MASTERS THESIS

Assessing the Laws and Practices of Access to Information Law in Africa

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Dedication

This work is dedicated to my loving daughter Josepine Barrere and my mother Rebecca Baindu Abdulai who have all being strong emotional pillars in my life. Certainly ladies are always strong pillars to lean on and my two ‘mothers and sisters’ have serve me well.

Open Society Justice Initiative is also strongly in my thought for giving me the opportunity and all the guidance necessary to undertake this work and complete my graduate school work. This work is devoted to Zaza Namoradz who shouldered me in difficult times in Budapest.

This work is also devoted to all the people who are campaigning for the freedom of information around the world, and those working assiduously to create a better Sierra Leone. To the youthful activitists in Sierra Leone, I say bravo to you and keep the flame burning.

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This work would have been difficult without the helping hand of many people. First I would thank my supervisor for his assiduous comments and guidance throughout this project.

Also, Article 19 has been of great inspiration to me considering the fact that I spent three month in their office doing my research and helping with work on access to information in Africa. My main source of information came from Article 19.

It would be a great disservice not to mention my two colleagues from Nigeria and Uganda: Edetaen Ojo and Patrick who in diverse ways helped me with data and granted me interviews, answered my sometimes disturbing emails and picking up my phone calls whenever I need to talk them

Abstract

Freedom of Information has gained an alarming prominence among political, as well as legal, scholars around the world as both a good governance and human rights protection tool. The essence and ramifications of this concept has remained vague and various laws around the world have given different interpretations to the established strands for a solid freedom of information law. This has produced a difference in laws in terms of the degree of adherence, from very good laws to average laws. Advocacy has also been led by mainly transparency leading civil society organisations around the world. Many have face insurmountable difficulties but are still pushing. This thesis would examine the content of an ideal FOI law and the established principles in general; assesses two advocacy campaigns in Africa – Sierra Leone and Nigeria; and analysis two of the four laws in the continent – Uganda and South Africa.

Introduction

Since attaining independence, African nations have struggled to provide better lives for their people. The continent has been enamoured by corruption, mismanagement and maladministration that have exploded into civil wars and other forms of conflicts of unimaginable magnitude. Poverty, diseases, reliance on the international donor agencies are perverse with most Africa Countries.

There are very few Freedom of Information (FOI) regimes in Africa, but there are many efforts at instituting many. In countries where FOI has worked, there is less poverty, under development and a disproportionate development in democracy and human rights protection. For FOI to be implmented many laws have changed in South Africa and Uganda and the constitutions expressly mandates the legislature to pass a law. On the other hand, countries without FOI are languishing in among the less developed in the world and found it had to practice true democracy and protect human rights. Bad, archaic, draconian laws remain in the statute books and the constitution is either silent on FOI or has weak provisions.

This research aims to identify this legal set-up and compare good practices and legal provisions and practices in South Africa for instance that have law in provision. It will argue that the reasons why some countries in Africa experience poverty is due to lack of transparency. This work will further prove that the culture of secrecy that prevents the free flow of information is responsible for many of Africa's woes. It will further postulate that the institutionalization of secrecy laws, immediately after independence, resulted in the erosion of good governance mechanisms like transparency and accountability, proper democracy and human rights adherence in Africa. The thesis will also show that South Africa with a strong

access to information law has a stronger democracy, better human rights record and is more developed than Uganda with a weak law; that Nigeria's advocacy for a freedom of information law has been stronger compared to the campaign in Sierra Leone due to quality of leadership in Nigeria.

The phrase 'freedom of information' is ambivalent, imprecise and uninstructive. Certainly, the unsure characteristic of the concept has led to different terminology offered by various schools of thought based on their intent and purposes. Among these terms include "Access to Information" (ATI)[1]; "Freedom of information (FOI)"[2]; "Right to Information" (RTI)[3]; and Right to Know Law. However, whatever the nomenclature, the holistic objective is to promote and protect the publics' rights to know.

One definition underpins that there exist a "right to access information, notably, government information and that it is freely available rather than closely restricted".[4] The problem with this definition is with the second strand which restricts access to information to mostly government held data. This narrow definition offered by Beats and Cripps, leaves out information held by private institutions like banks, mining companies, hospitals. Another problem with the definition is information of the nature cited is not free and can only be available when the holder deems it necessary and fit to release it, or some statutory enforcement duty is placed on it to be released. Even with this definition there have been many disagreements over the shape a working definition should take. Many writers on the

[1] "Open Society Justice Initiative and the Article 19 Global Free of Expression Campaign" are leading in the use of this term.
[2] FOI is the most common but disputed name and has been used by many institution including the United Nations. However this has prompted much controversy as opponents claim there is no concept like FOI.
[3] Commonwealth Human Rights Initiatives (CHRI) an advocacy based NGO based in New Delhi, India, advocating on the concept has persistent used this name
[4] Beatson and Cripps, "Freedom of Expression and Information", 1998. Oxford, pg 65

subject have shy away from the definition problem and rather offered types, elements and importance indicative of what the phrase means.

Perhaps a working definition could be suggested by this work as "the right to access information, inspect works and information, taking notes and extracts and obtaining certified copies of information, or taking sample materials of data, records and information held by private and public bodies in a society".[5] Though this working framework will invite questions of the meaning of "data" and "records" and the extent of what is meant by "public" and "private bodies", it, nonetheless, include the missing ingredient in other scholarly works.

The common law[6] failed to develop a concept of freedom of information, let alone formulate a body of jurisprudence based on such concept. The definition suggested by Beatson and Cripps above derives inspiration not from the common law, but the United States of America FOI law that was promulgated in 1966[7]. The only areas where common law sanctions information to be released are "contract, equitable or legal relations". Common law, including it fairest aspect – equity omitted to impose any duty to make information available. Where such a right exists the court would enforce it. For example, a court can issue an order to 'enforce a councilor's right' to examine a public documents held by a local government authority by making an order for production, in instances where there is " a bona fide ground for seeing the document"[8]. Clearly, certain procedural matters in "such as discovery, interrogatories, subpoena and orders for production impute obligation to avail particular information". Nonetheless, the above listed categories "fall short of sanctioning general access

[5] This is a definition I am offering and hope it would be recognized since I believe I covers many of the untouched aspect that many definitions have not offered
[6] Common law is regarded as the oldest form of law that develops before a recorded date of 1066 when the Roman conquered England. The absence on any jurisprudence could only be glaring and suspect.
[7] "5 USC 552 (1970 edn. Supp V)"
[8] "R. V Southworth Corporations, ex p Wrighton" (1907) 97 LT 431 at 432 per Lord Alverston.

to information." The secrecy cultures that have prevail over 'the operations of government which thrived in the United Kingdom[9] and Australia, in shape contrast to the United States where a stronger tradition of open government has prevailed',[10] a culture that has been attributed, though partially, to the First Amendments.

It is clear now that the common law has shown clear failure, however the civil law system took a different turn and produced a quite different approach on freedom of information. Quite opposite of the most alluded claim of the concept having evolved in the United States, freedom of information took root much earlier than the mid-1960s. It is now established that Sweden's "Freedom of the Press Act that was part of its 1776 constitution"[11] was the first access to information provision in the world, which demands that "all 'official' documents are now available for inspection and copying, though public cooperation, defined as commercial organization, were excluded". Under the Swedish law, it was held to be an exception that 'international memorandum' cannot be accessed until such document is filed. However, any other "(d)ocuments received by, or dispatched by, the authority are within the terms of the Act"[12]. It went further to tabulate the statutory details of this exemption in the Secrecy Act states that "classes of document and not their contents". Furthermore, it provided that there is a two to seventy year lucid period when information cannot be released. Like all modern laws, the Acts gives the right for appeal to an Administrative Court where a request has been refused. "This provision is noteworthy because, at that time, it was quite exceptional for any thought in this direction and considering the fact that appeal was cheap, readily available and

[9] Braittain S. Steering the Economy: The Role of the Treasury, (London: Penguim, 1972) 63. Here the it is affirm that the treasury in the UK and Australia has been influence to maintaining the culture of secrecy.
[10] See generally "New York Times Co. v United States 403 US 713 (1971): in this case the Supreme Court refused an injunction to restrain publication in the interests of national security of the Pentagon papers, a series of papers on high level policy discussion and decision relating to Vietnam War , which was obtain form the Pentagon without authority.
[11] Ibid
[12] Birkinshaw, Patrick Freedom of Information: The Law, the Practice an the Ideal. Pg. 95 (2001) Butterworths

administered by the Date Inspection Board, created by the Data Act, this was just phenomena".[13] Of some controversy has been the clash between its openness culture and that the limited liberal laws of the European Union..

The origin and controversy of nomenclature and meaning apart, the freedom of information concept is held to protect human rights. As Mary Robinson[14] once stated "*you can't claim your right if you don't know them*" and truly so, rights can only be adhered to when the holder of such rights request for respect and protection of it. Obviously there are legal rights regimes that offer rights and obligations, the people can only claim rights against the state when such rights are well publicized. Additionally, obligations can only be fulfilled when the obligator is aware of his obligations. In order for the adage "ignorance of the law is no excuse" to be well apt, the people should know their obligation.

"The right to access to information held by public bodies has now been regarded as a major benchmark of democratic development."[15] Free flow of information enhances pure and proper democracy as it encourages citizen's participation in governance, informed electorates on voting choices and creates transparent and open society. Transparency brings accountability, which in turns produces effective and efficient service delivery. A tool for development is transparency, unlike corruption, and proper service delivery of which the people are informed of the costs and benefit analysis involved. And democracy's ingredient is development and a wheel for a successful democracy depends on how best the people can actualize a better standard of living.

[13] Ibid
[14] Former United Nation High Commissioner for Human Rights
[15] A Report done by Open Society Justice Initiative, titled "Transparency and Silence: A Survey of Access to Information Laws and Practices" in 14 Countries, (2006)

Several academics as well other works have been done in Africa at country and sub-regional level; however, none has been done at continental or regional level. Oswald Hanciles,[16] concentrated on the need for FOI in "Sierra Leone and highlighted in detail the significance of FOI to the development of"[17] human rights, development, democracy and transparency and accountability. Started with a long history of Sierra Leone that went into pre-colonial, colonial and post-colonial regimes in Sierra Leone and went further to state that

> since Sierra Leone emerged from its bloody civil war, the government of President Ahmad Tejan Kabbah has had to face the massive task of reversing the chronic problems of poverty, ethnic strife and corruption that threatened the country's stability. However, the government's ability to crack down on these problems may soon be given a vital boost if the efforts of some civil society groups result in the Government taking the initiative to pass a national freedom of information (FOI) law. He then delved into the FOI status around the world: "currently, around the world, over sixty countries have enacted FOI laws.[18]

Formerly considered the province of industrialized nations, developing countries have increasingly viewed the implementation of a FOI law as a key tool for promoting good governance and facilitating public participation"[19]. Oswald's article, however, made a great omission. It failed to point-out the dangers of FOI in a new democracy: the overzealous used of access to information may led to reckless journalism, lack of state institutions to cope with demands, and the need to raise the level of education before FOI could be meaningful to the people. Also notably absent is not explaining the fundamentals of FOI; and the generally accepted exemptions that will inform any reader of the extent and limit of FOI in this twenty-two page article. It was worth mentioning these two rather than focusing more on the carnage of the recent civil way in Sierra Leone. Most importantly, this piece is lacking in legal analyses and comparative flavor, it centers more on historical and sociological findings of Sierra Leone alone.

[16] Lecture Media Law, Fourah Bay College, University of Sierra Leone
[17] Supra 16
[18] Ibid
[19] Oswald H. Freedom of Information: Promoting Governance and Democratic Development in Sierra Leone (Human Rights Mirror) pg. 8

Many African and international organizations[20] have done extensive work on FOI in relation to the legal environments in some African countries. Like stated earlier, and "as a result of the sparseness"[21] of the FOI in the continent, these advocacy works have focused on specific countries. Open Society Justice Initiative's survey[22], covers only four countries in Africa: South Africa, Nigeria, Kenya and Ghana; and, specifically, it only assessed the implementation mechanism. Of the four countries, only South Africa has an FOI Law, which leaves one to wonder why Uganda was not included since it has operated an FOI regime since 2005. The Report[23] made recommendations on implementation policies; these recommendations are very good in practical situations like South Africa. However, the countries covered have not passed the threshold of instituting a law, so implementation advice would be less meaningful at this stage. Article 19 and Commonwealth Human Rights Initiatives has done many reports, comments and legal analysis on FOI laws for Sierra Leone, Kenya, Nigeria and Ghana at country specific level. The two organizations are NGOs and there work might not be classed as academic nor are the comparative enough to cover more countries in the region.

The closest we have come is a comparative analysis of FOI laws and laws affecting the promulgation and practice of free flow of information is a Report[24] done by MISA[25]. This report edited by Titus Moetsabi[26], covers ten countries in the southern Africa region, viewing

[20] Article 19; Open Society Justice Initiative; Media Institute for South Africa; Commonwealth Human Rights Initiatives, Media Rights Agenda; Society for Democratic Initiatives, Sierra Leone and Open Democracy Advocacy Centre. All have done some extensive legal analyses of FOI in different countries and sub regions.
[21] See generally FOI and Media in South Caucasus, a report by Freedom Information found on www.freedominfo.org/reports
[22] Transparency and Silence: A survey of Access to Information Laws and Practices in 14 Countries 2007
[23] Ib. 16
[24] Baseline Report on the State of Access to Information in SADC (Southern Africa Development Cooperation: a sub regional body for development and governance cooperation)
[25] Media Institute on South Africa, an advocacy group based in Namibia
[26] He is an avid media lawyers and a colleague of the International Media Lawyers Association

and exploring the constitutional framework and other legislation of Angola, Zambia, Zimbabwe, Namibia, Mozambique, Swaziland, Malawi, Lesotho, Botswana, and South Africa. Detailly assessing the constitution of these countries as against the international obligations on the rights to grant their people access to information, the reports examined the UDHR[27], ICCPR[28], SADC Agreement, and ACHPR[29], pointing out specific provisions that provides for FOI and reiterating states obligations. Further, the report reveals that only South Africa, Angola, Uganda, and Zimbabwe have constitutional provisions for access to information. The others lack such provisions, making all other laws bad laws in light of access to information. It went on to critique the very constitutional provisions of countries with such protection and make recommendations on the need to improve the constitutional measures. What is however interesting of this report is that it went into practical issues of FOI affecting women and youth. Using "macro indicators in relations to women and youth"[30], the lack of correct information has hindered a consensus on the definition of youth and has severally affected socio-economic rights promotion and protections. The report concluded that: the access to public information:

> whether as a self standing rights or an incident of the rights of freedom of expression straddles numerous aspects of democratic society in manner quite unlike other fundamental rights we enjoy. It extends to and can conceivably be regarded as essential to the fulfillment of other rights- notably socio-economic rights and other political freedoms. [31]

Both the rights of "access to information and freedom of expression form the backbone of many vital institutions and activities of civil society."[32] However, this report is limited to only Southern Africa countries, and further fails to neither make any comparative analyses of the FOI regime in even the region covered nor address advocacy mechanisms.

[27] United Nations, in its Universal Declaration on Human Rights affirmed these principles in 1948
[28] "International Covenant on Civil and Political Rights", 1966
[29] "African Charter on Human Rights and Peoples Right", is very elaborative on this
[30] Id 12, p 40
[31] Id. 12. 41
[32] Id. 12, Supra 41

The gap of regional constitutional and other legal comparative scholarly work on FOI regimes that will identify gains and shortcomings on the continent has ushered in the need for this research. This study will compare the two most successful FOI regimes in Africa- Uganda and South Africa and point out the differences in legal and practical infrastructure that has accounted for a full implementation and realization of FOI benefits in these countries. This microcosm represents south, east and central Africa pointing out the lack of either strong or none regimes in other countries in the regions apart from the two. Further, the research will fill the lacuna of advocacy status in Africa, using West Africa's Nigeria and Sierra as microcosm to point out the short comings and strengths of advocacy efforts. This work will not examine every fifty-three countries on the continent, but, because of the similarities in political, legal, economic and social situation, would preview selected countries from the various regions as representative studies.

This study will attempt to face these questions by examining the legal and practical environment of selected countries as a microcosm of the region. In order to answer the questions posed, the research will use comparative methodology to unearth answers. Review of national constitutional provisions and other legislations and a comparison of case law will form part of the exercise. Additionally, analyses of these laws in a comparative perspective will achieve the goals of the study by exposing the virtues and defects in the legal, practical and advocacy regimes in the selected countries.

This research will begin by looking at the general background of the concept of 'access to information', how the concept has evolved, the international law related to the concept and

case laws that have been decided, then the main principles underlining the concept and the nature and scope of exception.

Chapter two will then focus on the Africa situation: assessing the legal environment in four countries- South Africa, Uganda, Nigeria and Sierra Leone. This assessment will cover constitutional guarantees of the citizen's right to know, if any; subordinate legal instruments enhancing and inhibiting free flow of information; and some state practices in the same direction.

Chapter three review the 'freedom of information laws' in South Africa and Uganda; it is clear that to countries have passed the freedom of information laws with different peculiarity, and compare the practical strength and weakness of the two laws. Furthermore, the chapter will review the draft laws of Nigeria and Sierra Leone and identify their pros and cons. It will further examine the actors behind the campaign in the two countries and identify their strength and weakness.

The comparative analysis will lead to a conclusion in chapter four, which will make recommendation on how the countries with law can improve their legal environment, practical approach and institutional strength for an effective implementation. Recommendations on best civil society practices in terms of advocacy strategies, coalition building, and resource mobilization would be suggested here.

CHAPTER ONE

"Fundamentals of Access to Information"

This chapter will assess the fundamentals of access to information as it should ideally be in any law that strive to protect the public's rights to know. There are many bills and laws around the world. Some African countries have adopted four bills into law, all different but a commonality has been established by the international standards developed by the Article 19 and Open Society Justice Initiative. This commonality, now referred to as the "basic principles" has been accepted as a template on which all meaningful bills should reflect. For instance, the Sierra Leone and Nigeria draft bills are heavily influenced by this template, making them a mark for success in protecting the rights to public information is these countries. The South African bill is quite different considering the apartheid background of the country. This would be fully discussed in chapter four.

This paper looks at the issue of freedom of information, one of the inalienable human rights established by international law.

What is "freedom of information" and why is it important?

Put simply, freedom of information is the right for citizens of society to access information, documents, materials, data or records used by any public or, where relevant, private body.

Freedom of information was recognized as a fundamental human right by the United Nations in its first General Assembly session. It was declared that:

"Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."[33]

Article 19 of the Universal Declaration of Human Rights, signed in 1948 and adopted by Sierra Leone in [1961] goes on to declare that:

> ***"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."***[34]

Why does the United Nations afford the right to freedom of information such a pivotal place in its hierarchy of freedoms? Because civilized society has recognized that freedom of information is important in securing a progressive democratic society for, *inter alia*, the following reasons:

The stemming of corruption – access to information ensures that people are aware of the decisions, and the motivations behind those decisions, of their government and public authorities. Only when citizens can enforce their rights to access to information can they verify that government and public authority actions were not motivated by self-interest and were duly carried out for the welfare of society as a whole. In essence, only freedom of information can ensure accountability of the Executive.

