institutional oversight from our South African Human Rights Commission (SAHRC) to the Information Regulator.

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<sup>9</sup> See further Open Data Barometer (2017), 2017 Results, available at: <https://opendatabarometer.org/>

In South Africa, the Department of Justice and Constitutional Development is the Ministry charged with oversight of our Promotion of Access to Information Act, 2000 (PAIA). It has gone some way to advancing public knowledge of the law, as well as the training of judicial officials, etc. In addition, the SAHRC currently has oversight and monitoring functions of the law - it can even receive complaints in relation to PAIA, if consistent with its processes for human rights complaints, but cannot be considered an independent RTI oversight mechanism as it is not empowered to make decisions on a PAIA appeal as an alternative to Magistrates' Court (see further below). However, the transfer of powers over time means the entity is currently under-resourced for its functions. This has real impacts - its training functions is severely currently challenged and as the SAHRC has itself stated:

"The Commission strives to fulfil its PAIA functions and despite its efforts there seems to be inadequate political will on the part of heads of various state entities to comply with this constitutionally mandated law. Budgetary constraints remain an impediment as the SAHRC can no longer travel to various institutions across the country to conduct PAIA law clinics and trainings for DIOs, unless the institutions requesting training fund the logistical costs. This has had a negative effect on the fulfilment of the SAHRC's promotional mandate. The SAHRC's lack of enforcement powers in respect of PAIA further continues to hinder the Commission's ability to enforce compliance by public bodies in respect of section 32 and section 14 reporting".<sup>10</sup>

In December 2017 the South African President appointed Adv. Pansy Tlakula as South Africa's Information Regulator, an office created under the Protection of Personal Information Act, 2013 to provide oversight to both that law and our access to information law - the Promotion of Access to Information Act, 2000. However, as of April 2019, the Information Regulator has still not had all its sections put into effect. As such, the South African Human Rights Commission still has 'oversight' of the PAIA, but does not have full enforcement powers - nor does it have human and institutional capacity, given it is preparing for the hand over its current functions to the Information Regulator (see above).

To establish the institutionalization of access to information at the level of individual authorities, the researcher used the contact numbers provided for in the PAIA manual itself to contact Deputy Information Officer's on the state of implementation. This in itself becomes a measure of implementation: assessing the accuracy and substantive input given in the generation of the manuals, and going some way to testing the user experience of first time requesters.

The spreadsheet results, however, can't be said to necessarily reflect on the formal compliance. In most cases, zero scores were received only because there were no responses to the calls made through the numbers provided (for some this was because the wrong number was provided, but for others it was simply a result of the Officer being busy). Currently, the results only show us the accessibility of the Information Officers - which is nevertheless an important indication of substantive implementation.

In terms of institutionalization through these formal mechanisms, experience has shown us that across agencies performance tends to be strong. This cannot necessarily be inferred from the results of this research given the inaccessibility problem noted above, though it is of course very important to note that whenever responses were received institutional compliance was always 100%. Formal compliance is, of course, not equitable to substantive compliance, which continues to be the South African challenge (better reflected perhaps in the processing results). The institutional compliance at authority level is also challenging to assess from an implementation perspective. While the methodology asks questions about whether guidelines and

<sup>10</sup> South African Human Rights Commission (2018) SAHRC PAIA Report

plans are used in practice, asking Information Officers and Deputy Information Officers that question won't necessarily enable us to get an accurate response.

Turning to the contextual challenges of implementation, in 2012, the SAHRC reported that fewer than 15% of audited institutions had specifically budgeted for PAIA implementation and compliance requirements since 2008.<sup>11</sup> This result is noteworthy in two respects: firstly it goes to the real challenge of institutional implementation, which is an issue of capacity and resource provision, which makes actually implementing the formal requirements very difficult.

The second noteworthy thing about that result is that survey was done very long ago, and there are no more recent statistics on the topic given this shifting of the institutional mandate. Authorities are trying to implement PAIA in a context of restricted resources, but also significantly in one where they have little external institutional support given the Information Regulator is not yet fully operational in terms of its PAIA function.

### Processing of Requests

The process of requesting information in South Africa has commonly been viewed as challenging, not assisted by the fact the process is rather bureaucratic. The process results were moderate, but the differences between superficial and substantive compliance is noteworthy.

PAIA, in section 25, prescribes a thirty-day period in which an Information Officer must respond (and the law permits for a further thirty-day extension to that period if certain grounds exist). Problematically as well, there is no mechanism for urgent requests. In terms of the implementation of the methodology, this presented a particular challenge. The authorities were selected on 21 March, which meant requests could only be submitted after that point (all requests submitted were sent on the 25 March). This is problematic because there are two interpretation problems that have consistently cropped up in relation to PAIA, which further impede the reality of requesting:

1. Most authorities count the days as being working days, not calendar days – an interpretation consistent with our Interpretation of Statute Act, but not necessarily with the substantive intent of the law; and
2. Because the law prescribes the payment of a request fee, most authorities only start counting the days from the point that fee is paid – while there are strong legal challenges to this perception, the reality remains that this is the practice.

