

**A NEWS SERVICE FROM TRANSPARENCY INTERNATIONAL-KENYA**

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## OFFICE OF GOVERNMENT SPOKESPERSON IN KENYA: FACILITATING ACCESS TO INFORMATION?

by Ken Opala

In June 2004, the government announced the creation of the office of the government spokesperson. The first of its kind in Kenya's history, the new office was greeted with a mixture of anticipation and skepticism. Before the office was created, politicians and high ranking government officers had been issuing disjointed and contradictory statements concerning questionable government transactions.

A skeptical public watched their antics with a sense of growing unease. The appointment of a government spokesperson seemed to suggest that the government was determined to inject greater coherence in its conversation with the Kenyan people. Among the public the announcement was met with mixed feelings.

There was anticipation for greater clarity and thus more accountability. But the public also quickly questioned the role, purpose and structure of the office. In addition, concerns were raised about the suitability of the person recruited to hold the office, Dr Alfred Mutua who, prior to his appointment, had been an associate professor in political science at a Dubai university.

Three months on, has the new office improved the government's public image? Not really. Ministers and high ranking government officers continue to release public statements in disregard of the office. Worse still, many have even gone so far as to admonish the office and its holder. It did not help that the spokesperson's first assignment was to manage the Anglo-Leasing scandal. The spokesperson's attempts to spin it failed spectacularly when his Finance Minister openly contradicted him. Ministers and MPs also continued to issue wildly conflicting statements on the issue. At that stage, public skepticism outweighed anticipation. If the government had hoped that appointing a spokesperson would shore up its credibility slide, it was being proved wrong with every uncertain step it was making.

The big questions still remain: what is the role, structure, purpose and accountability of the office? Is it propaganda, public relations or voicing the government policies? On whose behalf does the office speak- the government, the Cabinet or the President? To whom is the spokesperson answerable? How does the office relate to the presidential press office?

In connection to these concerns, Kenyans are also keen to know how the office relates with the spokespersons of individual ministries. When the spokesperson and individual ministers or their spokespersons contradict each other, whose word takes precedence? How independent is the spokesperson's office? In addition, is it the office's responsibility to locate information on certain issues or to wait and be briefed? In short, what is the office holder's job description?

*To create linkages that run through the government, the position [of Government Spokesperson] should be created by law ... [which] ... would bind ministers and other top government officials and compel them to disclose information within their jurisdiction and at their disposal*

Let us change tack briefly. Governments keep secrets. They are not keen on revealing them to their citizens. In order to do so deny their citizens the right to information-governments invoke that old chestnut; Preservation of National Security. This,

of course, can be interpreted to mean anything, including (and especially) the political security of the Head of State. In Kenya, the Official Secrets Act has for long acted as an effective barrier against the public's right to access official information. Appointing a government spokesperson can be seen as a government's attempt to break with this convention.

Ideally, the official spokesperson's office should speak for the government to the governed. It should bridge the "information gap" and promote the right to information, a fundamental right for too long denied the Kenyan people. In recognizing the centrality of the right to information the *Declaration of Principles on Freedom of Expression in Africa*, states that "public bodies hold information not for

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This is the second of a series of three issues focusing on the value of Freedom of Information and its impact on governance and transparency in the conduct of national affairs.

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themselves but as custodians of the public good and everyone has a right to access this information.”

Progressive governments use various strategies to bridge the information gap. Some have created the position of an overall Government spokesperson. Others have public relations officers for individual ministries performing that function, as well as presidential aides or personal assistants linking the Head of State with the public. Thus, the holder of the office of spokesperson must be knowledgeable and beyond reproach. He/She must be a firm believer in freedom of information (FOI), a person who is not ready to compromise integrity for cheap publicity or individual gain. Yet, for whoever assumes that position, the compelling issues will remain the same: is there the political will to see this office play its rightful role?

Take in our situation the office of Governance and Ethics in the Office of the President for example. Some powerful elements along the corridors of power attempted to frustrate it as demonstrated by the recent attempt to transfer it to another ministry and thereby degrade its independence. Those efforts were successfully opposed by diplomats and civil society organizations. It is therefore easy to draw parallels between the Office of Governance and Ethics, and Office of Government Spokesperson. Both are sensitive offices whose existence threatens corrupt elements within the government. In fact, in the ensuing controversy that has characterized the relationship between the Office of the government spokesperson and government ministers, it has emerged that it is the office that is in contention.