[33] Resolution 59(1) of the first UN General Assembly session, passed on 14 December 1946.
[34] Article 19 of the "Universal Declaration on Human Rights" 1964

The enforcement of other fundamental rights – only with access to relevant information held by public authorities can citizens enforce other fundamental rights such as the rights to housing and education. Without such information, the governance structure surrounding housing and education is opaque to citizens who are not involved in public office and, therefore, it is very difficult for such citizens to enforce their rights.

The proper functioning of democracy – if government and public authorities know that citizens do not have access to important information on the running of State then it is very easy for them to mislead the people on the efficacy of their government by selectively releasing "good news" stories. This renders it very difficult for citizens to properly assess the success of government and therefore impedes their ability to effectively use their right to vote.

Conflict prevention – Openness and transparency and a free exchange of information engender trust between institutions of government and its citizens. This fosters a more harmonious environment and reduces the likelihood of civil conflict.

International relations – the UN recognizes that "understanding and co-operation among nations are impossible without an alert and sound world opinion which, in turn, is wholly dependent upon freedom of information".[35] For these reasons, and many more, over 90 states, representing nearly 5 billion people, already have a freedom of information law of some kind while another 50 have proposals to adopt laws pending.[36]

International and regional legislation, authoritative statements and precedent

[35] See resolution 59(1) of the first UN General Assembly Session.

[36] See www.article19.org/pdfs/press/five-billion-now-have-right-to-information.pdf.

Freedom of information has a long international history and its legislative roots can be traced back as early as 1776 when Sweden's Freedom of the Press Act prescribed that "every Swedish subject shall have free access to official documents".[37]

As discussed aboved, the UN considered freedom of information important enough for it to be addressed at its first General Assembly session. The UN further elucidated the point in its *International Covenant on Civil and Political Rights* (ICCPR)[38] which was ratified by Sierra Leone on 23 August 1996:

> ***"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice."***[39]

Freedom to "receive" information was therefore entrenched in the general concept of freedom of expression. This declaration has been interpreted as imposing on States the obligation to enact freedom of information laws. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws[40] and the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has noted:

> ***"The right to seek or have access to information is one of the most essential elements of freedom of speech and expression…[It] imposes a positive***

[37] Article 1, Chapter 2.
[38] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[39] Article 19 of the ICCPR.
[40] See, for example, its comments on implementation of the ICCPR in Azerbaijan: UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".

obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems."[41]

Regionally, the African Charter on Human and Peoples' Rights[42], which was ratified, prospectively, by Sierra Leone in 1981, also protects freedom of information in Article 9 of the Charter:

"***Every individual shall have the right to receive information.***"

Drawing on Article 9 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa*[43], espousing the following principles:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
    - everyone has the right to access information held by public bodies
    - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right

[41] See report of the Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1995/31, 14 December 1995, para 35; and the corresponding 1998 Report UN Doc. E/CN.4/1998/40, 28 January 1998, para 14.
[42] Drafted under the auspices of the Organization of African Unity and came into effect on 21 October 1986.
[43] Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts
- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society;
- secrecy laws shall be amended as necessary to comply with freedom of information principles

Freedom of information has also been recognized in other regions and by international organizations, including the Council of Europe[44] and the Organization of American States[45], and a number of specific treaties also require ratifying States to introduce freedom of information laws.[46]

Freedom of information has also been addressed in regional case law. In *Claude-Reyes et al. v Chile*[47], the Inter-American Court of Human Rights found against Chile in relation to its refusal to provide Claude-Reyes and others with all the information they requested from the Foreign Investment Committee on a deforestation project to be executed in Chile without providing any valid justification under Chilean law.

[44] See Recommendation (2002)2 of the Committee of Ministers of the Council of Europe on access to official documents.
[45] See Organization of American States General Assembly Resolution AG/RES. 1932 (XXXII-O/03): Access to public information: strengthening democracy. See also the Inter-American Declaration of Principles on Freedom of Expression, agreed by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000, Principles 3 and 4.
[46] For example, Article 13 of the UN Convention against Corruption, ratified by Sierra Leone on 30 September 2004, requires ratifying States to ensure "that the public has effective access to information".
[47] Judgment of 19 September 2006.

Internationally recognized minimum standards for freedom of information legislation

The legislation, authoritative statements and case law referred to above, together with work by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression[48] and freedom of information working groups such as Article 19[49] and Open Society Justice Initiatives[50] have developed a set of internationally recognized minimum standards to be met by any meaningful freedom of information legislation. These include a strong presumption in favour of disclosure (the principle of maximum disclosure); broad definitions of "information" and "bodies"; a positive obligation to publish key categories of information; clear and narrowly drawn exceptions; and effective oversight of the implementation of freedom of information rights by an independent administrative body.

(1) "The Principle of Maximum Disclosure"

This principle recognizes that, as public bodies hold information not for themselves but as custodians of the public good, *all* information held by them should, in principle, be discloseable, subject only to narrow exceptions to protect certain overriding interests.

As set out in Article 9 of the African Charter on Human and Peoples' Rights, "every individual" has the right to receive information.[51] Therefore, it is not permissible for a public body to discriminate against any individual, for any reason, in processing such individual's

[48] See 1999 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 18 January 2000, UN Doc. E/CN.4/2000/63, paragraphs 42-44.
[49] A London based global campaign group for freedom of expression. See www.article19.org.
[50] An international human rights advocacy group. See www.soros.org/initiatives/justice.
[51] See page 6 above.

information request.[52] Further, individuals requesting access to information should not be required to demonstrate a specific interest in the information[53]. It should also be noted that if a public body refuses an information request, it has a positive obligation to justify its refusal.[54]

(2) Broad definitions of "information" and "bodies"

It is important that the pivotal terms "information" and "bodies" are defined sufficiently broadly in any freedom of information legislation so as to reflect the principle of maximum disclosure.

"Information"

We have seen that international legislation already provides for a fairly wide definition of "information". As referred to at page 7 of this paper, the ICCPR refers to information imparted "…orally, in writing or print, in the form of art or through any other media…". Therefore, the term "information" should be drafted in any freedom of information legislation so that it either explicitly or implicitly covers information stored in *any* form (e.g. manuscript, electronic storage, sound recordings, video tape or DVD). It should also cover information regardless of its source (whether it was produced by the public body or some other body) and the date of production.

"Bodies"

[52] See Principle 4 of the Johannesburg Principles on national security, freedom of expression and access to information (see footnote [31] for further details of the Principles).
[53] In Bulgaria, on April 13, 2005, the Bulgarian Supreme Administrative Court (SAC) decided a case brought by an NGO that was denied access to mayoral records related to public registers. The mayor placed a hurdle to access the information by requiring the NGO to produce a document showing its court registration. The SAC ruled that the mayor had violated the fundamental right of all citizens to access information from public bodies.
[54] See Principle 12 of the Johannesburg Principles.

As we have seen at page 7 of this paper, the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights states that "everyone has the right to access information held by public bodies…[and information] held by private bodies which is necessary for the exercise or protection of any right." Therefore, it is necessary to consider the public/private body distinction.

The definition of "public body" should focus on the type of service provided rather than on any formal designation. Therefore, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalized industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organizations), judicial bodies and private bodies which carry out public functions (e.g. a private security firm that guards prisoners carries out a public function and is therefore to be regarded as a "public body" to the extent of its public functions). This latter example is particularly important in this era of outsourcing. It would clearly be inappropriate to allow public bodies to avoid their disclosure obligations simply by privatizing their work.

"Private body" should generally be interpreted as a body that either carries on business or has a separate legal personality. Such an interpretation would catch individuals or loose collectives, to the extent they carry on business, and also corporates, partnerships or any other body with a legal personality distinct from its owners, managers or employees.

(3) Positive obligation to publish key categories of information

We have seen at page 7 of this paper that the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights

refers to a positive requirement for public bodies to actively publish important information of significant public interest even in the absence of a request for information. This positive obligation on public bodies to take specific measures to ensure a free flow of information to the public is, arguably, as important as the request-driven aspect of the freedom of information right.

At the very minimum, public bodies should be under an obligation to publish the following:

- operational information about how the public body functions (including costs, objectives, audited accounts, standards, achievements, etc.)
- information on any requests, complaints or other direct actions which members of the public may take in relation to the body
- guidance on the process by which members of the public may provide input into major policy or legislative proposals
- the content of any decision or policy affecting the public along with reasons for the decision and background materials of importance in framing the decision

Some progressive national legislation has gone further than this. For example, the Indian Right to Information Act 2005, one of the most progressive access to information laws in the world, requires public bodies to publish, in addition to the above:

- budget details
- reasons for any administrative or quasi-judicial decisions that affect individuals
- facts and other information that they hold in regard to important policies or decisions that affect the public[55]

(4) Exceptions

[55] See Chapter 2, section 3.

Obviously, it is not appropriate for certain information to be placed in public hands. However, there needs to be a balance between addressing this issue and satisfying the principle of maximum disclosure. Therefore, any exclusion to the right of freedom of information should be unambiguous and narrow in nature.

International law[56] has established a three-limb test which a public or private body, where applicable, must satisfy in order to justify non-disclosure of a particular piece of information. Such a body must establish that:

- the information relates to a legitimate protected interest, such as law enforcement or national security;
- releasing the information would do serious harm to that interest; AND
- the harm caused by disclosure is greater than the public interest in disclosure

The test implies that no public body or type of information should be outside the scope of the legislation altogether and that every request must be judged on its own merits.

A complete list of "legitimate protected interests" should be included in the relevant legislation.

Case law has established certain recognized "legitimate protected interests" as follows:

- Classified Information[57]
- Personnel Rules[58]
- Records specifically restricted from disclosure under another statute[59]
- Trade secrets and confidential commercial information[60]

[56] [***WILL HAVE TO INCLUDE A SOURCE HERE***]
[57] See *Environmental Protection Agency v Mink* 410 U.S 73 (1973).
[58] See *Department of Air Force v Rose* 425 U.S 352 (1975).
[59] See *Federal Aviation Administration v Robertson* 422 U.S 255 (1975).
[60] See *Public Citizen Health Research Group v Federal Drug Administration* 185 F 3d 898 (D.C. Cir.1999).

- Privileged Government Memoranda[61]
- Personal Privacy[62]
- Law Enforcement records[63]

Another commonly invoked "legitimate protected interest" is protection of national security. The Johannesburg Principles on national security, freedom of expression and access to information[64] contain an important analysis of the proper scope and nature of national security exceptions to freedom of information rights.

The Principles were agreed against a background of some of the most serious violations of human rights and fundamental freedoms being justified by governments as necessary to protect security and the desire of the Johannesburg collaborators to "promote a clear recognition of the limited scope of restrictions on freedom of information and expression that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms".[65]

The Principles suggest that:

[61] See *State of Maine v Department of the Interior* U.S CA for the First Circuit No.01-1234.
[62] See *National Association of Home Builders v Norton* 309 F 3d 26 (D.C. Cir. 2002).
[63] See *National Labor Relations Board v Robbins Tire and Rubber Co.* 437 U.S 214 (1978).
[64] The Principles were adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by Article 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand in Johannesburg. The Principles are based on "international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations". The Principles have been endorsed by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission regularly in their recent annual resolutions on freedom of expression.
[65] See Preamble to the Principles.

> ***"No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government."***[66]

It is worth summarizing the analysis of the component parts of this paragraph as it appears in the Principles:

Prescribed by law – Any restriction must be prescribed by law. The law must be drawn narrowly and with precision. The law should provide for safeguards against abuse, including judicial scrutiny by an independent court or tribunal.[67]

Necessary in a democratic society – to establish necessity, a government must demonstrate that: (a) the information poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.[68]

Legitimate national security interest – A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use of threat or force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violently overthrow the government. This does not cover interests unrelated to national security such as protecting a

[66] Principle 1(d).
[67] See Principle 1.1.
[68] See Principle 1.3.

government from exposure of wrongdoing, concealing information about the functioning of public institutions, entrenching a particular ideology or suppressing industrial unrest.[69]

Even where a restriction is justified, the Principles expound that a State may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.[70]

Restrictions should also, where relevant, be time limited. For example, the justification for restricting disclosure on the basis of national security may cease once a specific national security threat subsides.

Returning to the three-limb test for exceptions, the second part of the test requires that access may be refused only where disclosure seriously harms a legitimate protected interest, not where the information merely relates to that interest. In some cases disclosure may harm as well as benefit such interest but the key test is whether the net effect of disclosure would be to cause serious harm to such interest.

The third part of the test requires that, even if the first two limbs of the test are satisfied, the information should still be disclosed if the benefits of public interest in the disclosure outweigh the serious harm caused to the legitimate protected interest.

Principle 12 of the Johannesburg Principles echoes this public interest override on the use of any restrictions by providing that:

[69] See Principle 2.
[70] See Principle 12.

"in all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration."

By way of example, there may be circumstances where certain information may be private in nature but its disclosure is justified (and therefore the relevant exception is overridden) by the fact that it would expose high-level corruption within government and therefore the public interest in having the information disclosed is greater than the harm to the relevant person(s)' privacy.

It should be noted that there are instances where restrictions on access to information are justified for certain administrative reasons. For instance, a request for information may be too broad and would thus return a disproportionately large amount of information which, to oblige such request, would require significant resources and disrupt the normal operations of the relevant public body. Also, if the information requested is soon to be published then it may be justifiable for a request to be refused on the basis that the information will shortly be in the public domain. However, when considering such issues one should always view the public interest as an overarching and primary consideration.

(5) Effective oversight by an independent body

Principle 14 of the Johannesburg Principles refers to the need for a right of review of the merits of a refusal to an information request by an independent body, including some form of judicial review of the legality of the denial. Only when an independent body is established to

monitor a freedom of information regime will public authorities take their responsibilities under such a regime seriously.

Any decisions of the independent body should be binding and it should have the power to refer any criminal offences under the relevant legislation to the appropriate authorities. Such a body should also take the initiative in education and training in relation to the freedom of information regime so citizens fully realize the rights afforded to them.

Conclusion

It is clear that international and regional freedom of information legislation has a rich, long history, developing considerably over time by way of accession, amendment, precedent and authoritative statement. This development is a result of changing global attitudes towards the relationship between State and individual and the fundamental human rights that individuals should enjoy. Progressive societies have recognized that unfettered access to information is paramount in social, economic, civil and political development, and have legislated accordingly.

It is also apparent that a consensus is building on the minimum standards of freedom of information that citizens should enjoy. This is a result of tireless work by legal practitioners, human rights campaigners and non-governmental organizations and has been aided by technological developments which make it easier to contrast and compare the various freedom of information regimes across the globe.

These minimum standards now form the basis of what is recognized as a template on which all meaningful legislation should be based. Both the Sierra Leone and Nigeria bills are heavily influenced by this template and therefore stand up well in any comparison with legislation enacted in what are commonly considered “progressive societies” such as the US.

It should also be recognized that, as the global community expands, it will be necessary for States to evidence their respect for freedom of information if they are to convince other global “players” that they are ready to join the modern world.

Chapter Two

Working Towards Freedom of Information Regime in Africa: An In-depth Analysis of Efforts in Nigeria and Sierra Leone

This chapter will assess two of the leading advocacies for the promulgation of 'freedom of information law' in two of the leading FOI countries in the West African subregion. At the moment there is no FOI law in West Africa, but the sub-region has witnessed a robust effort in many countries. The first part of the chapter will review the background of Nigeria and assesses the general background of the process in Nigeira. It would detail and assess the techniques employed by the advocates; pinpoints its success stories and identify the obstacle it is facing as this protected campaign continues.

The second part of this chapter would assess the young campaign in Sierra Leone, but will through light on the socio-political dynamics of the country. This would include the history and set-up of the very rich nation that has embroiled itself in an eleven year of senseless civil conflict; a war that crippled the country and reduce it to begging for substance. This section would highlight how in the rehabilitation process, transparency is key for the creation of an open society in a post-conflict situation. As a unique situation, being post-conflict, the section would show that because Sierra Leone failed to create an open society, through the institutions

of accountability mechanisms like freedom of information, it went into its sordid past of a nauseous conflict. And would encourage the people of Sierra Leone to support the passage of these accountability mechanisms, FOI law, as a major pillar, for the avoidance of the relapse into conflict.

Part I

Nigeria: The Irony of Gun and Freedom: The Ostentatious Realities of an FOI Law Under Military Dictatorship in Nigeria

Background

In 1993, three organizations working independently on various media issues in Nigeria decided to come together and formed the Freedom of Information Coalition to work on the advocacies for the passage of right to information law in Nigeria. The organizations: "subsequently agreed to work together on a campaign for the enactment of a Freedom of Information Act."[71]

Since it creation, it was agreed that a loose network of civil society organization with a common vision of having a legal framework for the legislative process that will enable FOI law passed Nigeria. The objective was to ensure that the public to have access to all public information in the "custody of the government or its officials and agencies as a necessary corollary to the guarantee of freedom of expression.

[71] See generally: Background note on the Formation of the Nigeria Freedom of Information Coalition, a paper presented at by Edetaen Ojo, coordinator of the Coalition, at a conference in Accra on the 30th September 2008

What ensured was a broad range of consultation among the 'partner organisations' and the outcome was to

> "…determining the various interest groups likely to be affected by the legislation; those who should have a right or standing to request information under a freedom of information regime and under what circumstances information may be denied those seeking them; what departments or organs of government would be responsible for releasing information and documents to those seeking them; and determining the agencies and arms of government to which the legislation would extend"[72].

What remained a crucial issue at this point was the technical distribution of leadership and how things would be sorted out. In essence it was important to have a lead institution and the Media Rights Agenda was brought in to serve as a 'technical partner'. A lofty agenda of producing the access to information bill was set and a process of for background research was put together.

The initial ground work was done by the Legal Directorate of MRA, "which was lead by Mr. Tunde Fagbohunlu" then also working for the luko and Oyebode law firm. The outcome of this field research was a draft bill entitled "Draft Access to Public Records and Official Information Act" in 1994.

The Need to Consult on the Draft Bill

With much extensive work done by MRA and the not only to localize and legitimize the process the leading coalition members decided to consult on the "Draft Access to Public Records and Information Act" that was drafted by MRA.

[72] Ibid 70

Series of event were organized and it started with a technical seminar that was 'jointly organized' by the coalition "to examine and revise the draft, taking into consideration the views of other interest groups, which might use the proposed legislation". A wide range of participatory organizations were brought to the process and among them were human rights activists, lawyers, university professors, journalists and members of the "National Broadcasting Commission and the Federal Ministry of Information".

