The Access to Information Act (Bill), 2015 of Tanzania

tabled in Parliament in February 2015

CHRI's Preliminary Comments and recommendations for improvement[1]

This compilation of comments analyzing the contents of the ATI Bill and the recommendations for change are preliminary in nature. CHRI will circulate a detailed analysis of the Bill with recommendations for improvement for the use of civil society actors in Tanzania to engage with their Parliament for demanding improvements in the Bill to bring it up to internationally recognized standards of ATI laws.

Part I Preliminary Provisions

1) **Clause 1**: The Minister concerned has been given the discretion to fix the date for the implementation of this law after enactment. The experience from countries like India and the UK show that after the enactment of RTI laws, there is inordinate delay in the implementation of such laws. The FOI Act enacted by the Indian Parliament was never enforced until it was replaced with another law in 2005. UK's FOI Act took 5 years to come into force. It is advisable for Parliament to stipulate the period within which Tanzania's ATI law must be implemented. India's Right to Information Act (RTI Act) enacted in 2005 stipulated a time limit of 120 days. If this is too short, the time limit may be increased to six months in Tanzania. Another method of implementation could be to go in for staggered or phased implementation starting with those public authorities that have the largest clientele or are best equipped to implement such a law quickly. This was the model followed in the Cayman Islands.

2) **Clause 2:** The ATI Law is designed to cover only mainland Tanzania. As a result Zanzibar is left out. It is advisable to impress upon Zanzibar's representatives to enact a similar information access law for Zanzibar through its own legislature. **As ATI is an internationally recognized basic human right since 1948 and more recently in the African Charter of Human and People's Rights, all people living in Tanzania irrespective of their place of residence must have the same rights of access to information for their governments and public authorities.**

3) **Clause 2(1)(2)(b):** The ATI law restricts access to information from private bodies only if they are of significant public interest in relation to protection of human rights, environment, public health and safety, exposure of corruption or illegal actions. Another category of public interest is a person's right to seek justice from the courts. **This must also be included as a valid ground for seeking information from private bodies.**

4) **Clause 3:** the definition of "information" is restrictive. As the ATI law is intended to establish a regime of transparency the definition should be formulated in such a manner

[1] Prepared by Ms. Maja Daruwala, Director and Mr. Venkatesh Nayak, Programme Coordinator, Access to Information Programme, Commonwealth Human Rights Initiative, New Delhi, INDIA – April, 2015.

to permit the widest possible forms and nature of information. It is better to replace the definition with the formulation contained in Section 2(f) of the Indian RTI Act[2] which describes a wide variety of forms in which information may be held and includes samples of materials used in a public authority and also models. **As the objective of the law is to provide for information disclosure in public interest to combat corruption, access to samples and models is crucial.**

5) **Clause 4: "Enabling people to effectively combat corruption" must be included as another objective of the ATI Law.**

Part II Right of Access to Information

6) **Clause 5(1):** A progressive ATI Law recognizes the right of people's access not only to information in the control of a public authority or private body (for public interest purposes) but also to information that is held by such bodies in their custody. **The words- "or the custody" may be inserted after the phrase- "which is under the control" in Clause 5(1).**

7) **Clause 5 (2):**

   a) **In accordance with the recommendation made at para #6 above, it is advisable to insert the words- "or custody" after the words "which is under its control".**

   b) It is laudable that the ATI Bill recognizes the right of every person to access information. However the term 'person' is restricted to mean a citizen. This is not in tune with international best practice as it prevents private bodies such as companies, societies, trusts and trade unions from seeking information as a matter of right. It also limits access on grounds of citizenship. ATI is an internationally recognized human right and is available to all persons irrespective of citizenship under the African Charter on Human and People's Rights. **So it is advisable to amend the definition of 'person' in Clause 5(2) to clarify that it includes a natural biological person irrespective of citizenship, and also an artificial juridical entity.**