Critics claim that apart from the squabbling within the ruling National Rainbow Coalition (Narc), there was hardly anything to suggest the government was mismanaging information; nothing that necessitated the creation of the position. What curtailed access to information in the past was not the absence of a spokesperson, but the restrictive legal regime exemplified by the Official Secrets Act, which bars members of the public from accessing information. Thus, this position has been instigated by politics rather than by need. It has been created for political expedience rather than on a sound analysis of the situation. This argument is based on the following rationale.

First, the office appears to be a propaganda tool, hardly a recipe for better governance.

Second, the office does not appear to have a job description or clear role. Lack of a proper job description results in confusion which appears to juggle propaganda with public relations. Instead, what members of the public would expect is that the office presents official government positions. For example, on the Anglo-Leasing scandal, instead of detailing the rot and explaining to Kenyans the government's plans to re-coup taxpayers' money and

prosecute culprits, the office merely exonerated the administration from blame and instead passed the buck to the previous regime. It was unable to tell how much had been lost or received from Anglo-Leasing. Cynics felt it was being used by powerful individuals in the government to whitewash the myriad scandals in the current administration.

Third, the office is not supported by the requisite legal provisions. To create linkages that run through the government, the position should be created by law. This law would bind ministers and other top government officials and compel them to disclose information within their jurisdiction and at their disposal. In the Kenyan case, such legal structures do not exist. Thus, the spokesperson runs the risk of being denied information or being influenced by powerful individuals within the government. The holder of this office, who is at the level of an Undersecretary, will likely find it extremely difficult to order around ministers. On

the other hand, ceding to an individual the powers vested in ministers without the necessary legal provision could be a recipe for disaster. The fear is that the spokesperson could deny ministers and their deputies the right to freely express themselves on matters of public policy within their jurisdictions.

It goes without saying that it is necessary to define clearly the role and functions of the office before developing appropriate legal provisions. In addition to legal backing, it is necessary that the office enjoys political goodwill. Without political support, the office will not be able to scatter and scuttle the interests of the clique around the President.

As well as the need for a clear, feasible and legislated role, the office of the spokesperson has to draw all PROs of ministries, the comptroller of State House and the Presidential Press Service in order to be effective.

Based on the contradictory statements that have emerged, it would appear that within the government structure and the office of the Government Spokesperson, the right hand knows not what the left hand is doing. It is not that Kenya lacks an office charged with making public any information on policy. The problem is that the government is inaccessible. Even with the myriad spokespersons within ministries, Kenyans have no access to information because the PROs fear contradicting or antagonizing the centre of power.

Information is power. An administration that operates on fear and is accused of flagrant corruption will always be averse to sharing information with the public. It will protect itself through secrecy and thus promote the corruption that festers within its ranks.

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**The views expressed in this article are solely those of the author and do not necessarily reflect the views of Transparency International- Kenya**

## ACCESS TO INFORMATION AND POLITICAL FINANCE REFORM: PROMISING POLICY AREAS FOR BUILDING TRANSPARENCY

Democracies can no longer tolerate bribery, fraud and dishonesty, especially as such practices disproportionately hurt the poor. For the past 10 years, Transparency International has helped governments and citizens come to this realisation, in part by spearheading efforts to inform and educate them about the corrosive effects of political corruption, but also by developing ways to reduce it.

As a member of TI's Advisory Council, I am pleased that The Carter Center has had the opportunity to work with many local TI national chapters, particularly in the Americas.

Like TI, The Carter Center is committed to fostering transparency and preventing corruption. In countries such as Jamaica, Ecuador and Costa Rica, the Center has helped governments and civil society organisations develop plans and mechanisms to achieve these goals. Through our work, we have recognised that corruption is concomitant with a marked decrease in citizens' satisfaction with democratic institutions.

In our experience there are two policy reforms that hold the most promise for reducing corruption and promoting citizen confidence in government: development of an access to information regime and reform of political party and campaign finance systems.

Access to government-held information allows citizens to hold their government accountable for policy decisions and public expenditures. Informed citizens can more fully participate in their democracy and more effectively choose their representatives.