The consensus at the end of the workshop was that the need to overhaul of the entire "legal regime around access to government held information" in Nigeria. .

> Their conclusion was that since statutes which permit access to official information in Nigeria were few, the overall effect is that a culture of secrecy prevails in all government institutions, nurtured and given legal effect to by such laws as the Official Secrets Act and some provisions in the Criminal Code which make it an offence to disclose certain types of government held information.[73]

Additionally, it was agreed that the imperativeness for the replacement of the 'existing legal regime governing the rights to access government held information with a law that guarantees the right for all aforementioned law.

Several new suggestions came up and this prompted the need to revised the draft legislation and include the suggestions points from the workshop and reflect the need of the Nigerian opion which would both domestic and legalize the bill. At this point, also, the door was left open for institutions to make comments and suggestions on the draft legislation from both "stakeholders and other concerned parties within and outside Nigeria".

As a strategy a "Campaigns and Monitoring Committee" was set-up "in accordance with the resolutions of the workshop to carry out follow-up actions on the campaign for the enactment

[73] Report on the Consultative Meetings held on March 10-11 1995, pg 25

of the revised draft into law."[74] It was crucial for the access to information campaign to have legitimacy, and at this point a National Constitutional Conference that was organized by the then military Head of States was in session, but the membership of the coalition refused lobbying the "Conference to provide constitutional support for the bill. Simply on the grounds that"[75] civil society organizations around Nigeria had not only rejected attending the conference, but had questioned the credibility and lobbying such event would have meant providing legitimacy to the group. Instead of sending a draft to the body, the coalition instead sent copies to "Minister for Information and the Attorney-General of the Federation and Minister of Justice."[76]

A next advocacy measures where to meet various members of parliament and lobby them to support the bill. The Campaign Committee therefore me "met with the then Attorney-General of the Federation and Minister of Justice, Dr. Olu Onagoruwa, to secure his support for the enactment of the draft into law". Dr. Onagorwa supported the bill in principle but it was discovered that the required influence that was needed for the bill was lacking especially when it was with dealing the regime of General Abacha.

Unfavourable Political Situation Created Optimism for the Campaign

At this point, several setbacks hit the campaign as Gen. Abacha's regime embarked on 'repressive and brutal' policies that saw bad laws legislated but not the freedom of information campaign. Fortunately for the campaign, General Abacha mysteriously died in June 1998[77], and Major-General Abdulsalami Abubakar who took over the politic mantle of

[74] Campaign Strategy Paper done by the Campaign and Management Committee of the FOI Coalition
[75] Ibid 72
[76] Ibid 72
[77] Ibid 45

Nigeria started a swift transition process to civilian rule. This lead to elections in February 1998 and 1999 at 'various levels' in the country.

The delay provided an opportunity 'the necessary political climate' to revisit the bill again and with MRA at the centre of it a review process was began in March 1999. The process was spearheaded by MRA working together with Article 19, Nigeria "Human Rights Commission and the International Centre Against Censorship"[78] – a media watch dog group based in London. To enhance and posture a national agenda, the workshop was organized "at Ota in Ogun State between March 16 and 18 1999"[79] with a theme Media Law Reform in Nigeria. Sixty one participant from both state and private owned media institutions; "regulatory bodies; the legal profession; international institutions; local and international non-governmental organizations; and other interest groups"[80] attended this second phase of consultations.

A consensus document was released from the workshop titled The *"Ota Platform of Action on Media Law Reform in Nigeria"*[81], with further recommendations. The Ota Declaration and its further recommendation prompted another review of the draft access to information bill by the Media Rights Agenda to reflect imputes made by participants at the workshop.

Incorporating Others- the Birth of the Freedom of Information Coalition in Nigeria

The various consultation sprout many interest in the freedom of information campaign and many institutions expressed interest the initial three organization consortium. This lead to the "foundation of the 'Freedom of Information' Coalition" (FOIC) in September 2000 at a

[78] Id
[79] Id pg 67
[80] Id

"stakeholders meeting on the Freedom of Information Bill held at Rockview Hotel in Abuja from September 13 to 15, 2000"[82].

According the background information:

> "The Freedom of Information Coalition (FOIC) is a network of over 150 civil society organizations in Nigeria comprising of civil rights, grassroots, and community-based Non-Governmental Organizations campaigning for the passage of the Freedom of Information (FOI) Bill and eventual implementation when it becomes law in Nigeria."

It was agreed that a broader coalition membership based in all part of the country was important, it became apparent that participants of the event have formed a nucleus of spreading the 'gospel "in cities, towns and villages, (and) to spread (the Coalition) across the length and breadth of Nigeria.

Part II

Sierra Leone the Perplexing Paradox of Rich but a Poor Country: A Long Walk to Open Society in Sierra Leone

Sierra Leone lies on the west coast of Africa and borders with Liberia "in the east and south east, Guinea in the north east"[83] and the "Atlantic Ocean in the west." It covers an area of approximately 73,326 square kilometers. The country gained independence in 1961 from the United Kingdom and become a republic in 1971.

[82] Interview with Edetaen Ojo, Coordinator of the FOI Campaign in July 2008
[83] Alie, J. History of Sierra Leone

One of the Nastiest and Most Brutal Wars in Human History

Sierra Leone is not only the poorest country in the world[84] but it is also just emerging from eleven years of sordid and nauseous armed conflicts, one of, ever fought on the African soil in modern times. Why is this so?

In the early 1990's, the Revolutionary United Front (RUF) rebels ignited their war against the All People's Congress (APC) government. From 1992, even after the APC had been overthrown, and a military junta, the NPRC, taken over power, the war escalated year-by-year as the RUF rebels embarked on a schizophrenic orgy of maiming of men, women, and children (their unique 'trade mark' – crude amputation of their hapless victims - to inject fear into the populace for political capital), wanton and indiscriminate murder, senseless arson on private and public property, violent rape of girls, grandmothers, boys…, abduction of girls for sexual slavery, and capturing of boys as armed combatants. At least one hundred thousand Sierra Leoneans are estimated to have been killed[85]; more than ten thousand had their limbs brutally chopped off; over five thousand children (child soldiers) were forced to fight along side adults; up to twenty-thousand civilians were forcibly abducted, more than three thousand communities were completely destroyed. Some reports[86]

> "revealed that in addition to the practice of the chopping of limbs and other body parts of men women and even infants there are reports of pregnant women disemboweled and women and children raped and forced to be sex slaves".

Soldiers of the NRPC military government were supposed to be responding to the war being waged by the RUF rebels mainly against soft civilian targets. By 1995, rather than engaging the rebels in combat, the government soldiers were widely believed to had started collaborating with the RUF rebels to murder and plunder the citizenry – hence, the local press

[84] 2004, 05, 06 *UNDP Human Development Index Report*
[85] *"Truth and Reconciliation Report for Sierra Leone" 2006* pg
[86] Physicians for Human Rights, Report *War Related Sexual Violence in Sierra Leone* (January 2002) pg 18

dubbed the soldiers as 'sobels' (coining "soldiers" and "rebels" – soldiers who were meting out atrocities on the civilian populace no different from the RUF rebels).

The covert alliance between the RUF rebels and the NPRC soldiers came to light after the soldiers overthrew the legitimate SLPP government on May 25, 1997. Government soldiers then invited the rebels to form a military government called the AFRC – the lurking RUF rebels in 1997.

The AFRC junta was kicked out in 1998 by the Nigeria led West African Peace-keeping Forces- ECOMOG, but the war in the country intensified, with the AFRC/RUF rebels re-grouping, and slowly advancing towards the capital city from the Northern Province. In January 6, 1999, the RUF/AFRC rebels and sobels, made their cataclysmic military invasion of Freetown – and enacted a horrendous scenario of murder, maiming, mayhem, rape, arson. Why? What was the Sierra Leonean civil war so perverse? So bestial? Why!!?

After Sustained Kleptocracy…the APC System Imploded, then Exploded

Four years after it had taken power in 1968, the APC government by 1972 was consolidating its rule of state terrorism. It reduced the number of SLPP Parliamentarians in Parliament from 32 to 12 – through naked coercion, intimidation, and crudely unleashing state thugs on avidly anti-APC constituencies. With Parliament made docile, the APC government by 1972 had taken firmer control of the army – cashiering nearly 90 percent of the officers it met in the army when it took power in 1968, and replacing them with officers and rank-and-file from tribes and regions in the country from which it had drawn its massive electoral support to 'win' the 1967 General Elections.

From 1972 to 1977, with fear gripping the populace, and with the free media fast being terrorized into silence, with the economy beginning to stagnate, demonstrations were ignited by students of Fourah Bay College, University of Sierra Leone. That demonstration spiraled into nation-wide violent protests. There were deaths. Civil war threatened in the heartland of the Mende-controlled South, Bo Town. The government was forced to call General Elections.[87]

In the campaign leading to the General Elections in 1997, and during the elections itself, instead of yielding to the demands of the people for free and fair elections, for more justice in the system, the APC unleashed a war against the people – in the guise of General Elections. Constituencies – like in Bonthe and Bo districts – which were almost 100% anti-APC, had APC candidates returned unopposed. It was lewd political chicanery. Like ancient Roman conquerors, the APC declared itself the winner of the elections which was characterized by stark and crude coercion[88].

Emboldened with the complete thuggish subjugation of the opposition – in a lot of cases, easy capitulation of the opposition – the APC proceeded to legislate a One Party State. Nearly all the leaders of the SLPP opposition almost too willingly allow themselves to be absorbed into the One Party APC system – in senior positions in government. Effectively, political dissent, political diversity, was 'murdered' in the country. The lone voice of open opposition came from THE TABLET newspaper – with its editors and writers being graduates who were part of the students who had staged the 1977 student uprising against the APC. After failing to

[87] Kandeh, Jimmy, *"Ransoming the State: Elites Violence of Subaltern Terror in Sierra Leone". Uni. Virginia Press pg 15*
[88] Id. 5. 17

bribe, intimidate, or cajole THE TABLET, the APC used its characteristic strategy – throwing a bomb into the premises of THE TABLET, and forcing its editors into exile.

The APC Shadow State Led Inexorably to War

From the early 1980's onwards, corruption became institutionalized – a 'kleptocracy' was instituted in the country. So rampant was the looting of state resources, so reckless was the milking of even the country's vital foreign exchange reserve that by the mid-1980's the government ceased to function as a civilized government should. Unable to pay salaries regularly; unable to purchase petrol to get the country functioning as a modern state, unable to keep basic services of electricity, radio, T.V. and water going, the APC government had to turn to those merchants – largely of Lebanese origin – it had 'sold' the country to - for foreign currency to even purchase the staple food rice. A "parallel government….a shadow state"….existed in those years. Nearly all the big international players – the World Bank, the International Monitory Force, the African Development Bank – blacklisted the APC government, and pulled out of the country, appalled by the sheer reckless ineptitude with which the APC was running the country[89]. The value of the official currency, the Leone, plummeted – and even then, there were times when people could not even get their money from the bank, because there would be no 'paper currency'.

"Only A War Will Save Our Country!!" the People Cried Out

[89] William Reno, "Corruption and State Politics in Sierra Leone", 123-7

The APC One Party Parliament was a mockery of what a Parliament ought to be. There was absolutely no free press. Periodically, there "would appear to be a purge of the governmental elite in their gluttony of"[90] free-for-all looting of government money, with expose of the filthily corrupt – in "voucher-gate" and "contract-gate" charades that the local press would lap, and the people would goggle at. It was only cosmetic gestures meant to pacify increasingly restive peoples, not sustained efforts at fighting corruption. The downward slide of the economy could not be halted. With spasmodic military coup attempts, and court trials and execution of persons wanting to overthrow the APC government, by the late 1980's, there was a crescendo of expressions among the majority of Sierra Leoneans that "only a bloody war" would end the miasma of APC rule.

The yearnings of the people were realized when the RUF ignited its war in 1991. The war made it possible for young military officers to move from the war front and to overthrow the APC government in the capital city of Freetown in 1992[91]. The coup was greeted with ecstasy by the majority of people. There was a surge of goodwill for the young military officers who took the reins of government, and they were able to harness the energies of the majority youth population. They made dramatic surge in revamping the economy during the first two years of their existence. Then, they relapsed. Then, the disease of the APC set it again – corruption became rampant and flagrant. The press that dared to rear its head to report the truth – The New Breed newspaper – was throttled in soldier draconian style. The military junta saw the butt from popular demand for election in 1996 that saw the first post democratic government of Alhaji Dr. Ahmed Tejan Kabbah elected.

[90] Id 123-8

[91] The National Provisional Ruling Council of young military officers of an average age of twenty seven seized power and ruled the country for four years.

Legal Environment for Freedom of Information in Sierra Leone: Semblance of Open Society in Sierra Leone

There is however a dramatic difference between being tolerant of the press, placating international donors with theatrics of the semblance of an open society, condescending to journalists….and the reality of denying access to information in Sierra Leone.

As part of the legacy of the departing British colonialists, the Official Secrecy Act[92] is still in the law books of the government – and nearly all government ministries, departments, and agencies, religiously would deny access to even the most basic information; and, it would be unthinkable for one to get "access to meaningful information held by government to do investigative journalism."[93]

Sierra Leone is still struggling to create a democratic political system in the wake of decades of dictatorship and endemic government corruption. Repressive and outdated laws are impeding the reform process. The Public Order Act criminalizes libel and allows the banning of demonstrations, gatherings, and political associations. Government leaders continue to enforce these outdated laws to suppress opposition voices and government oversight.

Anti-Corruption Commission: A Tool for Witch-hunting Opposition to Government

The National Anti-Corruption Strategy of 2005 fingers the Ministry of Education, Science and Technology (MEST) as the most corrupt ministry in the country. The local press echoed this statement. But, no one investigated this ministry. Almost no big fish in the education

[92] 1911- Passed during colonial period, but has been maintained since with no attempt to review it. It's still hindering the process of open society.
[93] Interview emails answers from Paul Kamara, Editor of For Di People. 10th M ay 2008

ministry has been caught by the ACC. Some five years ago, a senior director in that ministry was prosecuted, convicted, and jailed for being involved in stealing about five billion leones, approximately one million eight hundred thousand dollars. The way government operates, there is no way he could have been involved in his deals alone; and it would have been a lot of deals spanning years, of which Soluku Bockarie was one person in a network of corrupt deals. But only Soluku Bockarie was made the 'sacrificial lamb' of government.

There was a lot of hype in the local press about a 'missing Le1.8 billion' from the Bank of Sierra Leone. The Anti Corruption Commission (ACC) was said to be "investigating" that case; as the ACC was said to be "investigating" the case in which the Minister of Marine Resources, Hon. Okere Adams was invited to the ACC for questioning. The strongly-held perception among the populace today is that the ACC is engaged in "selective justice" – investigating, and/or sending up for prosecution those who are not in the good books of the SLPP government, and, leaving off the hook, or turning a blind eye to, the big fish of corruption. This makes hallow all the relative massive campaign, as many see it "as a tool in the hands of government to" rein opposition especially among its own ranks – as all over the city of Freetown, people are seeing million dollar palaces being built by government officials who earn averagely $300 a month; and they are getting away with their apparent corruption with impunity, and hobnobbing and partying with the highest government officials.

There is clearly disenchantment among the majority youth population with the system in the country presently – as many of the youths see nearly all government officials as incorrigibly corrupt. A reflection of this are results of the just concluded election, which saw the opposition wins- a rare occurrence in Africa. There is a wave of anti-corruption songs being produced by the most popular of the local musical stars – and daily, these youths, almost

entirely unemployed, illiterate or mal-educated, crammed in their poverty-stricken homes, are having their disillusionment fuelled into anger. Among these song are *"corruption, corruption e do so"* – literary meaning 'corruption, corruption, end it now; and the popular term *'borbor belleh e meleh'* - sarcastically meaning pot-belly corrupt officials, whose belly is full with stolen money and mean to highest degree. It is hardly a wonder that the local newspapers emblazoned a recent report emanating from the United Nations, Secretary General, Mr. Kofi Annan, raising alarm about youth unemployment and anger in Sierra Leone – and the volatile implication of that.

Growing Momentum of Freedom of Information in Sierra Leone: The Symbolic Youth Leadership for FOI in Sierra Leone

I picked up the challenge of providing leadership for the FOI in Sierra Leone was in 2004, after attending the 2003 and 2004 World Bank-sponsored meetings as the brains and head of the Youth Action Network; indeed, I was about the only youth, the only person below 40 years of age, in a meeting with heads of institutions and men at the peak of their professional life) who started calling for meetings at the Talking Drum Studio on Bathurst Street in Freetown. Slowly, with meetings attended by persons like Oswald Hanciles (who had attended the 2003 and 2004 FOI meetings in Freetown as a representative of the National Revenue Authority; but, was attending the meetings as representative of the youth group he is guru for, Youth Arise!!!) the concept of Freedom of Information Act gained momentum[94]. With my enthusiasm, and sacrificial leadership, the Freedom of Information Coalition in

[94] Oswald Hanciles *Supra 1*1

Sierra Leone, now the Access to Information Network, Sierra Leone, has been having weekly meetings in Freetown over the past eight months. And the coalition expanded from about four organizations, into a coalition of some 215 organizations around the country[95].

I also drafted a 'Freedom of Information Bill', and presented the bill to parliament for consideration it in April 2006. This was followed with meetings with several key Parliamentarians; this included the Leader of the Opposition in Parliament than and now president of the country, Hon. Ernest Koroma, APC leader; the Deputy Speaker of Parliament, Hon. Elizabeth Lavalie (of the governing SLPP), and other noted public speakers, like Hon. A. O.D. George (SLPP).

The FOI campaign has also had interviews in several radio stations - including the Mount Aureole Radio (operated by the mass communications school in FBC); and interviews on UN Radio. The Press Releases, and activities, have been published in several local newspapers - including Awareness Times, Concord Times, PEEP, AWOKO, and Salone Times. SDI-SL has also be holding workshops around the country, though at a small scale, which reveals the growing demand for open government. The last parliament passed the bill to the Legislative Committee after introducing it, but the Committee failed to come-up with a report.

However, one major set-back was not getting the bill passed the committee stage. The Legislative Committee never came-up with a report till the end of the life span of parliament. This set-back is major considering the fact a whole new campaign has to be started afresh.

[95] Oswald Hanciles, Background to Freedom of Information Campaign in Sierra Leone. Salone Time, February 12, 2006

A 'Failed Parliament' Could Only Be Pushed into Passing a FOI Bill into Law by 'People's Youth Power'

The National Anti-Corruption Strategy of 2005 took a swipe at Parliamentarians in the last Parliament of Sierra Leone who instead of providing oversight to government agencies, and checkmating corruption, are hand-in-glove with the executive arm of government to secure contracts for themselves. The former Anti-Corruption Commission Boss, Val Collier, just months before he was sacked some nine months ago, had angrily accused the Parliamentarians of being involved with corrupt contracts – and this was widely reported in the local media (a reason why his contract was probably not renewed). It is unlikely that Parliament would of its own volition see the immense benefits of an FOI Act for the development of Sierra Leone; they would rather be fearful of an FOI Act, and would strive to protect themselves by slowing down any FOI Bill going through Parliament. Nearly all those who live comfortable lifestyles in Sierra Leone who are indigenes are government employees, or, are almost entirely dependent on government. For the past thirty years or so, such people have benefited from the graft of the system, enriching themselves, building mansions, sending their children to expensive schools overseas. It is unlikely that such people are going to provide leadership for an FOI Act that could undermine their lazy lifestyles of easy money – no matter how convincing the arguments for FOI would sound like.