8) **Clause 6(1):** ATI Laws modelled on international best practice standards are crafted with twin purposes- **(i)** to lay down the procedures for making information readily accessible to people or on receipt of a formal request and **(ii)** to lay down the circumstances under which access may be denied. Both, providing access to information, and denying access, must be governed by the concern for protecting or promoting one or more public interests. Denying access to information by holding that disclosure will not serve any public purpose is not a valid ground. Denial must be based on protecting an important public interest recognized by the ATI law itself such as national security or trade secrets or personal right to privacy etc. In other words, if

[2] See Section 4(1) of India's RTI Act accessible at: http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti_act_2005.pdf

disclosure will harm a public interest recognized and protected in the list of exemptions, then access may be denied. Clause 6(1)(a) adequately provides for this requirement. **Therefore Clause 6(1)(b) may be deleted.**

9) **Clause 6(2)(a):** The expression- "undermine' represents a rather weak threshold for a harm test. **It is advisable to substitute it with the phrase- "cause substantial harm".**

10) **Clause 6(2)(c):** The expression- "undermine' represents a rather weak threshold for a harm test. **It is advisable to substitute it with the phrase- "impede or frustrate".** The phrase "law enforcements" appears to be a typographical error. It may be substituted with the phrase- **"law enforcement authority".**

11) **Clause 6(2)(f):** The phrase- "commercial interest' represents a rather weak threshold for a harm test. Commercial interest may be founded on illegitimate expectations or considerations also. Exemptions must not yield to such demands. **It is advisable to insert the expression – "legitimate" after the expression- "infringe".**

12) **Clause 6(2)(i):** The protection for a party involved in legal proceedings is not a fair one. It is a requirement of fair trial procedures in both civil and criminal law that all evidence may be made public because the "public has the right to every man's evidence". The protection must be in relation to ensuring a fair trial. Similarly only such professional privilege recognised by law must be the ground for exempting disclosure of information. **It is advisable to amend Clause 6(2)(i) as follows: "impede the process of fair trial or confer unjust or unfair advantage on any party in a judicial proceeding or infringe professional privilege that is recognized in law."**

13) **Clause 6(2):** There is no exemption in Clause 6 for ensuring that the integrity of an examination process is preserved. **So it is advisable to insert a new exemption as Clause 6(2)(k) as follows: "compromise the integrity of an examination or selection or recruitment process or the process for granting promotion in rank or grade or pay scale."**

14) **Clause 6(3):** Foreign relations deserve a separate exemption and must not be clubbed with the exemption on national security. **So it is advisable to insert a new exemption as Clause 6(2)(l) as follows: "cause substantial damage to Tanzania's relations with any foreign State or international organization of which Tanzania is a member.**

15) **Clause 6(5):** The time limit specified in the sunset clause for exemptions is too wide. **It is advisable to reduce the period of operation of the exemptions to ten or fifteen years.**

16) **Clause 6(6):** The punishment for disclosing information exempted under the ATI Law is so severe (15 years in prison) that rejections are likely to become the default position of all public authorities and private bodies covered by this law. Information

officers would prefer to play it safe and refuse to disclose even routine information for fear of going to prison. This sub-Clause also runs counter to the intent of Clause 24 provided for later in the Bill. It is advisable to reduce the penalty to a monetary fine and also bring in the establishment of 'mens rea' for punishing an information officer. **It is advisable to amend Clause 6(6) as follows: "Any person who discloses information with malicious intent and in the full knowledge that such information ought not to have been disclosed under this Act commits an offence and may on conviction be liable to a penalty of 'XX Tanzanian Shillings'.**

17) **Clause 6:** Several RTI laws the world over including the Model ATI Law for the African Union contain provisions for disclosing even exempt information if it will serve the public interest better. **It is advisable to insert a new sub-clause (7) as follows: "(7) Despite anything contained in this Section an information holder or the Commission for Human Rights and Good Governance shall provide access if the public interest in disclosure outweighs the harm to any of the interests protected under this Act."**