Importantly, access to information laws can be used to ensure that basic human rights are upheld and fundamental needs met, as individuals may request information related to housing, education and public benefits. Such laws also help government, as they increase the efficiency and organisation of critical records. Governance is improved, and the private sector is assured of more transparent investment conditions. Access to information bridges the gap between state and society as a partnership for transparency unfolds.

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The Carter Center's Americas Program has collaborated with countries in the western hemisphere as their legislatures seek to pass and implement access to information laws that meet emerging international standards. We have further assisted civil society organisations as they prepare to use and enforce their new right to information.

In Jamaica, we helped to inform the debate regarding the now approved access to information act and have continued to provide advice and technical assistance relating to effective implementation.

In Bolivia, we have begun working with the vice-presidency's new anti-corruption secretariat to amend its draft access to information bill and engage civil society in the passage and implementation of this law. We encourage every nation to ensure that citizens have a right to access information, and The Carter Center stands ready to assist. Transparency in campaign and party finance is needed to bolster public faith in democratic institutions, especially political parties and legislatures.

Citizens are increasingly angry and alienated when elected representatives respond to the selfish interests of campaign donors, instead of to the general public.

This trend is evident in Latin America and the Caribbean, where poverty and inequality persist despite democracy, but public scepticism about the disproportionate influence of wealthy and corporate donors has driven campaign finance reform efforts in the United States and Canada as well.

In March 2003, building on the efforts of TI, International IDEA and the Organization of American States, The Carter Center convened a hemispheric conference to examine campaign and party finance in the Americas and discuss possible improvements.

Informed by the deliberations of representatives from government, the private sector, the media and civil society, 10 former presidents and prime ministers from the western hemisphere reached consensus on principles that should guide campaign and party finance. They backed a set of objectives and tools stemming from the premise that democratic governance costs money, and we should be willing to invest in our democracies.

Their recommendations emphasised the role of public finance, equitable access to the media, the need for full and timely disclosure and the importance of effective enforcement. International organisations such as TI and

The Carter Center play an important role in supporting such governmental, multilateral and civil society initiatives to fight and prevent corruption. We look forward to continuing together on this path.

*Jimmy Carter*

*Former president of the United States of America*

*Source: Global Corruption Report 2004*

## KENYA'S FOI BILL 1999: THE FIRST STEP TOWARDS AN EFFECTIVE ACCESS REGIME

*Analysis of the International Commission of Jurists draft Access to Information Bill 1999*

by Charmaine Rodrigues

Article 47 of the draft Constitution of Kenya provides a specific guarantee for the right to access to information held by the state or by a private body where it is required for the exercise or protection of any right or freedom. However, while constitutional protection is an important step towards entrenching the right to information domestically, it is still essential that the right to information legislation is enacted which details the specific content and extent of the right. Legislation sets a clear framework – which can be understood by the bureaucracy and the public – for gaining and given access and places specific obligations on bodies to put in place systems and develop cultures of openness that are uniform.

In recognition of the importance of entrenching the right to information via legislation – and responding to the failure of the Kenyan Government to take action itself – in 1999 the International Commission of Jurists (ICJ) in Kenya took the initiative to draft an *Access to Information Bill*<sup>1</sup>. In recent months, attention has again reverted to the ICJ draft Bill. The Government of Kenya has explicitly mentioned the need for right to information legislation in its Short Term Action Plan for the Governance, Justice, Law and Order Sector (GJLOS). It is understood that the Thematic Group on Ethics, Integrity and Anti-Corruption set up under the GJLOS Programme has reopened discussions on freedom of information in Kenya and have adopted the ICJ-Kenya draft Bill as a starting point.

The Bill drafted by the ICJ provides a very good basis from which to develop a right to information law for Kenya. Notably, however, the Bill in its current form still requires work to bring its provisions in line with international best practice. There are a number of general principles that underpin good access laws. CHRI has analysed the Bill against these principles and suggested some improvements. The following is a summary of the key issues raised in CHRI's analysis.

### Maximum Disclosure

An effective access law needs to be clearly premised on a strong commitment to the rule of maximum disclosure. This principle is supported by the conceptualisation of access to information as a RIGHT and a concomitant *presumption* in favour of access. The ICJ Bill rightly recognises the right to access information in its Preamble, but care needs to be taken to ensure that this is reflected throughout the entire Bill.