Sierra Leone Only Superficially Adheres to International Human Rights Protocols

Although Sierra Leone has ratified many of the international human rights covenants, it has very little domestic mechanisms and practices that ensure compliance. Largely, Sierra Leone, by the very decadence of the political governing class, by the poverty the majority of Sierra

Leoneans are wallowing in, has failed, in a holistic way, to protect and defend the fundamental 'human rights' of people as enshrined in these international agreements. One must not be naïve enough to think, and act, and project into the future, that a Freedom of Information Act would be a panacea as regards recognition for human rights observance for ordinary Sierra Leoneans. However, a FOI Act would tremendously bolster the fight for observance of other human rights – if the battle can be sustained.

FOI Act will be Vital at this Stage for Sierra Leone

For Sierra Leone, a FOI Act would not just be an intellectual luxury. 50,000 ex-combatants were demobilized and disarmed at the end our civil war. They are still lurking. They could still be inflamed. As youth unemployment becomes chronic, and dangerously festers, as insensitive governing elite apparently steal government money and flaunts it, youth anger could be inflamed, and could become uncontrollable. For Sierra Leone, therefore, a FOI Act could very well be a 'Survival-of-the-State Act' – for it could be one of the core variables that could save the state of Sierra Leone from another implosion and explosion.

When an FOI bill would have been passed, it negate the effort by journalists locally to lobby for government to expunge from its law books the Criminal and Seditious Libel Laws under the Public Order Acts of 1960 and the Official Secret Act. It will obligate the government to make available information of their daily activities and the people will have the right to seek information from public institutions.

Civil society in Sierra Leone has complained persistently about the tendencies of government to violate human rights, especially journalistic rights and freedom of expression to operate

within an unrestricted terrain. The Sierra Leone Association of Journalist, the Bar Association and even the government's owned Independent Media Commission has advocated that the Seditious and Criminal Libel Law be expunged from our law books.

All efforts by donors and civil society in trying to review the laws of Sierra Leone about the freedom of expression and association have proved futile, but with a FOI Bill, academically, it could almost negate the need to bother about the feared seditious libel laws. For indeed, it can be said that if we have a FOI Act, then, there could hardly be need for journalists to libel anyone, since they can get access to information that they want on any individual or corporate body.

So, Sierra Leone is at an important crossroads in its political development. The country held its first district council elections in three decades in 2004, and second post-conflict national presidential and legislative elections in August 2007. Freedom of information was has a central campaign issue, and Sierra Leone's main opposition parties have pledged to helped in the passage of the Freedom of Information Bill into law if elected. Now, they have been elected, it remains constant push from civil society reminding them of election promises. With inexperienced local councilors and a new administration to take office, Sierra Leoneans need help advocating for transparent and accountable governance. Repealing repressive legislation and advocating for greater freedom of expression and information is crucial to Sierra Leone's democratic reform.

The new president, who as opposition leader, has alluded the effort of the FOI campaign and declared that there was no need trying to 'convert the converted', has declared that his first priority is to fight corruption. How he would achieve this, he didn't say, but certainly fighting corruption can only be achieved by creating a transparent and accountable public service

through the institution of FOI law. The FOI bill was introduced in parliament in November 2010 but still to be passed into law. The ninety million dollar question remains whether it is not the normal political statement of fighting corruption. But as Peter Molner[96]neatly puts it, "lets wait and see".

Chapter Three

FOI: Regimes in Africa

Chapter three will generally look at the laws of Uganda and South African and would bring out the fact that the Uganda law though it has most of the necessary provisions is a week law. The South Africa law on the other hand is stronger law and has been regarded as one of the best laws in the continent and is also envied from around the world.

Part I

The Law without a Teeth: The Uganda Access to Information Law

Introduction

Uganda is among the countries that make provision in the constitution which expressed grant the right to access public held information by the state. In Article 41(1) of the Constitution of Uganda[97], " every citizen has the right to access information held by the State", but it went further to claw it that except where release of the information is likely to prejudice the security or sovereignty of the State or interfere with an individual's right to privacy. Interestingly, the

[96] Professor of Freedom of Information in a Comparative Perspective, at Central European University
[97] The 1995 Constitution of Uganda

constitution similarly mandates the House of Parliament to enforce the constitutional provision aforementioned and to categories the information which should be released or not[98]. The constitution further requires the mandated procedure for accessing such information to be established by the subordinated legislation.

In fulfilment of the constitutional requirement, the government promulgated the Access to Information Act, 2005,[99] (RTI Law) which was assented by the president to come into law on 7 July 2005. On the 20th April2006, the Act finally came into force making one of the five countries that guaranteed the right to access public held information.

It is interesting to note here that civil society activists, like in many countries around that world with an access to information law, played a leading role in getting the government into committing itself to pass the law. Another point to note is the government overt call to fight corruption and on this platform passed the bill. Generally, African government are not among the best supporters of anti-corruption crusade and taking this step further was a laudable move.

According to Article 19[100] "implementation of the Law remains elusive. Implementing regulations have still not been adopted as we go to print, over two years after the Law was adopted, and this has prevented proper implementation..."

The section would look at the substantive law and assess whether the law is a strong law in comparism with its South Africa counterpart. What is safe to note here is that " (s)ome of the

[98] Ibd 1
[99] Available at: http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf.
[100]

more positive aspect of the Law are narrowly drafted, for the most part, regime of exceptions, including a developed set of exception to exceptions".[101]

Of credit to the Law is it 'well-developed' procedural guarantees which appeared to be consistently "progressive, particularly as regards notice, which is required to be provided in some detail at every step". Like the South African, US, UK, India Laws, the Ugandan RTI protects "whistleblowers, or those who disclose evidence of wrongdoing". What is however limited is the provision for 'proactive' publication of information, which many access to information law around the world stipulates. In an ideal access to information law, an 'independent oversight mechanism' should be created in order to ensure a right to appeal to a neutral institution. This is however omitted in the Uganda RTI Law and places the only right to appeal in the judicial system which has very often be regarded as political motivated in the dispensation of justice.

The Access to Information Act, 2005 (AIA) was passed in Uganda in order to give effect to article 41 of the Constitution of Uganda and to "promote an efficient, effective and transparent Government"[102] for the people of Uganda. The progeny of a long process, the AIA was established with lofty goals set out in section 3 as a purpose "to promote transparency and accountability in all organs of the State by providing the public with timely, accessible and accurate information,"[103] and "to empower the public to effectively scrutinize and participate in Government decisions and that affect them".[104] Following international criticism for the overly broad exemptions and failure to include a mandatory public interest disclosure, whistle blower protection or severability clause,[105] the AIA was extensively overhauled before

[101] Id, commentary by Article 19 on the draft bill.
[102] Access to Information Act, 2005, Uganda, Section 3(a).
[103] Access to Information Act, 2005, Uganda, Section 3(d).
[104] Access to Information Act, 2005, Uganda, Section 3(e).
[105] Article 19 Memorandum on the Ugandan draft Access to Information Bill, 2004, London, March 2004.

passage.[106] However, the final product is far from complete in meeting international standards for freedom of information legislation. The AIA lacks any mention of legislative intent to encourage openness and transparency of government activities outside of official records, failing to include a principle that meetings of governing bodies are open to the public, or to address how previous legislation regulating access to records and information of public bodies should be interpreted with respect to the new access laws. Finally, the AIA fails to provide for access to information held by private bodies, even when these bodies may be performing work on behalf of the government.

This essay will attempt to analyze the Promotion of Access to Information Act in context of the Article 19 Principles,[107] a comprehensive set of guidelines for establishing effective access to information legislation. This set of guidelines enables review of legislation based on the categories of the principles themselves: (1) maximum disclosure; (2) obligations to publish; (3) promotion of open government; (4) limited scope of exceptions; (5) processes to facilitate access; (6) costs; (7) open meetings; (8) disclosure takes precedence; and, (9) protection for whistleblowers.[108]

(1) Maximum Disclosure

The Article 19 principle of maximum disclosure suggests a presumption of disclosure for all information held by public bodies, except in very limited circumstances prescribed by the law and weighed in favour of the public interest in disclosure of the information.[109]

Provisions

[106] *Compare* Draft Access to Information Bill, 2004, Uganda *with* Access to Information Act, 2005, Uganda.
[107] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999.
[108] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999.
[109] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 1.

The AIA announces a set of principles that imply maximum disclosure by public bodies of the government in declarations of purpose in section 3, but the content of the law does not proceed to instill this principle in the public bodies that are to administer the access to information policies. According to section 3 the law is intended to "promote efficient, effective government;"[110] as well as "transparency and accountability in all organs of the State by providing the public with timely, accessible and accurate information;"[111] and "to empower the public to effectively scrutinize and participate in Government decisions that affect them"[112]. This access to not to be affected by the reasons for seeking access to information, or the presumed reasons surmised by the information officer to whom the request is made.[113] Section 34 entrenches a duty to disclose records in the public interest that indicate evidence of illegal activity, imminent safety, health or environmental risk, or where disclosure meets a greater public interest than the harm contemplated in the exemption provided for the record. Under section 46, criminal offences are even created for the destruction, damage, alteration, concealment, or falsification of a record requested.

However, the AIA quickly limits the scope of access to information provided under the law in section 5, by granting access only to "every citizen", and only to "records in the possession of the State or any public body".[114] Furthermore, the AIA broadly denies access to any records of Cabinet meetings or the meetings of Cabinet committees, unless the Minister prescribes certain categories of records which can be released after protection period of at least seven years, and as long as twenty one years, after the record is produced.[115]

Analysis

[110] Access to Information Act, 2005, Uganda, Section 3(a).
[111] Access to Information Act, 2005, Uganda, Section 3(d).
[112] Access to Information Act, 2005, Uganda, Section 3(e).
[113] Access to Information Act, 2005, Uganda, Section 6.
[114] Access to Information Act, 2005, Uganda, Section 5(1).
[115] Access to Information Act, 2005, Uganda, Section 25.

Despite the purpose of the AIA as described in section 3, the law does not appear to establish any general presumption of disclosure by public bodies, and entirely avoids any imposition of duty on private bodies to disclose records despite the potential public interest or connection with government activities. The scope of the law unnecessarily limits access to information exclusively to citizens, denying any access to resident aliens, refugee claimants, domestic or international corporations, and any other juristic persons otherwise recognized to have rights under the legal system. These individuals and business are to be expected to abide by Ugandan laws, and to receive the benefits of those laws, but are denied the right to access information held by public bodies of the government that is otherwise accessible by citizens—regardless of the residence status of those citizens.

In the next phrase, the AIA limits accessible information to only those records possessed by the State or a public body of the State, exempting any records of State activities held by private bodies in connection with contracts procured from the Government, or funded by taxes. This exemption of private bodies allows the Government an all-to-convenient escape from the scrutiny and participation of citizens that is so boldly declared the purpose of the AIA in section 3, by enabling the State to privatize any public body, or offload any official business which the State would prefer to keep away from the prying eyes of the electorate to a private body. By allowing private bodies an exemption from public disclosure of records or information the release of which would benefit public interest and awareness of State activities that directly affect them, the AIA contradicts its declared purposes and opens avenues for abuse and corruption in government beyond the oversight capacity of the public.

Finally, the exemptions to disclosure include as a broad category all Cabinet meeting minutes, and those of Cabinet committees. Instead of allowing access to scrutiny of "all

organs of the State",[116] the AIA refuses access to the most powerful body in a parliamentary democracy to act within a cone of silence regardless of the content of their meetings. It is impossible for the public to "effectively scrutinize and participate in Government decisions"[117] when the most powerful organ of the State is exempt from scrutiny. The AIA should allow Cabinet meetings and meetings of Cabinet committees to be closed and the records sealed from the public for certain prescribed legitimate reasons, declared in advance of the meeting, but the presumption should be the same as stated in section 3(d): access is allowed to "promote transparency and accountability in all organs of the State by providing the public with timely, accessible and accurate information", including Cabinet.

Recommendations

1. The scope of the AIA should be amended in section 5 to grant access for all juristic persons to information held by public and private bodies in connection with government activities, or in the public interest.

2. Records of Cabinet meetings and meetings of Cabinet committees should not be exempt from public disclosure except under certain prescribed legitimates reasons, and when declared in advance of the meeting.

[116] Access to Information Act, 2005, Uganda, Section 3(d).
[117] Access to Information Act, 2005, Uganda, Section 3(e).

(2) Obligation to publish

The Article 19 principle calling for obligation to publish calls for legislation to establish a general obligation on public and private bodies to publish records, and explicitly dictate key categories of information that must be published by public and private bodies.[118]

Provisions

The AIA provides obligations to publish manuals and descriptions of the records kept by the public bodies affected, but does not establish a general obligation to publish, nor set out specific categories of information or records that must be published. Section 7 creates an obligation to public a manual of functions and contact information of each public body, a description and index of records held by that body, and how they can be accessed.[119] These manuals must also include information about any arrangements for a person by consultation or otherwise representation might have an opportunity to influence the formulation of policy or the exercise of powers and performance of duties by the public body.[120] Additionally, section 8 of the AIA obligates information officers of each public body to publish descriptions of categories of information that are automatically available without request under the AIA,

[118] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 2.
[119] Access to Information Act, 2005, Uganda, Section 7(1).
[120] Access to Information Act, 2005, Uganda, Section 7(1).

including by the authority of another law, for purchase, and for collection free of charge as a voluntary publication by the public body.[121]

Analysis

Despite setting out that each public body must publish information to assist the public in requesting access to information, including descriptions of categories of records held by the public body and how to request access to those records, the AIA fails to establish a general duty for public bodies to publish records. There is no mention of legislative intent to entrench access to information through either normative duties or mandatory obligations for public bodies to voluntarily publish records, nor any categorical list of records that each public body must publish. In order to grant effective access to information, it must be required that information which is sought by the public is published in the first place. Without the basic obligation to publish, it is possible for public bodies to escape public scrutiny and transparency by failing to publish embarrassing or incriminating records and simply refusing access on the basis that the record does not exist. In order to correct the potential for abuse and force public bodies to overcome past habits of closed secrecy, the AIA should be amended to establish an affirmative general obligation to publish records, voluntarily wherever practicable, and to expressly identify specific categories of records and information that must be published by each public body.

Recommendations

[121] Access to Information Act, 2005, Uganda, Section 8(a).

1. The AIA should be amended to include a general obligation for public bodies to publish information voluntarily wherever practicable and to specify certain categories of information and records that must be published by each public body.

(3) Promotion of open government

The Article 19 principle calling for promotion of open government suggests that legislation should require that government provide adequate resources and attention to promoting the goals of the legislation through public education and mechanisms to eradicate the culture of official secrecy hanging over from earlier times.[122]

Provisions

The AIA does not include provisions for education campaigns or promotional activities relating to the goals of the legislation. However, there are a few sections dedicated to enhancing basic public awareness. In section 9, the AIA requires that the Minister must publish contact information and descriptions of each public body in every telephone directory issued for general use by the public. The monitoring of implementation and affect of the law is to be conducted through annual reports from Ministers of each public body to Parliament on

[122] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 3.

requests for access to information received, granted, and refused—including reasons for refusal.[123]

Analysis

The failure to include any provisions to ensure adequate public education and administrative training for the employees of public bodies that must implement and administer the access to information system is a major flaw of the AIA. The bare minimum of promotion of open government is attempted by forcing the Minister responsible for a public body publish the contact information in the general telephone directories, but the AIA ignores any other duty to ensure that the new legislation is effectively implemented or accessible to the public. No attention is paid to the fact that this entirely new system and principle of access to information is being forced upon civil servants and public body employees who are accustomed to a culture of secrecy and silence, protective of information held by the institution and wary of members of the public who seek access to that information. These gaping holes in the legislation imply an apathy within the government to effectively implement the legislation and grant access to public body records and information, directly contradicting the professed goals of the AIA stated in section 3.

Access to information legislation from other countries can serve as a guide for creating obligations within the government to promote open government and educate the public and public body officials to ensure effective access to the records held by public bodies. South Africa, in the Promotion of Access to Information Act, 2000, charges the Human Rights Commission of South Africa with developing campaigns for public education and official training for public and private body employees who are required to administer the access to

[123] Access to Information Act, 2005, Uganda, Section 43.

information regime.[124] This system is not necessarily the most effective, but the legislation affirmatively provides a legal obligation for an institution to promote the transparency and open government that is the goal of the access to information legislation. Uganda needs to adopt a similar policy regarding public education, and internal training for civil servants charged with administering the regime, in order to ensure that effective access to information, and the goals of open and transparent government indicated in section 3 are met. This is best done by an independent body established by Parliament, and guaranteed sufficient funding by the government to carry out its duties of promoting access to information and open government, as well as monitoring and reviewing the impact of the AIA on the ability to gain access to public records and effectively scrutinize government activities that affect people in Uganda.

Recommendations

1. The AIA should be amended to include sections forcing the government to establish an independent body which is charged with promoting the goals of the legislation through campaigns of public education and training programs for officials of public bodies who are charged with administering the access to information regime.

(4) <u>Limited scope of exceptions</u>

[124] Promotion of Access to Information Act, 2000, South Africa, Section 83(2).