The second issue was in fact very strongly realised in the implementation of the methodology: The City of Cape Town, SAPS, and the DOJCD indicating that interpretation in their communications.

In relation to the requesting process, a request was sent to each authority for either their current Procurement Plan (prescribed for in terms of Supply Chain Management rules), or the previous years if the most current was not available. There were two reasons for this: the first is that, although required for in law, as seen in the proactive disclosure segment it was clear that this was an area of particular weakness in information provision.

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<sup>11</sup> South African Human Rights Commission (2012) 9. South African Human Rights Commission (2012) The Promotion of Access to Information Act (PAIA) and Records Management Consolidated Audit Report: 2008-2012, accessed 15 March 2015, available at <http://www.sahrc.org.za/home/21/files/Consolidated%20PAIA%20Audit%20Report%202012.doc2.pdf>

The second was that, by phrasing the request that way, we had the benefit of requesting both something slightly more controversial (as the most recent Procurement Plans have not yet been formally submitted to National Treasury as they are due end April) and less controversial as they could instead merely provide the older version. Interestingly, all the authorities that released the records, released those records that reflected the most recent (and thus 'more controversial') version of the plans (DOJCD, DBE, DOH released the 2018/2019 plans and the City of Cape Town and SAPS have indicated that they will release the 2018/2019 version).

On responsiveness, only 50% of authorities acknowledged receipt. Interestingly, the DBE and the DOH failed to acknowledge receipt, yet provided the information requested.

In terms of fees, request fees were paid on request to both SAPS and the DOJCD. In addition, SAPS decided to charge the prescribed access fees as well. While the law permits the charging of these fees, the total charged was R7, 60 – a charge so nominal it is interesting that it was required at all. While this should not be taken to negatively reflect on SAPS, as they are complying strictly with the law, it is an important indication of how important the drafting of a law is to implementation. Importantly, the DBE and DOH released the records without requesting a request fee – demonstrating best practice above all other authorities in relation to charges. Problematically, the City of Cape Town sent a response stating a request fee is payable (and, as mentioned, that they would not process the request until it was paid), but did not provide the information necessary for the requester to pay the fee. This is a result of the automated messaging, as in non-automated communication the City of Cape Town did not require it. This is nevertheless support for the argument that holds that the days calculated for a response should start from the point at which the request is received, and not from when the fee is paid.

On timeliness, as explained above at the point of drafting this report all authorities were still within the allocated time frame for providing a response – but only if calculated on working days (the DTSPS and DWAS are outside the time limits if calculated on working days).<sup>12</sup> This means that, though this report cannot definitively comment on timeliness in responding, you can get a comparative sense – in this regard then, the DOJCD and then DBE were the exemplar performers.

In conducting the research, a first draft of the research saw only 25% of the authorities releasing records. However, the following week – which was also the final week for the authorities to respond within the time prescripts of the law – saw that release rate shoot up to 50% with a further 25% requesting justifiable extensions. This means the request process scores differed drastically within a seven-day period. This points to two possibilities: one is that 30 days is essentially how long a request takes to process in South Africa. There is, however, another possibility: that authorities may be technically, but not substantively, implementing the law. This may be support for the inclusion of an emergency request process, as - if either explanation is correct – urgent requests will in practice not be able to be provided without a required procedure.

For a broader context in considering the processing of requests, some other research confirms the challenges in the vivid experience of trying to request. In 2014 a student, Stephanie Van Der Mey, undertook a to explore the response rates to requests made to all local municipal offices.<sup>5</sup> The object was to assess whether the language used in a request affected the response rates. This meant a 'neutral request' was sent to half of the sample, and an 'aggressive' request (so defined because of the use of highly assertive and legally based language) to the other half. The results were telling: across both request types, the number of deemed

<sup>12</sup> The date of this draft report was 15 April 2019

refusals, or ignored requests, was a staggering 86%.<sup>6</sup> Even more worryingly, legalistic requests demonstrated a faster response time. The study then is an indictment of how ordinary citizens would experience the PAIA system in South Africa.<sup>13</sup>

## Recommendations

1. The Information Regulator should become fully operational in the immediate term.
2. Departments should ensure sufficient funding for PAIA implementation as an additional form of institutional support.
3. Civil society advocacy should focus on ensuring citizens are capacitated to navigate the bureaucratic process of requesting, but also empowered to access recourse given the challenges to the requesting process.
4. Authorities should ensure that formal compliance with PAIA extends to substantive compliance – for instance, ensuring the accuracy of PAIA manuals, and developing access procedures consistent with the lived experience of PAIA requesting.
5. The provision of better procurement related data should be prioritised across agencies.