It is a concern that the content of the right may be narrowed in practice because the Bill focuses on access to “official records” and “official information”, rather than “information” generally. This latter term is broader and covers written, audio and visual materials and even samples and materials on its widest interpretation. Likewise, the Bill has unnecessarily restricted access under the law to “Kenyan subjects” or “a Kenyan person”. Conversely, jurisdictions like the United

States and Sweden allow *any person* to request information under their access law. This can be important in countries that accommodate large numbers of asylum-seekers, long-term residents and foreign workers who need to access information related to their welfare or rights.

The Bill should clarify that all arms of government will be covered by the provisions of the law. In some jurisdictions, the executive and the courts have been excluded from the scope of the law. The wholesale exclusion of these bodies cannot be justified. Although there is some information collected and/or used by the executive and judiciary which can legitimately be exempted from disclosure, any such sensitive information will be protected via the exemptions provisions.

The Bill currently allows for private bodies to be made subject to the law if they are specifically prescribed in regulations. In accordance with international best practice, the Bill should extend coverage generally to private bodies that “carry out public functions” and where they “hold information which is required for the exercise or protection of people's rights”. This recognises that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and should not be beyond their scrutiny. The South African *Promotion of Access to Information Act* provides a very good model to draw on.

Section 3 states that the rights conveyed by the Bill will be implemented “progressively”. While the Government may legitimately wish to allow time for bodies to prepare for implementation, a maximum time limit should be included in the law to ensure that implementation cannot be delayed indefinitely. This has been the case in India for example, where the Central Freedom of Information Act was passed in December 2002 but eighteen months later is still not in force. Experience suggests a maximum limit of 1 year between passage of the law and implementation should be sufficient.

Effective access laws not only impose a duty on bodies to disclose information upon request, but also require information of general relevance to the public to be proactively published and disseminated, for example, regarding an body's structure and activities, the documents they hold, their finances, opportunities for consultation and decisions/policies affecting the public. The Bill contains some basic proactive disclosure requirements, but these should be made much more comprehensive. The Bill should also explicitly require that said information be as widely accessible as possible, for example, by requiring that it be made available in multiple



Source: Global Corruption Report 2003

## ...Towards an effective access regime

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languages on the internet and for inspection at all local offices. The information should also be updated regularly.

Encouraging maximum information disclosure by public officials also requires the law to provide protection for “whistleblowers” (i.e. individuals who disclose information in contravention of the law and/or their employment contracts because they believe such disclosure is in the public interest). It is very positive that the Bill contains an entire part devoted to public interest disclosures. However, the provisions are unnecessarily restrictive, imposing a number of duties on whistleblowers to qualify for protection that in practice may be difficult for whistleblowers to discharge. These provisions should be reconsidered to ensure they will effectively protect all whistleblowers as long as they are bona fide in their intention.

### Minimum Exceptions

While keeping in mind the overarching principle of maximum disclosure, it is nevertheless well-accepted that there can be a small number of legitimate exemptions in any access regime to protect against disclosures which would result in serious harm to important interests. However, there is often disagreement about where to draw the line. As a general principle, exemptions should be kept to an absolute minimum and narrowly drawn.

The exemptions in the Bill are somewhat confusing. They are contained in two separate provisions – Sections 5(1) and 6 – but it would be simpler if these provisions were

merged and then reviewed to ensure they are the minimum to protect legitimate interests. The exemptions should also be reviewed to ensure that they require a sufficiently high threshold of harm to justify non-disclosure. For example, it is not enough that information simply *relate* to national security to warrant non-disclosure; disclosure should actually be likely to cause serious prejudice or substantial harm to national security.

Additionally, best practice requires that ALL exemptions are still made subject to a “public interest override”, whereby a document which is presumed exempt should nevertheless be disclosed if the public interest in the specific case requires it. While Section 6(1) refers to the public interest, for clarity, all of the exemptions in the Bill should be made explicitly subject to a clearly drafted public interest test. The logic of the exemptions provisions should be: Is the information covered by a legitimate exemption?