The Article 19 principle requiring a limited scope of exceptions requires that overriding the presumption to disclose information can only be justified on a case-by-case basis where exceptions are related to clearly and narrowly drawn legitimate aims existing in the law, and subject to strict "harm" and "public interest" tests, and never in the case where government seeks to protect itself from embarrassment or the exposure of wrongdoing.[125]

Provisions

The AIA adopts a regime of exceptions to disclosure in sections 23-33, measured and weighed against a provision obligating mandatory disclosure of records when "the public interest in the disclosure… is greater than the harm contemplated in the provision in question,"[126] or where disclosure would reveal evidence of criminal actions or imminent and serious threats to public safety, health or the environment.[127] Where records contain parts which are protected from disclosure based on the prescribed exceptions in the AIA, and parts which are in the public interest to disclose or are not protected from disclosure, the law provides the option for information officers to disclose those parts with are appropriate, and sever the record wherever possible to protect those parts that should be refused.[128]

The grounds for refusal to disclose records are listed in sections 25-33, and generally do not include provision in each section to disclose based on public interest where the interest outweighs the harm contemplated. The categories of grounds to refuse access to records include:

- Records of Cabinet minutes and the minutes of Cabinet Committees, unless specified by the Minister responsible for access to information regulations under prescribed

[125] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 4.
[126] Access to Information Act, 2005, Uganda, Section 34(b).
[127] Access to Information Act, 2005, Uganda, Section 34(a).
[128] Access to Information Act, 2005, Uganda, Section 19.

categories of records that can be released after time periods ranging from seven to twenty one years;[129]

- Records whose disclosure would compromise the privacy of another person, unless that person "is or was an official of a public body" and the record "relates to the position or functions of the person" in their official capacity;[130]
- Records containing the commercial information of a third party, including proprietary information, scientific or technical information, or information provided to the public body in confidence which could put that third party "at a disadvantage in contractual or commercial negotiations" or "prejudice that third party in commercial competition";[131]
- For the protection of certain confidential information where the public body owes a duty of confidence to a third party by an agreement, or where information was supplied by a third party and it is in the public interest that more information be received from that source, or the disclosure would prejudice the future supply of information from that source;[132]
- Where the disclosure of records or information "could reasonably be expected to endanger the life or physical safety of a person," or impair the security of a building, structure or system—including a computer or communication system—or methods, systems, plans or procedures for the protection of a person, any party of the public or of property;[133]

[129] Access to Information Act, 2005, Uganda, Section 25.
[130] Access to Information Act, 2005, Uganda, Section 26.
[131] Access to Information Act, 2005, Uganda, Section 27.
[132] Access to Information Act, 2005, Uganda, Section 28.
[133] Access to Information Act, 2005, Uganda, Section 29.

- To protect the integrity of law enforcement systems, procedures and activities, and the fair and balanced carriage of justice in legal proceedings, except where the information requested refers to the general conditions of detention for persons in custody;[134]
- Where records are protected by privilege due to production in connection with legal proceedings;[135]
- Where the records requested are "likely to prejudice the defence, security or sovereignty of Uganda," or "likely to prejudice the international relations of Uganda", unless the records relating to international relations activities came into existence more than twenty years before the request;[136]
- Where the records requested would "frustrate the deliberative process in a public body or between public bodies" or otherwise impair or inhibit the operations of public bodies and effective development and implementation of public policies by discouraging the open sharing of opinions, advice or recommendations for fear of disclosure to the public, unless the record came into existence ten years before the request.[137]

Analysis

The AIA provides a short, simple list of grounds for refusal of requests for access to records or information held by public bodies. These are mostly listed in affirmative, but not mandatory, clauses granting the option to information officers that information or records "may" be refused if it is within the category indicated by that section. This can be confusing and provide vague instructions to information officers, especially if they are not adequately

[134] Access to Information Act, 2005, Uganda, Section 30.
[135] Access to Information Act, 2005, Uganda, Section 31.
[136] Access to Information Act, 2005, Uganda, Section 32.
[137] Access to Information Act, 2005, Uganda, Section 33.

trained to understand the mandatory public interest disclosure override provision in section 34. This vagueness in enhanced by the fact that sections are not written in the same manner, and do not include a general harm clause within the section describing the grounds for refusal itself. By vaguely and confusingly explaining these exceptions, the AIA stands to exact blanket exemptions from disclosure for any records that include information meeting the categories under which records may be refused, despite there being no threat of prejudice or harm to the individuals or bodies affected by the potential disclosure. Such blanket exemptions further exacerbate any effort to establish a principle of maximum disclosure. These weaknesses can be ameliorated by re-drafting the exceptions clauses to clearly establish in which cases there is a blanket exemption from disclosure barring public interest overriding concealment, and in which cases the ground for refusal needs to be carefully considered, and records subjected to careful severing in order to allow access to the information which will not be harmful to disclose, in order to provide access wherever possible without causing harm or prejudice to third parties, the public body, or the State in international relations.

Recommendations

1. The AIA should re-draft its exceptions sections in order to incorporate general harm tests into the grounds for refusal calculus wherever that determination should be made on a case-by-case basis, to clearly establish what categories of information are to be exempt from disclosure, and to entrench a presumption of disclosure in the public interest of effective scrutiny of government activities.

(5) Processes to facilitate access

Article 19 indicates in its principle for processes to facilitate access that processes should be specified at three levels: internal processes within the public bodies; appeals to an independent administrative body; and appeals to the courts. Facilitation also calls for mechanisms to ensure access to groups such as illiterate or disabled individuals, people who do not speak the language of record, and the poor—who might not be able to afford access fees. Finally, Article 19 calls for legislation providing strict time limits for the processing of requests and the provision of written reasons submitted with any refusal notices.[138]

Provisions for Procedures Facilitating Access

To facilitate access to information, the AIA establishes procedures and duties for the information officer, and dedicates responsibility for ensuring that records of a public body are accessible to the Chief Executive of each public body.[139] Requests are to be made in writing to the information officer of the public body from which the record or information is sought, and where a requester is unable to write the request due to illiteracy or disability, the information officer is obligated to take the request orally, reduce it to writing in the prescribed form and provide a copy to the requester.[140] The information officer is under the further duty to offer or "render such reasonable assistance, free of charge, as is necessary" to make sure that a person complies with the prescribed forms for requesting information—even after the requester has

[138] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 5.
[139] Access to Information Act, 2005, Uganda, Section 10.
[140] Access to Information Act, 2005, Uganda, Section 11.

made an improper request, and before that inadequate request is refused.[141] Access will also be granted in whatever form requested, unless doing so would "interfere unreasonably" with the operation of the public body, negatively impact the preservation of the record, or infringe on copyright not owned by the public body.[142]

The AIA also provides procedures for handling requests throughout the process. Where it is determined that a record is not in the possession or under the control of the body which received the request, or the subject matter is more closely connected with the functions of another public body than those of the public body to which the request was made, the information officer should transfer the request as soon as possible and at least within twenty one days after receipt, and notify the requester of the transfer and reasons for the transfer.[143] If the records cannot be found or do not exist, the information officer must notify the person in writing that it is impossible to give access, including a full account of the actions taken to secure the record in question.[144] This notification is considered a refusal to grant access, and if the record is discovered or produced in the future it must be delivered to the requester unless it is refused according to one of the grounds for refusal established in the AIA.[145] When the record is to be published within ninety days of the receipt of a request to access, or a further period as necessary to print and publish the record, the information officer can defer access to the record until it is published. The requester may also make representations to the information officer regarding the urgency of their need for access to the record, and if "reasonable grounds for believing that the person will suffer substantial prejudice if access to the record is deferred" then the officer must grant their request for access.[146]

[141] Access to Information Act, 2005, Uganda, Section 12.
[142] Access to Information Act, 2005, Uganda, Section 20.
[143] Access to Information Act, 2005, Uganda, Section 13.
[144] Access to Information Act, 2005, Uganda, Section 14(1) and (2).
[145] Access to Information Act, 2005, Uganda, Section 14(3) and (4).
[146] Access to Information Act, 2005, Uganda, Section 15.

The decision to grant or refuse access must be made and the requester must be notified as soon as possible, but at least within twenty one days after receiving the request.[147] This period may be extended for a further period of twenty one days if the request is for a large number of records or requires a search through large numbers of records and compliance under the standard time frame would unreasonably interfere with the activities of the public body concerned, or requires a search through records kept in another city.[148] Interestingly, any extension of this sort must be consented to by the person requesting the record.[149] Notification of the decision must include the fees demanded for access, the form in which access will be granted, and sufficient information to provide the requester with the capacity to lodge an internal complaint against the access fees demanded or the form of access granted.[150] A failure to decide and notify within the time period specified in section 16 is deemed a refusal to grant access under section 18. A decision to refuse access must be accompanied by notification of the "adequate reasons for the refusal, including the provisions of this Act relied upon" and information to provide the applicant with the means of lodging an internal appeal or application with the court to overturn the decision to refuse access.[151] Finally, all records of the request, actions taken in relation to the request, and the decision regarding the request must be preserved until the request is met or all procedures for appeal are exhausted.[152]

Provisions for Appeals

The AIA established three levels of appeal against decisions about requests, fees charged for access, or the form of request granted. The first level is an appeal against the

[147] Access to Information Act, 2005, Uganda, Section 16(1).
[148] Access to Information Act, 2005, Uganda, Section 17.
[149] Access to Information Act, 2005, Uganda, Section 17(d).
[150] Access to Information Act, 2005, Uganda, Section 16(2).
[151] Access to Information Act, 2005, Uganda, Section 16(3).
[152] Access to Information Act, 2005, Uganda, Section 22.

decision of an information officer to the Chief Magistrate.[153] The secondary level is an application to the court, generally allowed for persons "aggrieved by the decision of the Chief Magistrate" and filed in the High Court within twenty one days of the Magistrate's decision.[154] Actions of this type are civil in nature, and the burden of proof is on the party claiming compliance with the law.[155] The rules for procedures regulating the courts in these actions were to be established by the Rules Committee within six months of the enactment of the AIA.[156] The AIA does explicitly state that courts are to be granted access to examine any record of a public body to which the AIA applies, and that courts are obligated to maintain the confidence of those records against disclosure to any person including the parties concerned with the proceedings.[157] In furtherance of this confidentiality, the court is given permission to receive representation ex parte, conduct hearings in camera, or to prohibit the publication of any such information in relation to the proceedings as the court deems necessary.[158] The decision of the court may grant an order "confirming, amending or setting aside the decision which is the subject of the application concerned", requiring information officers or Ministers to take such action or refrain from taking such action as necessary, granting interim or specific relief, declaratory orders or compensation.[159]

Analysis

[153] Access to Information Act, 2005, Uganda, Section 37.
[154] Access to Information Act, 2005, Uganda, Section 38.
[155] Access to Information Act, 2005, Uganda, Section 41.
[156] Access to Information Act, 2005, Uganda, Section 39.
[157] Access to Information Act, 2005, Uganda, Section 40.
[158] Access to Information Act, 2005, Uganda, Section 40(3).
[159] Access to Information Act, 2005, Uganda, Section 42.

The AIA provides strong measures for procedural facilitation of access to information, and a well delineated three-level appeals process. By creating a duty to assist applicants in order to adequately meet the form and manner of request requirements, including an obligation to take requests orally and reduce them to writing where an application is illiterate or disabled, the AIA ensures that procedures are in place to enable individuals to seek access to information. The AIA also grants access in the form requested wherever possible, and provides procedures for transferring, deferring, or extending requests as necessary in order to internally assist with the effective handling of requests in a timely manner. The transfer and deferral provisions are challenging to implement and present opportunities for abuse by information officers who might seek to frustrate applicants requesting access by transferring on the basis that "subject matter is more closely connected" with the functions of another public body, where the subject matter substantially overlaps several bodies and could easily be handled without prejudice to other bodies by the primary recipient of the request. In order to guard against such abuse, the implementation of the transfer provisions must be closely monitored, but the AIA fails to provide for any obligation to monitor or review the implementation of the legislation.

The appeals process adequately established three levels of appeal, granting opportunity to complain and seek remedy against improper or unjust application of the grounds for refusal or of unfair fees for access, with internal institutions and then two levels of the courts. The weakness of this system is that there is no independent body established or mandated to handle appeals in between the internal appeals process and applications to the courts. In the interest of minimizing costs to the requester, and ensuring secure and unbiased decisions regarding appeals, an independent body should be charged with responsibility for handling complaints before the complainant is forced to pursue the costly route of applying to the courts.

Recommendations

1. The AIA should provide for an independent monitoring body to ensure that transfer and deferral provisions are not abused by information officers, and to oversee the implementation of procedures that can substantially ease and empower the public to access information held by public bodies if properly implemented and applied.

2. The appeals procedures should be supplemented to include an independent appeals body which will handle and adjudicate appeals before complainants are required to apply to the courts.

(6) Costs

The Article 19 principle regarding costs advocates that costs of accessing information must not inhibit access or deter potential applications, and should be guided the rationale of freedom of information legislation to promote open access to information held by public or private bodies.[160]

Provisions

[160] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 6.

There is very rare mention of costs throughout the AIA. In the sections relating to access procedures, there is vague mention of the possibility that access fees may be payable in order to receive the requested documents,[161] but no indication of the actual cost or the delegation of responsible for establishing or charging the costs. In the "regulations" section, the principle is announced that the "fee for access to be prescribed by regulations under this section shall be a fee representing the actual cost of retrieval and reproduction of the information".[162]

Analysis

The costs and fee regime of the AIA is unclear and vague, and provides no principle for encouraging and empowering potential applicants to request access to public information. Section 47 adequately establishes a principle that access fees should represent actual costs confronted by the public body in order to generate the files for the requester, but fails to identify a principle regarding situations where a person is financially incapable of paying even the bare costs of retrieval and reproduction of the records requested. Further, the AIA does not clearly describe situations where fees are charged and how those fees should be assessed and computed by information officers handling requests. The dangers of an unclear fee regime is that public bodies might use the system to discourage and deter potential applicants by assessing discretionary or exorbitant fees for different services, or categories of records. If the information officer is able to use the lack of vagueness of the law to deter requesters from seeking certain types of records, then there is no right to access information in practice.

To correct this discrepancy, the AIA should be amended to include a description of specific acts which incur fees for accessing records, and to incorporate a normative principle

[161] Access to Information Act, 2005, Uganda, Section 20(1)(a).
[162] Access to Information Act, 2005, Uganda, Section 47.

that fees should be guided by the intent of the legislation to grant access to information to the public. In keeping with that principle, the AIA should add a section declaring that access fees can be waived by the public body, or must be waived, where an individual is unable to pay fees due to inadequate financial means.

Recommendations

1. The AIA should be amended to include provisions establishing a principle that costs should be minimal, and should encourage access to information by allowing for fee waivers where there is an economic inability to pay the prescribed fees.

2. The AIA should be amended to include a list of the specific actions of public bodies in relation to access to information requests that may or do incur fees for the requester.

(7) <u>Open meetings</u>

Article 19 advocates a principle of open meetings whereby access to information legislation establishes a presumption that all meetings of governing bodies are open to the

public, except in certain limited circumstances where closed meetings may be justified by appropriate reasons.[163]

Provisions

There is no section in the AIA that adopts a principle of open meetings. The one mention of meetings comes in reference to the exemption from disclosure of Cabinet meeting minutes and the minutes of its Committees.[164]

Analysis

By allowing Cabinet and Cabinet Committees exemption from public disclosure, the AIA sets a dangerous principle of secrecy and establishes a norm of governing body meetings being close to the public. This is directly contradictory of the purposes of the AIA stated in section 3, [165]as well as the general philosophy behind access to information legislation. Not only does this exemption deny access to the most important governing body and provide opportunities for the government to evade the access to information regime, it sets an example for lesser governing bodies that their meetings should or can be private and sealed from the public. Open meetings are not necessarily required in every instance, and would not be so required of Cabinet in each case. Similar to the exceptions clauses in the AIA and other access to information laws, there should be prescribed legitimate exceptions to the norm of open meetings, which enable a governing body to announce in advance that a meeting will be closed and give appropriate reasons for the closure. This fundamental principle of access to

[163] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 7.
[164] Access to Information Act, 2005, Uganda, Section 25.
[165] Access to Information Act, 2005, Uganda, Section 3(d) and (e).

information should be added to the AIA to enhance the regime and effectively grant the right of access that is announced in the section 3 purposes in the introduction of the law.

Recommendations

1. The AIA should be amended to include a section that declares a principle that all meetings of governing bodies should be open to the public, except in cases where the body has announced an intention to close the meeting according to certain prescribed legitimate reasons for privacy.

(8) <u>Disclosure takes precedence</u>

Article 19 calls for a principle that disclosure takes precedence, which requires that previously enacted legislation regarding access to records of public or private bodies should be interpreted in a manner consistent with the provisions of, or subject to the principles underlying, the freedom of information legislation.[166]

Provisions

There is little mention or recognition of previous legislation that enabled the public to access records, or protected records from public scrutiny, in the AIA. However, in section 8,

[166] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 8.

there is provision that public bodies must include in the manual published with descriptions of categories of records available from that body, which acknowledges that included in those descriptions must be information regarding records available under the authority of other laws.[167]

Analysis

The AIA fails to adequately establish a principle of disclosure taking precedence over previous regulations of records and information held by public bodies. Far from encouraging disclosure according to the principles of the AIA, the law largely ignores prior legislation relating to information held by public bodies. Despite mentioning the possibility of such laws existing which govern or mandate access to information held by some public bodies, the AIA does not provide conditions for transition from previous procedures to the new regime of public access. One example of an access to information law that does accomplish these goals is the South African Promotion of Access to Information Act of 2000, which provides three sections dedicated to the smooth, efficient transition of previously existing regulations over information to interpretation which correlates to the new standard and which gives precedence to the intent and purposes of the more recent law. The AIA should be amended to incorporate provisions which will assist civil servants and the public of Uganda to understand how the AIA affects previous rules regarding the disclosure or concealment of records.

Recommendations

1. The AIA should be amended to include transitional provisions which dictate how access procedures established by previously existing laws are to be

[167] Access to Information Act, 2005, Uganda, Section 8(a)(i).

interpreted under the new regime of access to information, giving precedence to the rules and guiding purpose of disclosure in the AIA.

(9) <u>Protection for whistleblowers</u>

Article 19 advocates for a principle of protection for whistleblowers included in freedom of information legislation that protects individuals from any legal, administrative or employment-related sanctions for releasing information, "as long as they acted in good faith and on the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing."[168]

Provisions

The AIA strongly establishes protection for whistleblowers who provide disclosure of records revealing evidence of criminal activities, imminent and serious risks of danger to the public or environment, or in the general public interest. The third purpose identified in section 3(c) highlights that the AIA intends to "protect persons disclosing evidence of contravention of the law, maladministration or corruption in Government bodies".[169] This strong declaration of intent to protect individuals acting in good faith against government wrongdoing is expanded in section 44 and 45, which grant protection of persons and public officers from civil, criminal, administrative or employment-related sanctions despite potential breaches of a legal or employment obligation.[170] Section 44 even specifically defines the "wrongdoing" which potential whistle blowing disclosures might serve to reveal, including "the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice,

[168] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 9.
[169] Access to Information Act, 2005, Uganda, Section 3(c).
[170] Access to Information Act, 2005, Uganda, Sections 44(1) and 45.

corruption or dishonesty, or maladministration regarding a public body".[171] Individuals are protected from sanctions so long as they "acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment".[172] Public officers gain protection for disclosure if their actions or omissions are "done in good faith in the exercise or performance of any power or duty under this Act".[173]

Analysis

The whistleblower protection clauses in the AIA strongly and adequately provide immunity for disclosing records which reveal wrongdoing, but could be enhanced with the inclusion of a mandatory obligation to reveal such records to the public once they are discovered. In the South African Promotion of Access to Information Act of 2000, there is also an affirmative obligation to disclose evidence,[174] which enhances the whistleblower protection provided by the law by compelling disclosure regardless of exemption under other provisions of the Act if such disclosure would reveal evidence of wrongdoing. The AIA would be substantially improved not only in the whistleblower protection provisions, but also in enhancing the principle of maximum disclosure and the principle of disclosure taking precedence, if a similar obligatory clause was included in the whistle blower protection provisions.