## TUNISIA

### Background

The right to access public information is enshrined in Article 32 of the 2014 Constitution of the Tunisia Republic, which states: “The state guarantees the right to information and the right of access to information and communication networks.” In accordance with the Constitution, the Right to Access Information Law No. 22/2016 was enacted in March 2016. The law conforms with international standards, most notably for exceptions now subject to the injury and general interest tests. It also complies perfectly with the African Union Model Law.

### The Right to Access Information Law

The ATI law provides practical mechanisms to ensure the implementation of the access to information, including recourse to justice and the set-up of the National Authority on Access to Information (INAI). Its scope is no longer limited, protecting the right of access to information for all of Tunisia’s citizens. The law requires that all governmental bodies, public institutions and any other institution receiving State funds make public upon request a wide range of information, including their organizational charts, legal texts, their agreements with States, their policies and programmes that concern the public, their procurement processes, statistics, as well as “any information relating to public finances, including detailed data related to the budget at the central, regional and local levels”. By law, a State agent who deliberately blocks access to information is liable to a fine of 500 to 5 000 dinars (from 170 to 1 700 dollars) and disciplinary sanctions. However, it is unclear what the exact legal proceedings are in this regard.

<sup>13</sup> Van Der Mey, S & Eyal, K (2014) The Impact of Emotional ‘Affect’ on Municipal Budget Transparency in South Africa: A randomized control trial using PAIA requests, accessed 15 March 2015, available at <https://open.uct.ac.za/bitstream/item/10148/Stephanie%20van%20der%20Mey%20Transparency%20in%20Municipal%20Budgets%20PAIA%20Final%20Version.pdf?sequence=1>

It further identifies certain types of information that institutions are not obliged to provide, including information on security or national defense, international relations, intellectual property, personal and private data. However, the law explicitly emphasizes that these exceptions “do not apply to information that is necessary for disclosure in order to disclose serious violations of human rights or war crimes or investigations which are related or the pursuit of their authors.” Any case in which an institution would invoke such an exception is subject to the public interest test for each application. The public body may refuse to grant information only when this could potentially jeopardize national security, defense, international relations, or the rights of a third party with regards to its privacy, intellectual property and personal data. These exceptions are not considered to be absolute. They are subject to the injury test as well as the public interest test for each application. The proportionality between the denial and the granting of the information request will be considered. Lastly, the right of access to information does not include data on the identity of persons who have submitted information to denounce abuses or cases of corruption.

Each institution need to publish the granted information online and update it at least once every three (3) months following any changes, stating the date of the last update. Additionally, the website must contain the legal and regulatory framework governing access to information, the forms to table information requests, the procedures of appeal, the service responsible for receiving information requests, and reports relating to the implementation of the ATI law.

Any natural or legal person may submit a written request to access information. In case of refusal, the requesting party will be informed via a letter listing the reasons. The exception automatically ends when these reasons are no longer valid. The law considers that a failure to respond to a request within 20 days is tantamount to refusal and constitutes an appeal to INAI.

The ATI law does not charge for the filing of an information request or to appeal a refusal to INAI. A standard application form is available, but its use is not mandatory. Only basic information such as name, address, and details of the application and its addressee are required for submitting an information request. It can be submitted by email, mail, fax or in person to the institution where the information is requested.

### **The National Authority on Access to Information (INAI)**

INAI was created with the task of protecting the right of access to information and oversee the implementation of the ATI law. It is an independent public body with financial autonomy. Its board is composed of a council, elected by the People’s Congress. In compliance with the ATI law, the INAI is tasked with investigating complaints against public institutions in relation to access to information. It may, if necessary, carry out the required investigations on the spot, perform all review procedures, and interview relevant persons. INAI decisions may be appealed to in administrative tribunals. Since its inception to mid-March 2019, INAI has received 750 cases.

With its law on the right of access to information, Tunisia is at the forefront of the Arab world in promoting transparency in public institutions. State agencies are obliged to provide a wider range of information, simultaneously limiting what information can be kept confidential.

### **Application**

The following entities were assessed:

#### **1. Ministry of Gender**

2. Ministry of Justice
3. Ministry of Health
4. Procurement Regulatory Authority
5. Ministry of Finance
6. Parliament
7. Ministry of Interior

### **Overall Analysis**

Despite strong provisions in the ATI law, there is a clear quantitative and qualitative lack of information proactively published. Institutions are slow to respond to citizens' requests. Public authorities are gradually adapting, but there is still resistance.