Will disclosure cause substantial harm? Is the likely harm greater than the public interest in disclosure?

### Simple Access Procedures

A key test of an access law’s effectiveness is the ease, inexpensiveness and promptness with which people seeking information obtain it. The law should include clear and uncomplicated procedures ensuring quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law.

## ...Towards an effective access regime

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A number of standard provisions generally included in access laws to promote effective implementation are missing from the Bill. For example, there is no mention of who will be responsible for managing applications; many laws commonly require a "Public Information Officer" be appointed for this purpose. The absence of a designated information officer could be confusing for the public because requesters will not know who they should contact to follow up their applications. There is also no provision requiring misdirected applications be transferred, which could result in applicants themselves being burdened with the expense and difficulty of resubmitting their applications. The Bill also does not mention which language(s) applications can be made in, nor whether information will be translated, if requested by the applicant.

The time limits for processing applications need to be clarified. Time limits should be clearly stated so that there is no room for officials to exploit ambiguities to delay processing of applications. Drawing on international best practice, consideration should also be given to include an additional provision shortening the time limit for responding to applications to 48 hours where the requested information relates to the life and liberty of a person.

The Bill currently allows for the imposition of fees, including the imposition of higher fees for commercial requests. Ideally, no fees should be imposed under the law – a situation that occurred in Australia when their *Freedom of Information Act* was first introduced in 1982. At a minimum, any fees should not be set so high as to deter potential applicants. Best practice requires that fees be limited only to cost recovery, and that no charges should be imposed for applications (as is the case in Trinidad & Tobago and Mexico) nor for search time; the latter, in particular, could easily result in prohibitive costs if bureaucrats drag their heels when collating information.

### Independent Appeals & Enforcement Mechanisms

Effective appeals and enforcement provisions ensure the success of access legislation. The Bill's appeals regime – namely, one internal appeal followed by an appeal to the newly established independent Information Commissioner and then to the courts – is well-designed, although some practical issues require clarification.

It is positive that Section 5(3) requires that refusals are accompanied by substantive written reasons and information regarding the appeals process. It should be clarified though, that applicants can appeal not only a decision to refuse access, but also the fees imposed and the form of access provided. While the Bill allows for an internal review as a first step in the appeals process, it leaves the details to be determined in regulations. This is not appropriate. An effective and internally consistent appeals framework is essential to the proper functioning of the entire access regime. The primary legislation should set out such important details to ensure that the overall

regime is holistically sound. This deficiency should be rectified as a priority.

Nonetheless, it is very positive that the Bill seeks to establish a new position of Information Commissioner to serve as an independent body with the mandate to hear appeals under the law and make binding decisions and that final recourse still remains with the courts.

The law should include penalties to act as a practical deterrent to non-compliance. The Bill currently contains sanctions for non-compliance with the Information Commissioner's orders and wilful destruction of records subject to requests. However, penalties should also be available where there has been unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records and/or obstruction of the work of any public body under the Act. Consideration should also be given to permitting penalties to be imposed on individuals because without personalised penalty provisions, many public officials may shirk their duties, safe in the knowledge that their employer will suffer the consequences. Notably though, defaulting officers at whatever level of seniority must be penalised and not just the official responsible for managing the body's requests.

### Monitoring and Promotion of Open Governance

Many laws now include specific provisions empowering a specific body, such as the National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. It is positive that the Bill places an obligation on the new Information Commissioner to report annually to Parliament on the operation of the law. However, consideration should be given to elaborating upon exactly what the Information Commissioner's reports should contain at a minimum as the new Commissioner may benefit from more explicit guidance.

It is also increasingly common to include provisions mandating a body to promote the Act and the concept of open governance. Consideration should be given to include provisions which impose a legal obligation to train implementing officials on the new law. The Information Commissioner and/or the Ministry with responsibility for overseeing the law should also be required to raise public awareness of the rights provided under the law.

The full text of the analysis of Kenya's FOI bill can be found on CHRI's website at [www.humanrightsinitiative.org](http://www.humanrightsinitiative.org).