Recommendations

1. The AIA should be amended to include a provision compelling mandatory

[171] Access to Information Act, 2005, Uganda, Section 44(2).
[172] Access to Information Act, 2005, Uganda, Section 44(1).
[173] Access to Information Act, 2005, Uganda, Section 45.
[174] Promotion of Access to Information Act, 2000, South Africa, Section 89.

disclosure of records that reveal evidence of wrongdoing or serious and imminent threat to public safety or the environment.

Part II

South Africa: A Law Widely Envied: Is it the Best in the World

Introduction

This section would look into the South African law and try to analysis it on its strength and weaknesses. It would have been desirable to do sectional analysis, however, in order to avoid repetition from the previous subsection, I would try to make it brief and touch on the only the most important aspect of it.

However, it is important to look at the background to this law. The 1996 Constitution of the Republic of South Africa made a breakthrough on human right issues and tried to avoid the type of official secrecy that unleashed democratic development and the gruesome violation of human rights in South Africa during the regime of apartheid. The constitution that was drafted for the transition period made provision for the right of access to information by ordinary citizens. What is striking about this provision however is that it included private bodies held information? Presumably considering the fact that the country was on the verge of purging its body politic from the heinous legacy of apartheid, one would not be surprise.[175] Then it took the proactively further to include in it the legislation a law that would give effect to the constitutional mandate within three years after the coming into effect of the constitution[176]

[175] Act No. 108 of 1996, Section 32. Available at:

[176] Article 32(2) and Schedule 6, item 23 of the 1996 Constitution.

When such a provision is made in the grand norm, it brings many advantages. One is to bring the government to act and two is to place the importance of such rights that needs law to protect and promote it.

From 1996, the law was not promulgated March 1991 and considering the fact that the constitution mandated the government on it, it was only necessary for the government to act. Many commentators have listed this law as the 'most progressive' law in the world and it was a clear shift from the apartheid system that was so built on mistrust.

According to Article 19, the law "has very strong procedural guarantees, as well as a narrowly crafted set of exceptions". However the law does not make any attempted at firstly providing for an administrative level aspect of appeal. In event of refusal only courts can review such provisions.

Similarly the law does not provide for proactive obligation to disseminate information like modus operandi of institutions. This is where the Ugandan law is different and many lots of attention has been placed on this provision in recent regimes as a means to reduce the burden of 'request-driven access' only.

The strong provisions the legislation has not been realised by a strong implementation. And many believe the implementation is very weak. Toby Mendy for instance has suggested "that

62% of requests are met with a 'mute refusal' or simply no answer, the highest for any country in the study where a right to information law was in force".[177]

It went further to look at compliance (i.e. actual provision of information in response to requests), and reveal that the country has "by far the lowest score of the seven monitored countries with freedom of information laws."[178] To support his, the African Commission on Human and Peoples Rights in 2005-06 annual report suggested that "The number of public bodies submitting section 32 reports [on their performance under the Law] continues to remain low with a decrease in the number of reports received compared to the previous reporting period."[179]

The South African Promotion of Access to Information Act (PAIA) of 2000 was passed pursuant to the constitutional obligation enshrined in Section 32 of 1994 Constitution of the Republic of South Africa, which guaranteed a Bill of Rights for the people of South Africa and brought to an end the terrible regime of apartheid. The historical context of the 1994 constitution of South Africa as the harbinger of the end of apartheid and the dawn of a new era of recognition for human rights in South Africa put the right to access information held by public or private bodies enshrined in Section 32 in stark relief as the end of the "secretive and unresponsive culture" among government authorities that "led to an abuse of power and human rights violations"[180] during the apartheid regime. In response to the constitutional obligation to enable access to information and promote transparency in

[177] See *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, 2006), p. 43. Available at:

[178] *Ibid.*, p. 69.
[179] Annexure, p. 85. Available at:
[180] Promotion of Access to Information Act, 2000, Preamble.

government, the South African Parliament in 2000 passed the PAIA, which has been considered one of the best drafted freedom of information laws in the world.

This essay will attempt to analyze the Promotion of Access to Information Act in context of the Article 19 Principles,[181] a comprehensive set of guidelines for establishing effective access to information legislation. This set of guidelines enables review of legislation based on the categories of the principles themselves: (1) maximum disclosure; (2) obligations to publish; (3) promotion of open government; (4) limited scope of exceptions; (5) processes to facilitate access; (6) costs; (7) open meetings; (8) disclosure takes precedence; and, (9) protection for whistleblowers.[182]

(10) Maximum Disclosure

The Article 19 principle of maximum disclosure suggests a presumption of disclosure for all information held by public bodies, except in very limited circumstances prescribed by the law and weighed in favour of the public interest in disclosure of the information.[183]

Provisions

The PAIA preamble establishes a presumption of maximum disclosure by stating the intended purpose of the Act is to "promote transparency and accountability in public and private bodies by giving effect to the right of access to information", which belongs to "juristic persons to the extent required by the nature of the rights and the nature of those

[181] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999.
[182] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999.
[183] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 1.

juristic persons".[184] Sections 11 and 50 of the Act grant the right of access to a record of a public or private body, respectively, if the requester complies with procedural requirements, and access to the record requested is not refused according to the limited exception outlined in the exceptions prescribed in the Chapter 4 of Part 2 and 3 of the Act. Section 11 further entrenches the presumption of disclosure by guaranteeing in subsection (3) that a requester's right of access is not affected by any reasons given for requesting access, or the information officer's belief regarding the requester's reasons for seeking access.[185] To facilitate maximum disclosure in light of the exceptions, the PAIA in section 28 obligates information officers to, wherever reasonably possible, sever information that is excepted on grounds prescribed from information that there is a public interest in publishing but is contained on the same record as protected information.[186]

Further, the PAIA creates criminal liability under section 90 for destruction, damage, alteration, concealment, or falsification of a record, in order to encourage a culture of openness and transparency and prevent abusive disclosures of falsified records. The PAIA also includes protection from liability for disclosing records of wrongdoing in section 89, and includes provisions for the obligatory disclosure of records of public and private bodies where it is in the public interest even if belonging to an excepted class of records.[187] However, section 12 exempts access to certain categories of information from access, including records of Cabinet and its committees, judicial officers of the courts, and individual members of Parliament or of provincial legislatures in their capacity as representatives.[188]

Analysis

[184] Promotion of Access to Information Act, 2000, Preamble.
[185] Promotion of Access to Information Act, 2000, Section 11(3)(a) and (b).
[186] Promotion of Access to Information Act, 2000, Section 28.
[187] Promotion of Access to Information Act, 2000, Section 89, 46 and 70.
[188] Promotion of Access to Information Act, 2000, Section 12(a) and (c).

The PAIA does an exemplary job of establishing a principle of presumption of maximum disclosure. The principle is entrenched directly in the preamble as the intent to promote transparency and accountability in public and private bodies involved in governance. The preamble grants the right to access information made available under this legislation to the widest possible scope of participants by including all juristic persons into the access regime. Added to the explicit statement of the intention to advance philosophies of openness and transparency, the law includes a severability clause that enables information officers to disclose valid records whenever reasonably possible to sever them from information that is protected or excepted under the prescribed exceptions. Combined with these provisions, the PAIA creates criminal liability for anyone who destroys, damages, alters, conceals, or falsifies a record, and protects whistleblowers from criminal, civil or employment-sanction liability for disclosing records illicitly based on a reasonable good faith belief that disclosure will uncover wrongdoing and is in the public interest. These sections together should function as an effective presumption for disclosure of records, with the balance of the prescribed exceptions listed in Chapter 4 of Part 2 and 3 of the Act.

However, Section 12 substantially contradicts the philosophy of transparent and open maximum disclosure that these other sections enact throughout the law. Section 12 arbitrarily, and without override by a public interest or general harm test, denies access to information from Cabinet or its committees, judicial officers of the courts, or records of individual members of Parliament or provincial legislatures. Without explaining the intention for this blanket exemption from public disclosure, these three categories of records are refused to the public regardless of their subject matter. This section should be amended to reflect the harm contemplated, the purpose of exempting these bodies or individuals from public scrutiny, or the adoption of a public interest or general harm balancing test to reflect the philosophy of the rest of the PAIA, or removed from the law altogether.

Recommendations

1. Section 12 should be amended or removed from the PAIA, in order to enhance the principle of maximum disclosure embodied in the rest of the law, or to reflect the sort of balance of public interests in disclosure of information and transparent governance that is the mission and purpose of the law.

(11) Obligation to publish

The Article 19 principle calling for obligation to publish calls for legislation to establish a general obligation on public and private bodies to publish records, and explicitly dictate key categories of information that must be published by public and private bodies.[189]

Provisions

The PAIA creates an obligation to publish and make available certain records, to be prescribed by the Minister in charge of implementing the freedom of information legislation, and to publish and update at least annually manuals describing the public or private body, how to contact and obtain access to information held by that body, and details facilitating requests for access to that information.[190] The Ministry in charge is required by section 10 to publish a guide to public bodies, and using information submitted by each public body should include

[189] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 2.
[190] Promotion of Access to Information Act, 2000, Section 14 and 51.

contact information, and a description of all of the records and information that can be found at those bodies.[191] Section 14 further requires that public bodies describe any arrangement or provision for a person to participate in or influence policy-making or the exercise or performance of the duties of the body.[192]

An affirmative duty to voluntarily publish and disseminate certain categories of information is established under section 15, and descriptions of those categories of information are required to be provided to the Minister. Descriptions are required to include any information that can be available for inspection by legislation other than the PAIA, for purchase or copying from the body, or free of charge, and how to access those records. The Minister is then obligated to publish every description and update the publication at least once per year.[193] Similar voluntary publication provisions are enacted for private bodies under section 52.[194] Finally, the contact information for the information officer of each public body must be published in every telephone directory issued for general use by the public.[195]

Analysis

The PAIA initiates the process of establishing an obligation to publish within public and private bodies, through requiring the Minister and private agencies to publish an access to information guide and each public and private agency to publish a manual for accessing information from their agency. The law does create an affirmative duty to publish information voluntarily, but refrains from identifying any classes or categories of information that should be maintained as voluntary or free publications by public bodies, except for the manuals explaining how to accessing information. However, the PAIA fails to establish any categories of information that should be required by each agency for publication, or to obligate the

[191] Promotion of Access to Information Act, 2000, Section 10.
[192] Promotion of Access to Information Act, 2000, Section 14.
[193] Promotion of Access to Information Act, 2000, Section 15.
[194] Promotion of Access to Information Act, 2000, Section 52.
[195] Promotion of Access to Information Act, 2000, Section 16.

Ministry or any other body to establish such minimum guidelines for publishing certain records. The Act highlights that records of requests and decisions on requests for access should be kept until the final result of the process is reached, but fails to identify any guidelines for preserving records of public or private bodies for any period in order that they might be available for public disclosure upon request.

There are two primary problems with failing to identify categories of information that must be published, or the length of time that records should be preserved. First, if the government has not previously been forced to disclose records upon request, the public bodies in question may not produce written records of their activities, or at least may produce only minimal and unclear records that would not lead to the transparency and open government that is intended by the PAIA. Second, if there are no guidelines for preserving records, then public bodies are under no obligation to keep records longer than they feel necessary, leaving the prospect of abusive destruction of records by policies of destruction after an unreasonably brief period. Particularly for records of international relations or national security, which may be protected for up to 20 years if they are determined to fit the exceptions of section 41, these records may never see light if there is no obligation to preserve them for a period longer than 20 years.

Recommendations

1. The PAIA should be supplemented with explicit categories of information or records that public and private bodies are obligated to produce and keep available, either voluntarily or upon request, or the Ministry in charge of administering the PAIA should be required to keep and update such a categorical list.

2. The PAIA should include a statute of limitations requiring the preservation of records, or classes or categories of records, for certain specified periods, in order to create clear standards for the maintenance and availability of information for public disclosure upon request.

(12) Promotion of open government

The Article 19 principle calling for promotion of open government suggests that legislation should require that government provide adequate resources and attention to promoting the goals of the legislation through public education and mechanisms to eradicate the culture of official secrecy hanging over from earlier times.[196]

Provisions

The promotion of open government is to be accomplished under the PAIA by adding duties to the Human Rights Commission of South Africa (HRC). Part 5 of the PAIA establishes the affirmative duties placed on the HRC "to the extent that financial and other resources are available" to pursue the development of educational programs to advance the public understanding of the Act and how to exercise the rights to access information, especially in disadvantaged communities, and encourage other public and private bodies to undertake such programs themselves.[197] These educational programs are supplemented by the duty of the HRC under section 10 to publish a guide to the PAIA at least every two years,

[196] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 3.
[197] Promotion of Access to Information Act, 2000, Section 83(2).

including an explanation of the objects of the PAIA, and an outline of the contact information, manner and form of request for information from every public body that is practicable to include, a description of the services available from the information officer of a public body, and the legal remedies available for an act or failure to act relating to a right or duty conferred or imposed by the PAIA.[198] This guide is also required to include a description of the duty of public and private bodies to compile a manual and how to obtain access to that manual, a description of the voluntary disclosure provisions in sections 15 and 52, and the requirements of notice regarding fees to be paid for access requests.[199]

The resources for these programs and other activities of the HRC in relation to the PAIA are to be derived from the Parliamentary budget disbursement to the HRC for this purpose.[200] The HRC is positioned by the PAIA as the primary body responsible for monitoring and overseeing the implementation and effectiveness of the PAIA and engaging in processes of review and advocacy for amendments to improve the effectiveness of the PAIA.[201] To help with the monitoring and oversight duties of the HRC, public bodies are obligated under section 32 to report annually to the HRC with statistics of information requests received, granted, refused, granted with severed information, requests that required extension of the period for processing, and the number of internal appeals handled.[202] This information is to be used by the HRC in its annual report to the National Assembly, which should also include recommendations for improving the effectiveness of the PAIA.[203]

Analysis

[198] Promotion of Access to Information Act, 2000, Section 10.
[199] Promotion of Access to Information Act, 2000, Section 10.
[200] Promotion of Access to Information Act, 2000, Section 85.
[201] Promotion of Access to Information Act, 2000, Section 83(3).
[202] Promotion of Access to Information Act, 2000, Section 32.
[203] Promotion of Access to Information Act, 2000, Section 84.

The PAIA explicitly obligates the HRC to engage in public education campaigns and promotion of open government that is called for by the Article 19 principles. By creating the affirmative obligation to educate and promote the Act, and placing it firmly in the responsibilities of the HRC, the legislation promotes open government and encourages the undertaking of educational programs using funds disbursed by Parliament specifically for this function. If implemented effectively, these provisions could lead to real access to information being realized by the people of South Africa, and a well-understood right to free access of information even by the disadvantaged communities the HRC is empowered to give priority to educating in section 83(2).

However, by forcing these responsibilities solely on the HRC, the legislation fails to adequately provide for the effective implementation of these provisions and potentially overburdens an already heavily-laden public body with more work. One way the legislation could have avoided this trouble is by mandating the creation of a new, independent oversight body, or a new division of the HRC, dedicated exclusively to the legislated duties endowed to the HRC in these provisions. A sufficiently independent oversight body could also act, or incorporate a division dedicated to acting, as a second-level appeals authority for decisions of information officers. Section 85 identifies the source of funding for PAIA-related activities undertaken by the HRC, but does not guarantee that some minimal funding will be provided by Parliament—potentially leaving the promotion, oversight, monitoring, and review of the access to information legislation open to abuse by Parliament through minimal or non-existent funding. Incorporating a minimum level of funding, or a provision that guarantees sufficient funding from Parliament in order to meet the burden of the mandated responsibilities, could better ensure the effective promotion and oversight of the PAIA.

Recommendations

1. The PAIA should mandate the creation of an independent body within, or similar to, the HRC which could fulfill the duties bestowed upon the HRC by the PAIA to promote the access to information law through public education programs, and to monitor, review and make recommendations to improve, the effective implementation of the right to access information.

2. Section 85 should be amended to guarantee a certain minimum standard for funding the HRC, or such an independent body described in recommendation (1), in order to ensure that there is adequate funding to meet the duties outlined in the PAIA for promotion of open government.

(13) <u>Limited scope of exceptions</u>

The Article 19 principle requiring a limited scope of exceptions requires that overriding the presumption to disclose information can only be justified on a case-by-case basis where exceptions are related to clearly and narrowly drawn legitimate aims existing in

the law, and subject to strict "harm" and "public interest" tests, and never in the case where government seeks to protect itself from embarrassment or the exposure of wrongdoing.[204]

Provisions

The PAIA makes exceptions for disclosure in cases where requests are vexatious or frivolous[205], or concern records that are protected by prescribed exceptions[206]. However, section 46 overrides these exceptions by obligating mandatory disclosure where "the public interest in the disclosure of the record clearly outweighs the harm contemplated" in the prescribed exception.[207]

The grounds for refusal of access by public bodies are interpreted into obligatory and affirmative option to refuse access. The categories excepted from disclosure include:

- records that prejudice the privacy of other individuals;[208]
- certain confidential records of the Revenue Service;[209]
- commercial information, trade secrets, scientific or technical information of third parties, or information that could put third parties at a disadvantage in contractual negotiations;[210] confidential information supplied by third parties;[211]
- records that could reasonably be expected to endanger the life or physical safety of an individual, building, structure, system, or any part of public;[212]

[204] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 4.
[205] Promotion of Access to Information Act, 2000, Section 45.
[206] Promotion of Access to Information Act, 2000, Section 33.
[207] Promotion of Access to Information Act, 2000, Section 46(b).
[208] Promotion of Access to Information Act, 2000, Section 34(1).
[209] Promotion of Access to Information Act, 2000, Section 35(1).
[210] Promotion of Access to Information Act, 2000, Section 36(1).
[211] Promotion of Access to Information Act, 2000, Section 37.
[212] Promotion of Access to Information Act, 2000, Section 38.

- records of police dockets and that would prejudice the integrity of law enforcement and legal proceedings;[213]
- privileged records produced in legal proceedings;[214] records pertaining to national security and international relations of the Republic, produced in the last 20 years;[215]
- records that would "materially jeopardize" the economic interests and financial welfare of the Republic or the commercial activities, including trade secrets, financial, commercial, and scientific or technical information, of public bodies;[216]
- records of research being conducted by or on behalf of a third party or public body, which disclosure would expose the person conducting the research or the subject matter of the research, to "serious disadvantage";[217] and,
- records involving opinions, advice, or consultation regarding the formulation or prejudicing effective implementation of policy or operations of public bodies.[218]

Sections 34, 35, 36 are excepted mandatorily by the PAIA, whereas each section from 37-44 grants the affirmative option to refuse disclosure if it is in the public interest to maintain the confidentiality, weighed against the public interest of publishing the information contained in the record, and any exception may be overridden by the mandatory obligation to disclose information in the public interest or exposing wrongdoing contained in section 46.