Although the law lays out procedures for obtaining public information, the reality in obtaining it is quite more complicated. Public access to information stumbles on administrative burdens and bureaucratic inertia. As stipulated by the ATI Act, officials in charge are appointed and the mechanisms for receiving applications are well established. Nevertheless, it is difficult to get an answer to the request (one time out of seven): public servants do not respond to emails or telephone calls, and websites' contents are not regularly updated. The problem sometimes arose from the fact that within a government agency, the officer responsible for answering requests fails himself to obtain information from the colleagues who hold it.

### **Analysis by Result Area**

#### ***Proactive Disclosure***

A majority of the seven assessed public entities use their website to fully or partially publish descriptions of their main activities and services. This includes the functions and responsibilities of the authorities, the organisational structure, and the names and contacts of key officials. Laws governing the authority's operations also appear on their specific websites. However, updates are not being done systematically.

Many public institutions fail to provide information on budget allocations, including detailed data of the budget at central, regional, and local levels; on public debt and national accounts; on the distribution of public expenditure and the main indicators of public finances as well as public contract information; on oversight entities; on the conventions which the state intends to accede to or ratify; and on census data. Information about mechanisms and procedures to consult and request information are also partially published or totally absent.

Lastly, the Tunisian government is also late with its reporting obligations.

#### ***Institutional Measures***

Access to information implementation by the Tunisian authorities has been inconsistent: institutional measures are present but are not fully functional. With exception of the Procurement Regulatory Authority,

which refers to the general system put in place by the Ministry of Finance, all the prospected authorities appointed a Public Information Officer who is responsible for ATI implementation. He/she is appointed by the head and deputy of the internal entity subject to the provisions of the ATI law. In particular, he/she shall receive information requests, process and respond to them as well as ensure coordination.

His/her duties also include the preparation of an action plan and an annual activity report. The report should contain suggestions and recommendations necessary to reinforce access to information. Furthermore, it should include statistical data on the number of submitted requests, as well as replies, refusals, appeals, amongst others, complemented further by the measures taken in relation to ATI at the initiative of the authority concerned, document management and training sessions. The Public Information Officer needs to ensure follow up on the implementation of the action plan and update it accordingly. However, we found that apart from the Ministry of Interior, no such reports have been published to date.

A single form to request information is available on the authorities' specific websites, and in some cases it still refers to the 2011 ATI law, now cancelled and replaced by the 2016 ATI law. This indicates a lack of interest in implementing ATI consistently.

ATI training sessions also do not seem to be a priority. The public authority did not provide ATI trainings to its information officers, but nevertheless allowed them, when there was an opportunity to take part in training sessions organised by other institutions.

### ***Processing of Requests***

In principle, the process of submitting information requests is very simple. Information requests can be submitted by natural or legal persons, either by hand, registered letter, fax, or email in accordance with a pre-established model or on free paper. The request needs to include the applicant's name and address and the necessary details concerning the information requested, without any justification.

Though the prescribed process may be simple, the reality is more complicated with administrative burdens and bureaucratic inertia. Emails or telephone calls remain without reply and websites are not regularly updated. It sometimes arose within a government agency that the Public Information Officer responsible for answering requests was not able to obtain the requested information from colleagues.

As a result, many information requests are submitted in person at the institution itself. Others go through INAI mediation to retrieve it. Advocates of the access to information have expressed concerns about the shortcomings in the implementation of the ATI law. One of these concerns is that the executive bodies do not always respond to requests, even after they have been ordered by INAI and administrative tribunals.

### **Recommendations**

4. A focus must be placed on enhancing the capacities of both institutions and society to identify, publish, and disseminate useful information. Training and capacity building of public agencies is needed to better implement the ATI law. INAI should receive increased funding and strengthen its human resource capacity for timely consideration and disposal of cases.
5. A culture of transparency needs to be developed and implemented through advocacy and awareness campaigns. Public officials and citizens must recognize that information belongs to the public. Civil

society activists, journalists, and all citizens should play an effective role in the use of the ATI, through debates amongst all stakeholders (journalists, media organizations, trade unions, and the government). Partnerships between INAI and universities to organize awareness campaigns on ATI.

6. The development of progressive national indicators and targets about public access to information are needed in order to achieve the 2030 Agenda.

## | CONCLUSIONS

The three dimensions assessed by the FOIANet methodology - proactive disclosure, institutional measures, and processing of requests demonstrated that while there is access to information laws in the three countries, the implementation of proactive disclosure of information is still weak and needs to be emphasized in the provisions of the laws. Capacities of Institutions is weak in terms of staffing, resources among others to actively engage in the promotion of access to information. There is also need to strengthen mechanisms for receiving and responding to public requests,



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