Part III <u>Access to Information</u>

18) **Clause 7:** There is no guidance as to whether an information holder must appoint only one or more information officers. Section 5(1) of the Indian RTI Act links the numbers to the requirements of dealing with the information requests that are submitted to a public authority. The Clause is also silent about the levels at which they may be appointed. It is general practice to appoint information officers in all administrative units of bodies covered by the law. **It is advisable to insert the phrase- "as may be necessary to in all administrative units or offices of a public authority or private body to give effect to the provisions of this Act."**

19) **Clause 8(1): In accordance with the recommendations made at para #6 and 7 above, the phrase- "or the custody" may be inserted after the phrase- "under the control" in this Clause.**

20) **Clause 8(2):** This provision requires every piece of paper generated or every bit of information collected for a period of 30 years. This requirement places an unjustifiable burden on every information holder. For example, even applications for leave of absence and sanction of leave, will have to be maintained for 30 years. An information holder may simply run out of space to maintain such records unless it digitalises all records. All records keeping, management and archiving or destruction of records for which an information holder has no use must be done in accordance with *The Records and Archives Management Act, 2002.* The Commission for Human Rights and Good Governance must be empowered to issue guidelines for improving records maintenance, management, archivisation and weeding out of old records from time to time. **So it is advisable to amend Clause 8(2) as follows: "For the purpose of sub-section (1) the information holder shall maintain every record or**

information in accordance with the provisions contained in The Records and Archives Management Act, 2002 and according to the guidelines issued by the Commission for Human Rights and Good Governance in consultation with such information holder."

21) **Clause 9(1):** It is laudable that the ATI Bill contains a requirement for proactive disclosure of information by all information holders. However, the list of categories is too short and does not adequately serve the purpose of making information automatically available to people without waiting for them to make a formal request for the same. The extended list must include information about the organization and structure of the information holder body, its budget or balance sheet and reports on expenditure, consultative mechanisms established for getting feedback form the people, norms that govern the functions of the information holder etc. Further a mere desctiption of the manuals used by an information holder for performing its functions is not adedquate. Unless an exemption is attracted, the entire text must be made public. **It is advisable to expand Clause 9(1) along the lines of Section 4(1)(b) of the India's RTI Act and Article 7 of Mexico's *Federal Transparency and Access to Public Government Information Law, 2002*.**[3]

Further, there is no guidance in the ATI Law for the manner in which such proactively disclosed information will be disseminated to ensure easy access to people. Furthermore, there is no requirement of routine disclosure of information relating to government policies and decisions and giving reasons for administrative or quasi-judicial decisions to affected persons. **These matters may be provided for in the manner of Section 4(1)(c), (d) 4(2) and 4(4) of India's RTI Act.**[4]

22) **Clause 10:** ATI is a basic human rights. No reasons need be given by any person for seeking information from the government in just the same way as no person may be compelled to give reasons for exercising or demanding the fulfillment of any other human right. However, in actual practice, information officers may compel a requestor to disclose reasons for seeking information unless there is an express provision in the law that forbids such demands. **It is advisable to insert a new sub-Clause (5) under Clause 10(4) as follows: "(5) While making a request for information under this Act, a person shall not be compelled to give reasons for seeking information by the information officer or any other person."**

23) **Clause 11:** There is no provision for shorter time limits for providing access to information that have a direct bearing on the life and liberty of a person. In such circumstances a 30-day wait may be too long. Several ATI laws including India's RTI Act provide for dealing with such requests on an urgent basis – within 24-48 hours. In such cases it may be necessary for the requestor for establishing the reasons for making the urgent request. **It is advisable to insert a proviso under Clause 11(b) as follows: "Provided that where the information so requested relates to the life or**

[3] See f.n. #1 above and Article 7 of Mexico's *Federal Transparency and Access to Public Government Information Law, 2002*, accessible on the website of the Federal Institute for Access to Public Information (IFAI) at: http://www.ifai.gob.mx/descargar.php?r=/pdf/english/&a=LFTAIPG%20ENG%202010.pdf

[4] See f.n. 2.

liberty of a person, the information officer shall provide such information in accordance with the provisions of this Act within 24 hours upon being satisfied that the reasons provided by the requestor justify the urgency of the request and the immediacy of the response."