Private bodies are granted exceptions from disclosure in sections 63-69, with a similar mandatory disclosure in the public interest override contained in section 70, and in section 59 the capacity to sever excepted information from records partially acceptable for disclosure, wherever possible. The ground for refusal of information requested from private bodies includes:

[213] Promotion of Access to Information Act, 2000, Section 39.
[214] Promotion of Access to Information Act, 2000, Section 40.
[215] Promotion of Access to Information Act, 2000, Section 41.
[216] Promotion of Access to Information Act, 2000, Section 42.
[217] Promotion of Access to Information Act, 2000, Section 43.
[218] Promotion of Access to Information Act, 2000, Section 44.

- mandatory protection of privacy of third parties;[219]
- protection of commercial information of third parties, including trade secrets, financial, commercial, scientific or technical information;[220]
- protection of certain confidential information of third parties;[221]
- protection of safety of individuals, and protection of property;[222]
- protection of records privileged from production for legal proceedings;[223]
- commercial information of the private body, including financial, commercial, scientific or technical information and trade secrets;[224]
- protection of research information of third parties or the private body.[225]

Analysis

The PAIA establishes clear and narrowly drawn legitimate exceptions to public disclosure, and tempers the majority by incorporating a case-by-case balancing test based on public interest in disclosure of the requested information and the general harm contemplated by the original exception clause. The law goes a step further by including an exemplary mandatory public interest override in sections 46 and 70, obligating information officers to disclose records if the public interest in disclosure "clearly outweighs the harm contemplated in the provision in question"[226] and an obligation to disclose records that reveal evidence of the contravention or failure to comply with the law, or imminent and serious public safety or

[219] Promotion of Access to Information Act, 2000, Section 63.
[220] Promotion of Access to Information Act, 2000, Section 64.
[221] Promotion of Access to Information Act, 2000, Section 65.
[222] Promotion of Access to Information Act, 2000, Section 66.
[223] Promotion of Access to Information Act, 2000, Section 67.
[224] Promotion of Access to Information Act, 2000, Section 68.
[225] Promotion of Access to Information Act, 2000, Section 69.
[226] Promotion of Access to Information Act, 2000, Section 46 and 70.

environmental risks.[227]This override and affirmative obligation to 'blow the whistle' by disclosing evidence of wrongdoing or serious risks to the public at large effectively balances the legal rights to access information with the necessity of protecting certain classes of information. Enabling information officers to sever protected information from disclosures of records that should be made available further enhances the balanced approach engendered in the limitations clauses of the PAIA.

The grounds for refusal contemplated by the PAIA are adequately clear and narrowly drawn, with sufficient adoption of public interest and harm tests for achieving a balance of interests in disclosure or sealing records from the public. Certain categories have been prescribed as mandatorily protected records, but there is substantial inclusion of balancing clauses to allow information officers to make a case-by-case basis for requests for access to a wide variety of information. However, the inclusion of section 12 threatens the effective opening and transparency of government bodies by establishing a blanket exclusion of records of Cabinet or its committees, judicial officers, of individual members of Parliament or provincial legislatures. Allowing these individuals and bodies to be exempt from disclosure of information too easily creates opportunities for government to work around the access to information legislation and maintain secretive practices. All the government needs to do is make any issue exclusively a record of Cabinet or Cabinet committees, and the public is denied access to its contents regardless of the subject matter or the public interest in disclosure. While this provision is allowed to remain, the PAIA and the principles of transparency and open government it is intended to enact can be circumvented.

Recommendations

[227] Promotion of Access to Information Act, 2000, Section 46 and 70.

1. Section 12, granting an exemption to Cabinet, its committees, judicial officers, and records of individual members of Parliament or provincial legislatures, should be amended to incorporate a public interest override or general harm test, or removed entirely, as it threatens the intended purpose of the PAIA to promote transparency and open government.

(14) Processes to facilitate access

Article 19 indicates in its principle for processes to facilitate access that processes should be specified at three levels: internal processes within the public bodies; appeals to an independent administrative body; and appeals to the courts. This principle calls for mechanisms to ensure access to groups such as illiterate or disabled individuals, people who do not speak the language of record, and the poor—who might not be able to afford access fees. Finally, Article 19 calls for legislation providing strict time limits for the processing of requests and the provision of written reasons submitted with any refusal notices.[228]

Provisions for Procedural Facilitation of Access

The process to facilitate access is primarily provided in the PAIA in sections 11-32 and 50-61 for public and private bodies, respectively. The PAIA requires in section 11 that requesters be given access to a record if they comply with all procedural requirements as long as access is not refused according to the prescribed exceptions. Section 11 further guarantees

[228] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 5.

that the requester's reasons for seeking access or the information officer's belief regarding such reasons cannot affect the requester's right of access.[229] Regarding the manner of application, section 18 vaguely specifies that requesters must provide "sufficient particulars"[230] to identify themselves, the records sought, the applicable form of access required, preferred language, and contact information for the requester.[231] Records are guaranteed to be delivered in a preferred language if it exists in that language, or if it does not exist in the preferred language it will be provided in any language that it exists in.[232]

These sections also facilitate access for groups who might be disadvantaged in obtaining access by the required procedures. Section 18(3)(a) provides a waiver of the written request requirement in the case of illiteracy or disability, obligating the information officer to take the request orally, reduce it to writing in the prescribed form and provide a copy to the requester. In fact, section 19 creates an affirmative duty for information officers of public bodies to provide reasonable assistance, free of charge, to help requesters comply with section 18(1) in submitting appropriately written requests.[233] To ensure efficient processing and adequate accessibility to records, information officers of public bodies are obligated in section 17 to designate sufficient deputy officers as are necessary, and in delegating duties to deputies the information officer must consider the need to "render the public body as accessible as reasonably possible for requesters of its records."[234]

If it is discovered that the request should have been made to another body, the information officer has an obligation under section 19(4) to assist the requester to make the appropriate request or to transfer the request according to section 20, depending on which

[229] Promotion of Access to Information Act, 2000, Section 11.
[230] Promotion of Access to Information Act, 2000, Section 18(1)(a).
[231] Promotion of Access to Information Act, 2000, Section 18(1).
[232] Promotion of Access to Information Act, 2000, Section 31.
[233] Promotion of Access to Information Act, 2000, Section 19(1).
[234] Promotion of Access to Information Act, 2000, Section 17.

option will result in earlier processing of the request.[235] Reasons for transfer to another body can include that the record is not in possession of the body where the requester inquired, the subject matter of the record is more closely connected with the functions of another public body, or the record contains commercial information in which another body has a greater commercial interest. Such a transfer is required within 14 days after the request is received, and received transfers must be given priority by the more pertinent body, as if received on the original date the request was made.[236]

In the event that the record cannot be found or does not exist, section 23 requires the information officer to provide an affidavit or affirmation to notify the requester of the impossibility of giving access to that record, including a full account of all steps taken to find the record or determine its existence, and if the record is later found it must be provided to the requester concerned unless access is to be refused according to the prescribed exceptions in the PAIA.[237] Alternatively, if the request is for information that is in the process of publication, is required by law to be published but has not yet been published, or has been prepared for "submission to a legislature or a particular person" but has yet not been submitted, the information officer can elect to defer access to the record "for a reasonable period" as necessary to allow publication and open access, and notify the requester that they can appeal the deferral decision to the information officer with reasons that the information is required before such publication.[238]Where the requester "will suffer substantial prejudice if access to the record is deferred for the likely period" then the information officer is obliged to provide access immediately.[239]

[235] Promotion of Access to Information Act, 2000, Section 19(4).
[236] Promotion of Access to Information Act, 2000, Section 20(1), (3) and (4).
[237] Promotion of Access to Information Act, 2000, Section 23.
[238] Promotion of Access to Information Act, 2000, Section 24.
[239] Promotion of Access to Information Act, 2000, Section 24(3).

Decisions on requests for access to records should be granted "as soon as reasonably possible, but in any event within 30 days, after the request is received"[240] and should be presented in written form and state the access fee to be paid upon access, the form access in which will be given, and that the requester has the option to lodge an internal appeal against the access fee or form of access and the manner and procedure for lodging such an appeal.[241] However, if the request involves a large number of records, requires a search through a large number of records, requires search for or collection of records from an office in another city, or requires consultation with several divisions of the public body, and compliance within the prescribed time constraints would "unreasonably interfere with the activities of the public body concerned" then the information officer can extend the period to handle the request by an extra 30 days.[242] If the request is to be refused, the notice should include the reasons for refusal, including the provisions of the PAIA relied upon, and information to enable to requester to lodge an internal appeal or application to the court, against refusal of the request.[243] Finally, if the request is determined by the information officer to be "manifestly frivolous or vexatious", or to "substantially and unreasonably divert the resources of the public body" the officer can elect to refuse the request.[244]

Provisions for Appeals

The PAIA provides for a multi-level appeals process, beginning with internal appeals to the public body and allowing applications to the High Court or courts of similar status to appeal decisions of internal appeals. To facilitate the appeals process, section 21requires that the public body preserve records of the request, processing, decision regarding the request,

[240] Promotion of Access to Information Act, 2000, Section 25(1)
[241] Promotion of Access to Information Act, 2000, Section 25(2).
[242] Promotion of Access to Information Act, 2000, Section 26.
[243] Promotion of Access to Information Act, 2000, Section 25(3).
[244] Promotion of Access to Information Act, 2000, Section 45.

and internal appeals decisions until all appeals have been exhausted or the statute of limitations for lodging appeals has passed.[245] The internal appeals process is the first stage of appeal, and requires that complaints be lodged within 60 days of the decision regarding access, payment of the prescribed appeal fee, and obligates the information officer to respond to the relevant authority within 10 days, or as soon as possible.[246]Decisions on internal appeals may "confirm the decision or substitute a new decision"[247] for the grant or refusal by the public body, and require that the public body defend the reasons and application of the PAIA to deny access to the records requested, or charge the fee appealed, or fulfill the requirements of the PAIA in sufficient time. The internal appeals decision obligates the information officer to provide access to the record concerned immediately, or apply to the courts in appeal.[248]

Applications to the court for a civil lawsuit appealing internal appeals decisions[249] are allowed under section 78, "after the requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body", if they are made within 30 days from the decision of the internal appeal[250] to a High Court or another court of similar status.[251] Section 80 enables the court reviewing the case to gain access to the records in controversy in order to appropriately examine the application of the PAIA, but obligates the court to maintain non-disclosure of the records until they decide to grant access to the records to the requester.[252] The court is also empowered to conduct hearings ex parte or in camera, and to prohibit the publication of information relating to the proceedings including the names of the parties and the contents of orders made by the court in reference to the case.[253] The

[245] Promotion of Access to Information Act, 2000, Section 21.
[246] Promotion of Access to Information Act, 2000, Section 75(1)(a), (3)(a) and (4).
[247] Promotion of Access to Information Act, 2000, Section 77.
[248] Promotion of Access to Information Act, 2000, Section 77(5)(c) and (6).
[249] Promotion of Access to Information Act, 2000, Section 81.
[250] Promotion of Access to Information Act, 2000, Section 78.
[251] Promotion of Access to Information Act, 2000, Section 79(2).
[252] Promotion of Access to Information Act, 2000, Section 80(1) and 80(2)(a).
[253] Promotion of Access to Information Act, 2000, Section 80(3).

court ruling can confirm, amend, or set aside previous decisions of the public body or internal appeals process, and can require the information officer or the relevant authority of the public body to act or refrain from acting as the court considers necessary, within a period outlined in the ruling.[254] The court can further grant relief, make a declaratory order, and offer compensation as to costs.[255]

Analysis of Procedural Facilitation of Access

The PAIA enacts sufficient policies for facilitating procedural access to requesting records and information from public or private bodies. The affirmative responsibilities bestowed upon information officers to appoint enough deputies to ensure reasonable accessibility to the body for requesters of information indicates that the law is dedicated to guaranteeing effective access to records within reasonable time periods. Also, by establishing a duty to assist requesters who are unable to comply with the procedural requirements based on illiteracy or disability, and requiring that they be provided with a written copy of their request, adequately accomplishes the intended aim of the PAIA of promoting transparency and open government to all juristic persons.

The provisions for transferring and deferring access to records are complicated in any freedom of information legislation, but the PAIA attempts to adequately balance the practical complexity of administering an access to information system and the public interest in efficient and timely disclosure of records requested. Monitoring the implementation of these provisions is imperative to ensure that they are not used abusively to delay unnecessarily the disclosure of information that could be disclosed without transfer or deferral. This is particularly problematic where requests could be transferred for being "more closely

[254] Promotion of Access to Information Act, 2000, Section 82(a) and (b).
[255] Promotion of Access to Information Act, 2000, Section 82(c) and (d).

connected with the functions of another public body" or "contains commercial information in which another body has a greater commercial interest", as these provisions are open to wide interpretation and subjective application where commercial data is not disclosed in other publications. Clarifying the circumstances for transferring requests for information and standards for overturning decisions to defer access could greatly improve the processes to facilitate access to information in the PAIA.

Analysis of Appeals Process

The appeals mechanisms created by the PAIA adequately allow for internal appeals and application to the courts for an independent review, but fail to establish an independent appeals body to review and confirm or overturn the decisions of internal appeals processes, before the applicant must engage in the added expense and time of applying to the High Court for relief. The time limitations mandated for preparing and lodging appeals to the internal process or in application to the courts is effective as a balance between the requester's interests in pursuing appeals and the interest of the public or private bodies interest in processing new requests and concluding the issue. However, the vague and unclear references to "prescribed fees" for appeals, to be set by the information officer or the Minister responsible for the public body leaves the appeals process open for abuse as these fees could be set in a manner which prohibits or discourages lodging appeals by individuals who are disadvantaged economically. Provisions that guarantee fee schedules will protect the rights of individuals to lodge appeals and exercise their contemplated right to access information would substantially improve the effect of access to information in the PAIA by encouraging people of all financial backgrounds to pursue requests for information without fear that their request will be refused in order to extract more money from them or to discourage them from

requesting information in the future or pursuing the information in question through costly appeals processes.

Recommendations

1. The transfer of requests to other bodies and deferral of requests for information provisions in sections 20 and 24, respectively, should be carefully monitored and reviewed as necessary to reflect the best practices for effective implementation of their contemplated aims and clear standards for deferring requests or granting repeal of deferrals based on representations regarding the need for more immediate access than after the deferral period.

2. The PAIA should mandate the creation of an independent body to serve as a secondary appeals process, before the matter must be taken to the courts—saving the courts unnecessary cases and offering a less expensive option for appealing decisions of the internal appeals process to an external auditor. This could be a function served by the HRC division dedicated to the access to information promotion and monitoring, or it could be served by a new body created for this purpose specifically.
3. Fees for appeals, and for requests in general, should be subject to waiver based on financial need or economic status, in order to better facilitate the exercise of the right to access information by all juristic persons as intended in the preamble.

(15) Costs

The Article 19 principle regarding costs advocates that costs of accessing information must not inhibit access or deter potential applications, and should be guided the rationale of freedom of information legislation to promote open access to information held by public or private bodies.[256]

Provisions

The PAIA repeatedly identifies that access will be granted only upon payment of the "prescribed fee" for requesting access, and that establishes a two-tier fee system which demands a flat-fee for requesting information and a scheduled-fee system for requests that take more time, effort, reproduction, or preparation than allocated for the basic request for access to records. Sections 22 and 54 govern the fee schedules for requests for access for public and private bodies, respectively. Both require that a "prescribed request fee" be paid before processing the request by the information officer, and in sections 22(2) and 54(2) the information officers of bodies involved are enabled to charge a deposit fee for processing requests where they believe the research and preparation of the records requested will take more than the hours prescribed for this purpose per requester.[257]Such deposits are to be returned if the request is refused based on the exceptions prescribed.[258] Time spent in excess of the prescribed hours to search and prepare for a record are to be billed to the requester, including postage and reproduction fees, as reasonably required.[259] Internal appeals require a

[256] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 6.
[257] Promotion of Access to Information Act, 2000, Section 22(2) and 54(2).
[258] Promotion of Access to Information Act, 2000, Section 22(2) and 54(2).
[259] Promotion of Access to Information Act, 2000, Section 22(6) and (7)

further fee under section 75(3), but appeals to the courts enable the court to award costs in the ruling award.[260]

The PAIA does not establish a norm of minimal fees for requests to access information, but it does include a broad authority for the Minister to exempt any person or category of persons from paying fees, set maximum amounts for certain fees, determine the manner in which fees are to be calculated, exempt persons or categories of records for a stipulated period from any fee, or elect to waive fees where the cost of collection exceeds the amount charged.[261] Finally, the PAIA limits fees chargeable for publication of information that is voluntarily published by public bodies to the cost of reproduction.[262]

Analysis

The PAIA could better meet the Article 19 principle of minimal costs and engaging in effective fee schedules that do not inhibit or deter potential requesters from seeking access to information by explicitly announcing a normative principle of enabling access to information regardless of economic status or capacity to pay the required fees. The PAIA goes half way on this issue by empowering the Minister to exempt any person or category of persons from paying fees, or setting maximum amounts for certain fees, but does not establish an explicit norm, nor any obligation on the Minister to employ these powers. Further, the PAIA continually refers to fees to be charged as "prescribed fees" for access requests, appeals, or extra work required in preparing and reproducing records pursuant to a request. This vague and ominous declaration of "prescribed fees" without any guidance that such fees should be minimal and promote access to information for all juristic persons, regardless of economic

[260] Promotion of Access to Information Act, 2000, Section 75(3)(a) and 82.
[261] Promotion of Access to Information Act, 2000, Section 22(8)
[262] Promotion of Access to Information Act, 2000, Section 15.

capacity, leaves open the possibility of abusing the option to charge fees to the detriment of the accessibility of information to the public.

Recommendations

1. The PAIA should be amended to incorporate an affirmative norm that access to information should not be predicated on access to economic status, and to include a waiver of fees based on proof of limited economic resources.

2. The Minister should be obligated to employ the powers bestowed in section 22(8) to exempt certain persons or categories of persons from payment of fees, or establish maximum amounts for certain fees, with the intention of furthering the goals of the legislation to establish transparent and open government.
3. All references to "prescribed fees" should be clarified.

(16) Open meetings

Article 19 advocates a principle of open meetings whereby access to information legislation establishes a presumption that all meetings of governing bodies are open to the public, except in certain limited circumstances where closed meetings may be justified by appropriate reasons.[263]

Provisions

The PAIA makes no official references to meetings, or a presumption that meetings of governing bodies should be open to the public. However, the PAIA does include the provision

[263] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 7.

in section 12(a) that records of Cabinet and its committees are exempt from access to information requests,[264] implying that all Cabinet and committee meetings would be closed from the public.

