



Whitepaper

Public Consultation

Review and Reform of the Access to Information Act, 2018

The Information Commission in Seychelles is proposing a review and reform of the Access to Information Act, 2018. The purpose of this paper is for comprehensive consultation with stakeholders before advancing to the Attorney General's Office for legislative drafting and finalization. This paper provides context, outlines preliminary findings, and proposes recommendations.

Executive Summary

The Access to Information Act (ATIA) was enacted on the 20th of July 2018. **The Information Commission (InfoCom)** is the body responsible for administering the ATIA with a mandate *“To foster good governance through enhancing transparency, accountability, integrity in public service and administration, participation of persons in public affairs, including exposing corruption, to recognise the right of access to information envisaged in Article 28 of the Constitution and for matters connected therewith and incidental thereto.”* The InfoCom has been promoting the right of access to public information since 2019. Based on the practical experiences and learning since, ongoing monitoring, and stakeholder feedback, there are some critical gaps in need of addressing. This paper outlines some of the current weaknesses of the ATIA and proposed recommendations for changes. It intends to facilitate in-depth discussion with stakeholders at large including civil society, the Information Officers (IOs) and Head of Information Holders (HOIHs) of Ministries, Department and Agencies (MDAs), the Minister for Information, Cabinet of Ministers, Independent State Institutions, National Assembly and the Attorney General’s Office before legislative amendments are drafted and finalized.

Introduction

Over the past five years, the Information Commission has undertaken the following types of work:

- 1) Advisory consultations;
- 2) Investigations and due justice for complaints;
- 3) Investigations and due justice for appeals;
- 4) Mediation and negotiations;
- 5) Awareness and education programs;
- 6) Advocating proactive disclosure;
- 7) Monitoring and auditing MDAs statutory compliance;
- 8) Developing policies;
- 9) Compiling and publishing access to information reports.

The first three points relating to consultations, complaints and appeals are critical pathway areas for citizens to exercise their rights to access public information. In administering its duties, the InfoCom has faced challenges in terms of delay or time-consuming proceedings inherent within the structural design of the ATIA, inadequately defined terminology, lack of provisions to enforce directives, decisions or orders, and deficiencies for addressing contempt. To deliver on its mandate responsibly and with integrity, the ATIA as the definitive legal accountability mechanism needs to be strengthened to permit practical application and ensure intended justice is served. Some of the recommended changes pertaining to enforcement of directives and matters of contempt or obstruction of due justice merits expedient legislative amendment.

Preliminary Consultation

The InfoCom started planning a reform process in 2022. From the onset, the goal was to promote transparent, evidence based, and participatory approaches that would form the basis of national institutional good governance improvements and effective regulatory reform of the ATIA. The consultation process comprised of surveys, desktop reviews, and dialogues such as:

- A systematic research survey in April and May of 2024;
- Direct in-person and written feedback of the InfoCom IO Convention on the 1st of March 2023, comprising of approximately 125 IOs;
- Feedback from a joint Transparency Initiative Seychelles (TIS) and national media platforms workshop on 10th July 2022;
- 1 to 1 meetings with peer organizations and stakeholders during the course of work including outreach with members of the National Assembly from 2022 to present;
- Monthly leadership meetings 2022 to present;
- Desktop review of the ATIA;
- Desktop review of the body of work related to appeal cases;
- Desktop review of InfoCom strategic documents.

The stakeholders included members of the public who had consultations, complaints or appeals with the InfoCom for an informed perspective, key members of the Seychelles police at various interactions and representative State Counsel discussions from the Attorney General's Office in 2023 and 2024.

The first-hand implementation experiences of the InfoCom and information collected from this consultative process has formed the basis for this paper.

Reasons for Change

Overall, it has been observed that both, the ATIA and InfoCom, have legislative and administrative weaknesses surrounding the following areas:

A) Legislative

- Enforceability;
- Obsolete parts;
- Ill-defined parts;
- Lengthy timeframe and related cumbersome proceedings;
- Replicated proceedings.

B) Administrative

- Inadequate staffing and regulative public service orders;
- Lack of financial autonomy;

- Lack of customized quasi-judicial guidelines and procedures;
- External, part-time, dual-mandated, and competing priorities of IOs;
- Regular turnover of IOs, HOIHs, and staffing;
- Lack of training and systems clearly defining key implementation, enforcement, and prosecution bodies.

Findings and Recommendations

PART VII – APPEAL TO THE INFORMATION COMMISSION

Finding 1 (URGENT HIGH PRIORITY)

There is an absence of clear legal provisions in the Act as to the enforcement of ‘orders, decisions, and directives’ of the InfoCom. There is evidence of appeal cases whereby information holders have ignored directives, decisions, or orders of the InfoCom without any recourse. There are no clear provisions to address contempt within the Act. Penalties outlined in Section 67 are as criminal offences with the police as the enforcement agency. So far, the Attorney General’s Office official stated position is that non-compliance by any person to a ‘directive, decision, or order’ of the InfoCom is not a prosecutable offence.

Moreover, enforcement by the InfoCom entails complex, lengthy, and expensive legal proceedings. The InfoCom lacks adequate specialized set-up, legal personnel, and the financial means to conduct these operations. For the past five (5) years since the enactment of the ATIA, the InfoCom as a quasi-judicial body has had to rely on a part-time consultant in an advisory capacity and this is insufficient.

As a result of lack of enforceability and surrounding mitigating factors, overall the ATIA has proven to be ineffective in this aspect and the InfoCom has had limited effectiveness in the administration of its law.