24) **Clause 13:** It is laudable that the ATI Bill contains a provision for transfer of an information request from one information holder to another. However the grounds for effecting such transfer are vague and arbitrary. The grounds for transfer must be either that the information sought is in the custody or control of another information holder or it more closely relates to the working of that other body. **It is advisable to amend Clause 13(as follows: "Where the information sought from an information holder under this Act is held by or under the control of any other information holder either partially or entirely, the information officer shall transfer the entire request or such part of it as may relate to the other information holder and give a written notice of such transfer to the person who made the request and both actions shall be completed in no later than seven days from the date of receipt of such request."**

25) **Clause 14:** All decisions of rejection of a request for information under the ATI law must be based on the exemptions listed in Clause 6 and no other reason. The ATI law must make this crystal clear so that information officers do not reject a request for information for extraneous reasons. **It is advisable to insert the phrase- "based on the provisions of this Act and none other" after the phrase "set out reasons for the refusal".**

26) **Clause 15:** It is good practice to seek the views of a third party when information sought by a person relates to such third party. However all information relating to a third party should not be subject to such procedures where there is no adequate reason to do so. In India's RTI Act the view of a third party are sought only if the information requested has been treated as confidential by that third party. This procedure may be followed after the information officer makes a determination that none of the exemptions listed in Clause 6 are attracted. Further, the Interpretations Clause must also define the meaning of the phrase- 'third party'. **It is advisable to amend Clause 15(1) as follows: "Where an information officer intends to disclose the information sought which relates to or has been supplied by a third party and which has been treated as being confidential by that third party, the information officer shall take all reasonable steps to notify such third party. In Clause 3 'third party' may be defined as follows: ""third party" means any person other than the person seeking the information and the information holder who has custody or control of such information."**

Further, nothing in the ATI law provides any guidance to an information officer about what needs to be done after the notice is served on the third party. **It is advisable to insert new sub-Clauses (5) and (6) under Clause 15(4) as follows: "(5) Where a notice is served on a third party under sub-Section (2), the information officer shall take into consideration any representation made by the third party verbally or in writing while arriving at a decision on the request for information. (6) Where an information officer decides in favour of disclosure**

of information under this Section despite anything contained in the representation of such third party, he shall give notice of his decision to such third party and of his right to seek a review of such decision before the Commission for Human Rights and Good Governance."

27) Clause 16: It is advisable that the ATI Law provides for deferral of access to information. However the law must also clarify that such decision is also subject to review by the Commission for Human Rights and Good Governance. **It is advisable that a new sub-Clause (3) be inserted under Clause 16(2) as follows: "Where a request for information made under this Act has been deferred by an information officer, the person making such request shall have the right to seek a review of such decision before the Commission for Human Rights and Good Governance in accordance with the provisions of this Act."**

28) Clause 17(1):

a) In accordance with the recommendation made at para #4 above the form of access must specify that samples may also be provided. **It is advisable to insert a new sub-Clause (g) under Clause 17(1)(f) as follows: "certified samples of materials used by the information holder."**

b) Merely permitting inspection of records is not enough. A requestor must also be permitted to make notes or photograph or videograph the records at his own expense. **It is advisable to amend Clause 17(1)(a) as follows: "inspection of the information and taking of notes or extracts or photographing or videographing the information at his own cost."**

29) Clause 17(3)(a): As Clause 6 already provides for refusing access to information on grounds of national security, there is no reason for including it in Clause 17 again. **It is advisable that Clause 17(3)(a) is deleted.**

30) Clause 18: One of the important principles underlying modern ATI laws is that information once made public shall remain public and no further restrictions may be imposed on its dissemination. Clause 18 criminalises dissemination of information obtained under this Act. This is wholly unnecessary and violates the basic human freedom of speech and expression of persons in an unreasonable manner. Commercial re-use of copyrighted information can always be dealt with under the copyright law prevalent in Tanzania. There is no reason why this issue must be dealt with under the ATI law. **It is advisable that Clause 18 is deleted.**