Analysis

The PAIA fails to address the Article 19 principle that meetings of governing bodies should be presumed to be open to the public. In fact, the law endangers any establishment of such a norm by exempting Cabinet and its committees from public scrutiny by disclosure of records, in section 12. This fundamental principle of access to information should be implemented in order to effectively promote transparency and open government in the Republic of South Africa, and to avoid the potential for abusive application of this exemption of Cabinet and its committees through using Cabinet to engage in secretive practices beyond the public gaze.

Recommendations

1. The PAIA should be amended to include a provision explicitly recognizing the principle that all governing body meetings are open to the public except in certain limited, prescribed circumstances where meetings are permitted to be closed.

2. Section 12 should be amended or repealed in order to further the principle of open meetings by governing bodies by applying the rule to Cabinet and its

[264] Promotion of Access to Information Act, 2000, Section 12(a).

committees, and thereby indicating that no governing body is exempt from public scrutiny.

(17) Disclosure takes precedence

Article 19 calls for a principle that disclosure takes precedence, which requires that previously enacted legislation regarding access to records of public or private bodies should be interpreted in a manner consistent with the provisions of, or subject to the principles underlying, the freedom of information legislation.[265]

Provisions

In the PAIA, disclosure takes precedence according to the transitional arrangements of Part 6. Section 86 guarantees that previous legislation regarding access to information held by public or private bodies will be covered by blanket amendment to the PAIA by the Minister within one year, and that the disclosure procedures implemented under the PAIA will take precedence unless those procedures provided for in previous legislation are "not materially more onerous" in the manner of access, including but not limited to the fees required in payment.[266] The precedence of this disclosure legislation is further entrenched in provisions such as section 15(a) whereby categories of records that are automatically available include those that are available according to "terms of legislation other than this Act", incorporating previously granted access into the procedures and provisions of access granted by the PAIA.

[265] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 8.
[266] Promotion of Access to Information Act, 2000, Section 86.

Analysis

The transitional provisions of the PAIA are adequately drafted to enable efficient transition into an era of transparency and open public access to records held by public and private bodies. The implementation of amendments by the Minister have not been reviewed by this report, but their adequate drafting and effect are fundamental to the efficacy of these transitional provisions. Throughout the PAIA, there are numerous references to the inclusion of previously legislated access into the principles and interpretive procedures of this law. In order to ensure that access to information is effectively pursued, the HRC should vigilantly review and monitor the application of the PAIA to previous legislation regarding access to records of public and private bodies.

Recommendations

1. The application of the PAIA should be carefully monitored with regard to previous legislation allowing or restricting records of public or private bodies from public disclosure, to ensure that such requests are being interpreted according to the principles of transparency and open government enshrined in this law.

(18) <u>Protection for whistleblowers</u>

Article 19 advocates for a principle of protection for whistleblowers included in freedom of information legislation that protects individuals from any legal, administrative or employment-related sanctions for releasing information, "as long as they acted in good faith and on the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing."[267]

Provisions

The PAIA does include a provision for exemption from criminal or civil liability for "anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act," in section 89.[268]The law also incorporates an affirmative obligation to disclose information that reveals "substantial contravention of, or failure to comply with the law" or "imminent and serious public safety or environmental risk" as part of the mandatory public interest disclosure provisions of sections 46 and 70, thereby establishing the act of whistle blowing as an affirmative duty of information officers aware of such records.

Analysis

The PAIA provides excellent protections for whistle blowers, and even extends an affirmative obligation to information officers to disclose records that reveal wrongdoing or identify imminent public or environmental risk. This protection from civil, criminal, or employment-related sanctions for disclosing information to the public, particularly where information might otherwise be protected by the exceptions provisions of the PAIA, is

[267] Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", June 1999, Principle 9.
[268] Promotion of Access to Information Act, 2000, Section 89.

paramount to ensuring that transparency and open government is established. The legislation effectively mandates the protections for reasonable, good faith disclosures, and it is imperative that the HRC and other groups interested in monitoring the effective implementation of the PAIA hold the government and private individuals accountable for protecting whistleblowers from sanction.

Recommendations

1. The whistle blower protections enshrined in the PAIA, including the affirmative obligation in sections 46 and 70 to disclose information in the public interest revealing wrongdoing, and public or environmental risk, must be effectively implemented and guaranteed in practice as well as in legislation. The HRC and civil society must work to ensure that whistle blowers are effectively protected from civil, criminal, or employment-related sanctions for their reasonable, good faith disclosures.

Chapter Four

Conclusion

The foregone chapters have looked at the general concept of freedom of information and the international instruments making provisions for the existence of the law. It is clear that the right to access information is not a second or third generation of rights but formed the foundational rights of the UN in 1946.

Similar international instruments like the ICCPR and the ACHPR have endorsed the right and mandate members states to enforce it. This has prompted many campaigns around the continent and like South Africa many states have passed the without any undue pressure from civil society. In other societies like Nigeria and Sierra Leone the campaign is ongoing and huge tasks since the various governments are unwilling to pass the bill into law.

Advocacies: Nigeria

The advocacy trend shows two angels: the Nigerians took the campaign to a military government and flow with the transition. The Nigeria government shows some willingness only because the big institutions like Media Rights Agenda and the Nigeria Association of Journalists were behind the idea. From the onset, the Nigerians got funding and support because of the elaborateness of the campaign and while the campaign became so popular and grass root, it became inevitable for the legislators not to listen to the clarion calls.

When a Nigerian talks of national institutions like MRA and NAJ, its membership is made of well educated and elder men who can engage the government or state apparatus from all

angles and ensure that the message is sent across forcefully. The leadership of the Nigerian Coalition posses all these qualities and engaging state and federal legislators was quite easy. No wonder the bill went through all levels of the legislative process but got refused by the president's assent.

The Nigerians after military government are more open to new ideas and transformational programs and following the strong leadership of MRA et al, the grass root organisations easily follow the campaign. So the campaign was not only at federal levels but at state level to the extent that each state senator was pressured by a wide range of domestic activists.

Obvious Lessons…Opaque Lessons

on

Freedom of Information in Sierra Leone

Unlike Nigeria, Sierra Leone's process has never been accepted by the nation or big civil society organisations as a whole. Rather group smaller institutions found the opportunity to push the process. In the process has been struggle and counter struggle for leadership, control of resources and personality war.

While the government scorning the process because of the calibre of people involved in the process, a new brand of leadership, in the leadership of Society for Democratic Initiatives, emerged basing the campaign on personal drive and the need for a general change in the country. It has emerged that irrespective of the country's history with corruption being the main-stray of the country's decadence, its remain a whole challenge for the FOI campaign to be accepted as a national issues rather than a class struggle – political elites against the

lumpen proletariat. The campaign is also starving from funding and this could be attributed the strategy employed for fund raising by a mainly youthful leadership. The governments in Sierra Leone have failed to do any realistic anti-corruption campaign and this has undermined the FOI campaign similarly.

Grass root mobilisation remains a major challenge due to the educational level of the people- in a country that still carries over seventy percent of people illiterate. The donor driven economy and mentality has dissipated into civil society and has undermined the effectiveness of civil society. Many civil society groups now rely on donor support before initiating actions on any issue of national concern. Understandably, with no funds available for this campaign, civil society enthusiasm has remained on the periphery. What is however strange is the failure to connect FOI with transparency and accountability and other issues like good governance by civil society organisations around the country.

Another issues worth noting and reason for the dime coalition support is the level of education of many civil society organisations. The leadership of most youth led civil society organisations cannot fully grasp the issues of FOI. Certainly it is not only an issue of FOI, but many activists now rely on the precept of only attending workshops and support issues without any real of full understanding of the ramifications of the issues. Thus, campaigns are shallows and undermined by the brains engaging on them.

Sierra Leon FOI campaign has never been done in coalition because of the fragmentations of the embodiment of the coalition. Many and the present leadership still fears a reoccurrence of the past internal scribbles and have resorted to building networks. There is need for coalition building and a strengthening of membership to take the message down to the people.

Continual Research on Accountability: There must be continual research on the concept of transparency, accountability, and Freedom of Information as it relates to Africa, to Sierra Leone. All involved, all over the world as they relate to Africa, must avoid the 'cardinal sin of superficiality.

Political reward; and political punishment: Ultimately, transparency and accountability can only be sustainable when people, groups, and political parties are rewarded politically for being transparent and accountable (which would inexorably lead to better and better services for the governed) by winning elections – and punished by losing elections.

For us to accept the above feat, FOI and anti-corruption activists in Africa, in Sierra Leone, must appreciate the gravity, and the nuance, of the African 'tribal war mentality' mindset – and develop an antidote for this.

Imaginative Communication of FOI Concept: Using diverse media – cartoon stories; audio and video documentaries; 'Nollywood'-type video drama; print media education; face-to-face communication by highly credible people, and top notch communicators – we must be able to educate the majority of people about the dangers of their overt, and implicit, ,support for their village folks who are engaged in graft.

Understanding the pivotal role of religion in Africa: generally, there appears to be a dichotomy between religious groups (especially Christian) who come to spread their creed in Africa, and those who are involved in purely humanitarian and developmental projects

(Though some developed country Christian churches – i.e. the Lutherans, Catholics, Methodists – appeared to have successfully blended the developmental and the Christian.

Kenyan theologian, Prof. John Mbiti, postulates that "African lives always in a religious universe". For the African, religion – traditional religion that is; religion that pre-dated Islam and Christianity in sub Saharan Africa - is not a Sunday-to-Sunday matter. The African, every second lives and breathes religion. Religion is everywhere – all the time.

The African's understanding of Islam and Christianity should not be taken on face value – based on the enthusiasm of practitioners, or, their outside piety, dedication and diligence to a particular creed. In many instances, it appears as if negative traditional beliefs have simply been transplanted in the African's understand of Christianity or Islam – hence, there is much emphasis on 'witches' and 'wizards' by too many of the most dynamic new 'Born Again' churches in the country.

The African's understanding of religion also underpins his attitude to such concept as transparency and accountability. Generally, Africans believe that it is "God who gives" – and there should be little effort by mankind to change his condition.

Thus, a man who is corrupt,, and clearly would have enriched himself, would be praised in his church by his pastor as "having been rewarded by God" – especially if that corrupt person donates heavily to his church. The congregation generally would believe that the corrupt man had been "blessed by God". They would envy the corrupt person. They would reward him by electing him to lead in many subgroups in the church. They would give me many awards. Since Africans generally believe that riches are given by a benevolent God (even if it is clear

that a man would have stolen public money to enrich himself; people would believe that if "God had not agree", the man would have been caught, and punished), people don't exert themselves too much to earn money in legitimate ways, believing that "when their time comes", they would get their own rewards –according to "divine plan". Such belief systems get too many Africans to be tepid about suggestion to overturn the status quo of the corrupt.

The magnitude of the FOI concept, and the profundity of the FOI Bill becoming an FOI Act was never put in perspective by both the institution that brought the concept to Sierra Leone, the World Bank, and the institution that first sponsored it being popularized, Westminster Foundation for Democracy . It appeared as if WFD put the FOI project for Sierra Leone almost on the same level as say, projects it were sponsoring dealing with rural women in Koinadugu.

It would have been sensible if groups like the WFD had had their Board Members educated on the centrality of an FOI Law , and not allow themselves to put the FOI campaign at the same level as other projects.

It would have been more useful if WFD had initially contracted institutions, or, key individuals, to prepare well-researched concept papers on FOI in Sierra Leone, and its likely impact on the socio-economic reality of the country. Before money would have been 'invested' for implementing an FOI project in the country [269].

Let us put the FOI in perspective. The lack of accountability and transparency in Sierra Leone was a principal factor in the country imploding in the 1980s, and exploding in the 1990s –

[269] Very much like what the SDI is doing presently

with cataclysmic results. There were over half a million lives lost. Tens of thousands of men, women, and children were maimed, raped…; suffering unimaginable psychological trauma as they were gripped in Apocalyptic events. Relatively, the economic loss of the civil war in Sierra Leone would go into tens of billions of dollars (the ECOMOG and UN armies that were part of the war and peace effort gobbled up about ten billion dollars).

FOI, which would stimulate greater transparency and accountability, and would prevent a lot of such enormous loss as outlined above.

Hundreds of thousands of dollars has been spent on developing the Anti-Corruption Commission (ACC). The executive head of the ACC receives a monthly salary of $7,000. (The embedded British consultant in the ACC probably earns much more, if not in direct salaries, but, in other perks). Even with the 'fangs' given the ACC by the new Anti-Corruption Act by this Parliament – which includes the power to prosecute those indicted of corruption; the power to investigate the relatives, lovers, etc. of indicted corrupt people who could be using their relatives as fronts to launder money illegally got – the ACC is still just one institution, and within its ranks, its staff could be compromised.

A Freedom of Information Act in Sierra Leone would bring into practice a transparency and accountability creed that would be egalitarian, so, it would not be manipulated by any individual, or, interest groups. Thus, it can be said that a Freedom of Information Act will not only enhance the activities of the ACC, but, is likely to be more potent in the arena of transparency and accountability than the ACC itself. In General Elections in Sierra Leone in 1996, 2002, and 2007; in Local Government elections in 2004 and 2008, millions of dollars

have been set up to establish an electoral institution, pay staff well, and recruit temporary staff; as well as to promote the idea of “elections”.

Successful democratic elections have been held in Sierra Leone for over ten years now (graded by independent monitors as one of the best in the world; especially with the 2007 elections leading to a peaceful change of power from one political party to the next). The purpose of democratic elections should not just be the hype of campaigning, dropping ballot papers into ballot boxes, and electing officials. Democratic elections must lead to governance – and the elected governors being able to provide, or, stimulate, better and better goods and services for the majority governed. The ‘product of elections’ has not meant any significant increase in the standard of living of Sierra Leoneans over the past ten years or so.

n spite of the kudos for free and fair elections, all surveys, all opinions from opinion leaders have been a crescendo that corruption is still rampant. And, in Freetown – the proceeds of corruption smacks one in the face. The period of democracy has meant splendid and expensive-looking mansions sprouting in the affluent suburbs of the city, the elites cruising in cars worth tens of thousands of dollars, posh restaurants and guest houses that cater to the narrow elite springing up all over the city – while the living conditions of the majority poor continues to deteriorate.

- Quality education at the public school level is non-existent.

- Where public hospitals have been built, there are either no medical personnel, or, medical personnel use public facilities to conduct private business.

- Or, there would not be medicines available….

- Hopefully, a Freedom of Information Act will stop this psychological tomfoolery and skulduggery that masquerades as democracy in Sierra Leone.

- If millions of dollars can be spent on the ACC and in 'democratic elections' in Sierra Leone, then that concept which would give meaning to both those concepts/institutions – Freedom of Information - should be given the appropriate gravity, and access to funding.

If the above had been done, the process of researching the concept would have meant consultation with key stakeholders who would have understood the concept, and given their intellectual commitment to it even before the project proper commences.

If the concept had been researched, it would have been likely that the WFD would have put more funding to that what they gave – 30,000 British pounds. It would have meant more "institutional capacity" building for "human resources development" funding for those who are to develop the project.

Apparently, the WFD did nothing of what I suggest above.

- The WFD funded a 'coalition' – the Freedom of Information Coalition-Sierra Leone.
- The WFD did not bother to examine closely the composition of the coalition (the knowledge base, the experience in managing projects, the 'integrity level' of individual members) before disbursing money to the coalition.

- The WFD did not closely examine the laws and rules governing the coalition; and what are its own internal transparency and accountability mechanisms, the checks and balances of its powers.
- In funding the FOIC-SL the way it did, it appeared to me as if the WFD was paternalistic.

It appeared as if the idea of a 'coalition' was injected into the minds of Sierra Leoneans from the very introduction of the FOI concept – by the World Bank in 2003/2004. The message was: there is likelihood that you would receive funding from donors if you form a coalition.

So, in 2003/2004, a 'coalition' was formed. But the coalition had no central leadership who believed in the concept, no central ideological underpinning. When Emmanuel Saffa Abdulai re-activated the idea – no, no, it was really 'resurrected' the idea - of the FOI in 2005, he also had the belief that the concept would be better funded, or, even, would move ahead if it is built around a 'coalition'.

There were a few youth who bought the idea, who gave some of their time into developing the idea. By 2006, when the FOIC-SL moved its meeting place from Talking Drums Studio on Bathurst Street to the NFHR office on Wellington Street only about nine youth (with the exception of Oswald Hanciles) were regulars in meetings of the FOIC-SL.

When Emmanuel developed the projects for the FOIC-SL, his problem could have been that he felt hemmed in by a membership that – largely; not entirely – lacked the capacity to develop marketable projects; lacked resources – financial; material; or, even in terms of being

known in society or having important contacts – and so were largely 'hanging on there', with the hope that one day the FOIC-SL will receive funding.

In too many cases in post-war Sierra Leone, coalitions are formed expeditiously, as a bait for funds to fund some pet idea of theirs. Including having a fuller intellectual grasp of projects they aim to fund within the context, there should be a paradigm shift in how donors like WFD fund Sierra Leonean groups like FOIC-SL. There should be a 'finder's fee', or, 'intellectual property' reward for the person (s) who locate the funding agency, or, who has put the most in terms of time, energy, material or financial resources into developing the concept (or project) up to the time donor (s) agree to fund it.

In the case of the FOIC-SL, given the fact that the cream of the Sierra Leonean elite failed to see value in the concept in 2003/2004, even after the World Bank had endorsed the idea; given the fact that it was Emmanuel Saffa Abdulai who resurrected the idea; given the fact that it was Emmanuel who developed the idea for a project, located possible donors for the project, a 'capitalist reward' should have been factored into the project for Emmanuel.

Factored into the development of the project –like the capitalist award suggested above – would be the empowering (or, the search) for a project manager with passion for the project; and/or project manager with knowledge, and proven experience in developing projects like the one being funded. (Experience in developing a project in digging pit latrines, or, providing relief for displaced persons and refugees would not necessarily prepare one for an 'information' and 'PR' project like the FOIC-SL).

The Law Countries

Uganda law is a weak law and from the onset one would come to the conclusion that the government was playing a game. Every legal action was taken to vitiate the effectiveness of an FOI in Uganda.

Apart from the fact that there are procedural as well structure failures, there are similarly semantics and the complete absence of political will on the part of the government to open up its system to public scrutiny and to enhance and protect the rights of the people of Uganda.

It is certainly clear that there is need for amendment to the Ugandan law and such amendment is not likely to come down easily from the government on its own violation. The need for donors to make the full implementation, on one hand, and a better law to replace the existing one, on the other would greatly enhance the process. There is also need for pressure from within and this where civil society comes in. There is a strong civil society network working on access to information that needs to be blustering. It needs fund and support from other civil society organisations in the country to enhance its work.

The South African law is a major breakthrough in Africa as to what an FOI law should be. Even though its implementation has been one of problem considering the fact that the law is so good that implementing will require an extra effort. Apart from the lack of internal appeal provision in the law and the expensiveness of an appeal, the South African model is just be a good law that, not only transitional countries , but any nation fighting for a cleaner society would love to have.

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