Recommendation 1

It is recommended that a person’s intentional non-compliance to a ‘directive, decision or order’ issued as per Section 63 of the Act or any other relevant Section of the Act be inserted and explicitly stated in Section 67 of the Act.

Secondly, it is recommended that in addition to a part-time legal consultant, a full-time legal position be added to the InfoCom to support day-to-day necessities.

Finding 2

Section 63 does not distinguish between nor defines ‘directive, decision or order’.

Recommendation 2

It is recommended for this to be reviewed and definitions inserted in the Act.

Finding 3

There is an inconsistency in the fines of Section 63 (3) which omit the HOIH and target only the IO. Both, the Information Officer (IO) in PART II and Head of Information Holder (HOIH), are addressed in relation

in PART IV. Moreover, there is specific reference to the role of HOIH in PART VII Section 58 on a requestor's appeal to the Information Commission.

Recommendation 3

It is recommended that Section 63 (3) should include the HOIH. The HOIH fine imposed may be higher given the differing pay scales, capacities and levels of responsibility.

Finding 4

There is no explicitly stated redress mechanism. It is currently interpreted that anyone affected by the decision of the InfoCom can apply to Court for a judicial review of that decision.

Recommendation 4

It is recommended for this to be reviewed and if necessary, inserted in the Act.

Finding 5

There is no provision to address conflict of interest of the police investigating itself or related agencies under Section 67 to maintain independence.

Recommendation 5

It is recommended for this to be reviewed and inserted in the Act.

Finding 6

Section 58 lacks an enforceable finite timeframe for appeals to be received to the InfoCom.

Recommendation 6

It is recommended for this to be reviewed and inserted in the Act.

Finding 7

A lack of provisions for the InfoCom to refuse or cease to pursue trivial, frivolous, vexatious cases or those made in bad faith.

Recommendation 7

It is recommended for this to be reviewed and inserted in the Act.

PART II – ACCESS TO INFORMATION OF PUBLIC BODIES

Finding 8

Part II relating to IO request formalities and Part IV relating to HOIH review formalities are often repeated. It has been the experience that in practice, the IO initially consults with the HOIH. The HOIH essentially determines the initial request and the response is communicated by the IO. Subsequently the HOIH reviews the request a second time with the same outcome. This impedes the efficiency of the request timeframe and effectiveness of the Act.

Furthermore, the request timeframe to information provision or decision determination is too lengthy. It takes a total of fifty (50) days counting a twenty-one (21) day provision to supply information in

normal course with a fourteen (14) day extension, and a fifteen (15) day review period. Often times, further time lapses in following up in between these stages before culminating in an appeal case to the InfoCom. This takes additional time to investigate and find recourse.

Recommendation 8

It is recommended for this to be reviewed and merging or streamlining Part IV Section 34 review with Part II Access to Information of Public Bodies. It could allow a reduced timeframe of fifteen (15) or more days.

Finding 9

Section 7(1 to 2) pertaining to the designation of the IOs lacks consideration for times when the IOs post is temporarily absent or vacant for long periods and what qualifies a long period. There is no Acting IO mechanism nor legal protection for Acting IOs.

Often times, the HOIH assumes the role of the Acting IO. This currently creates legal conflicts of provisions in PART II for the IO and PART IV for the HOIH overlapping.

Recommendation 9

It is recommended for this to be reviewed and addressed in the Act. It is recommended that the HOIH be permitted to act temporarily as IO in the absence or resignation of IO with an acting period of not more than 30 days.

Finding 10

There is a provision for one (1) IO per entity. Some MDAs are significantly operationally complex or larger and one (1) IO is insufficient to bear the load.

Recommendation 10

It is recommended that provisions are reviewed along with connected remunerative policies.

PART III – EXEMPTIONS

Finding 11

Section 32 (1) does not provide for a definition to apply to ‘manifestly vexatious’ requests.

Recommendation 11

It is recommended for this to be reviewed and inserted in the Act.

Finding 12

There is inconsistency in the treatment of third party rights, specifically Section 33 (4) permits automatic release of information for cases of third party unavailability. Once this information is released in the public domain by the IO and if subsequently reviewed by the HOIH or appealed to the InfoCom and overturned, the information would already be in the public domain. These parts contradict each other.

Recommendation 12

It is recommended for this to be reviewed and furthermore, considered alongside the newly enacted 2023 Data Protection Act.

PART V – INFORMATION COMMISSION

Finding 13

Section 44 (a to d) contradicts Section 37(1).

Recommendation 13

It is recommended that Section 44 (a to d) add “*Office*” and read “.....*of the Office of the Information Commission*”.

Finding 14

The CEO and Commissioners terms need to be revised multiple times there are minor or major revisions to the salary table, contracts, or other causing delays and undue administrative burden.

Recommendation 14

It is recommended for Section 37(4) Section 37(4) to be reviewed and amended as necessary as per current laws and policies. An option could be by repealing the words “*shall be such as may be prescribed*” and substituting the words “*in such form and format as the Minister responsible for information may determine*”. Furthermore, Section 41 (2) Section 41 (2) is amended by repealing the words “*shall be such as may be prescribed*” and substituting the words “*in such form and format as the Information Commission may determine*” or otherwise.

PART VI – POWERS AND DUTIES OF THE INFORMATION COMMISSION

Finding 15

Section 52 on ‘Implementation Plan’ has not been applied. Section 53 ‘Information Manual’ and 54 ‘Annual Report’ have been applied. The numbers of reports, plans and/or manuals are administratively burdensome for MDA’s.

Recommendation 15

It is recommended for this to be reviewed and streamlined.

Consultation Period

The InfoCom would be grateful for any comments emailed to mhasan@infocom.sc by 31st January 2025.