31) Clause 19:

a) The grounds for filing a review plea before the Commission for Human Rights and Good Governance must be expanded to include more grounds. For example, in many developing countries, it is not uncommon for an information officer to refuse to receive a request for information without reasonable grounds. It is also not uncommon for information officers to supply misleading, false, or incomplete information to a requestor or simply destroying information that was requested. All such actions must be reviewable. **It is advisable to insert the following new grounds for seeking review before the Commission: (e) inability of a**

person to submit a request for information for the reason that no information officer exists in the information holder; (f) refusal by an information officer to receive a request for information from any person without reasonable cause; g) destruction of information that was the subject of a pending request under this Act.

b) There must be a time limit stipulated for seeking a review from the Commission on Human Rights and Good Governance which is missing from the current formulation. **It is advisable to insert the following phrase- "within ninety days of receipt of a decision from the information officer or of the date on which a decision ought to have been made" may be inserted in Clause 19(1) after the phrase- "by a decision of the information holder in relation to the request, may".**

Part IV General Provisions

32) Clause 21: While it is in keeping with international good practice to charge fees for providing access to information, this must not become a discouraging factor for people to seek information under this law. The ATI Law must provide for the principles that must guide the charging of fees under this law and also the categories of people from whom no fee will be charged on account of indigence or because they have sought information in which there is a substantial amount of public interest. **It is advisable to insert the following new sub-clauses under Clause 21 which may renumbered as Clause 21(1):**

(2) The Minister shall make regulations prescribing the rates of fee payable for obtaining information under this Act and the categories of persons from whom no fee shall be charged on grounds of indigence.

(3) All fee chargeable under this Act shall be reasonable and not exceed the actual cost of reproducing the information:

Provided that the Minister or an information holder may waive the requirement of payment of any fee for disclosing information in which there is a substantial amount of public interest.

33) Clause 23:

a) It is laudable that the ATI Law provides for some measure of whistleblower protection. However in the absence of an agency that is expressly mandated with the duty of ensuring the protection of the whistleblower, Clause 21 may remain empty of any real meaning. **It is advisable that the Commission for Human Rights and Good Governance be made the agency responsible for ensuring that a whistleblower is not victimised.** However whistleblower protection requires a separate legal framework for ensuring effective protection for whistleblowers and facilitating whistleblowing in circumstances outside of the ATI Law. CHRI can provide technical assistance for drafting such a law if sought.

b) It is advisable that 'committing a human rights violation" be included in the list of wrongdoings in sub-Clause (2).

34) The only penalty provisions in the ATI Law pertain to the offence of disclosing exempt information or defacing or destroying information that was the subject of a request. While we have recommended tempering down of Clause 6(6), the formulation of Clause 22 may remain as it is. However experience from developing countries like India, Bangladesh and Nepal have shown that information officers commit other kinds of contraventions of the law such as refusing to receive an information request or rejecting a request or delaying the furnishing of information under this Act without reasonable cause. All these contraventions must also be punishable with a graduated system of penalties. Section 20(1) of India's RTI Act may be used as a model for rafting these penalty provisions.[5] **It is advisable that the Commission for Human Rights and Good Governance be vested with the power to impose these penalties after giving the person whose behaviour is under scrutiny an opportunity of presenting his defence.**

CHRI reserves the right to circulate a more detailed analysis and recommendations for strengthening this Bill at a later date.

For more information please contact:
Ms. Maja Daruwala (director@humanrightsinitiative.org) or
Mr. Venkatesh Nayak (venkatesh@humanrigtsinitiative.org)
Commonwealth Human Rights Initiative
#55A, 3rd Floor, Siddharth Chambers-1
Kalu Sarai, New Delhi
INDIA - 110 016
Tel: +91-11-43180 215/200
Fax: + 91-11-26864688
Website: www.humanrightsinitiative.org; www.sartian.org

[5] Ibid.