<sup>1</sup> Vitalis Omondi, *New Law Against Secrecy Proposed In Kenya*, *The East African*, 13-19 October 1999. <http://www.nationaudio.com/News/EastAfrican/111099/Regional/Regional6.html>

## FREEDOM OF INFORMATION LEGISLATION: PROGRESS, CONCERNS AND STANDARDS

by Toby Mendel

Freedom of information (FOI) includes the public's right to access information held by public authorities and imposes an obligation on public authorities to publish key categories of information. Many recently adopted constitutions include specific guarantees of FOI, reflecting a growing acceptance of this fundamental human right. Examples include the 1994 Malawi constitution and the Thai equivalent three years later, as well as many recent European constitutions.

Experience shows that constitutional provisions are not enough to ensure the right to FOI in practice; implementing legislation is required. Countries around the world are adopting such legislation, with Bosnia-Herzegovina, Britain, Kyrgyzstan, Poland and South Africa among those to have done so since 2000. Draft laws are under consideration in Guatemala, India, Indonesia and Nigeria and numerous other countries.

The trend is not limited to states: a number of intergovernmental organisations (IGOs) have recently adopted FOI policies. The EU adopted the Regulation Regarding Public Access in May 2001 and the World Bank revised its Policy on the Disclosure of Information in September 2001.

Not surprisingly, legislation and practice vary considerably. Where laws provide a good basis for openness, attention must now focus on implementation. Some governments have responded to pressure to adopt legislation but limited the right as much as possible. An extreme case in point is the recently adopted Zimbabwean Access to Information and Privacy Act, which is more about controlling the media than securing access to information.

### Areas of concern

Key issues to consider in assessing whether legislation provides for effective exercise of the right to FOI include exceptions and exclusions, secrecy laws and the right of appeal.

Exceptions are the most controversial issues in most FOI laws. All FOI laws include a number of exceptions, many of which protect important social interests such as national security and personal information. If exceptions are too broad, however, they can effectively undermine the legislation. Two safeguards can help prevent this problem.

First, exceptions should include a 'harm test'. It is not legitimate, for example, to exclude *all* information relating to national security; only information that would actually *harm* national security should be covered. In practice, although harm tests are found in most recent FOI legislation, they do not apply to all exceptions.

Second, all exceptions should be subject to a public interest override. This approach provides for the release of information, even if it falls within the scope of an exception, in cases where the overall public interest is served by disclosure, for example where the benefits of disclosure outweigh the harm. The public interest override should apply, for example, where personal information regarding a civil servant exposes a ring of corruption. Governments have proved reluctant to include public interest overrides in legislation, and many FOI laws do not contain them. This issue proved divisive in Britain, and the law finally adopted contains only a limited override.

Exclusions refer to bodies entirely outside the ambit of the law and under no obligation to disclose information. The bill currently before the Indian parliament, for example, excludes all intelligence and

security organisations, as does the British law. In some countries, exclusions are provided for by an excessively narrow definition of public bodies. On the other hand, some laws – such as the Polish FOI act – apply to a broad range of public bodies.

In principle, all public bodies should be under a *prima facie* obligation to disclose information, subject only to the regime of exceptions.

Secrecy legislation should not be permitted to extend the regime of exceptions in an FOI law, which should be sufficiently comprehensive to protect all legitimate interests. Wide-ranging secrecy laws can significantly undermine FOI legislation and should, therefore, be subordinate to it. Unfortunately, this is rarely the case in practice. A disturbing trend in European countries is the adoption of secrecy laws as a precondition for NATO membership. NATO refuses to disclose even the document that sets out its secrecy standards, though there is no reason to keep such information secret.

Appeals processes enable individuals to contest any refusal to disclose information. Independent oversight is essential where public officials refuse to disclose information, especially if they are hiding corruption or other wrongdoing. Individuals in most countries have the right to appeal to the courts, but this remedy is often inaccessible and the process excessively time consuming. Many FOI laws provide for an appeal to an administrative body, but these bodies can only be effective if they are truly independent. In Japan, members of the appeals body, the Information Disclosure Review Board, are appointed by the prime minister after the approval of both houses of the legislature, a process that prevents control by any single political party.

### The need for standards

One reason for the varied effectiveness of FOI laws is the lack of clear, authoritative standards. The non-governmental organisation (NGO) ARTICLE 19 has taken a step towards defining FOI standards with its publication 'The Public's Right to Know: Principles on Freedom of Information Legislation'. The UN's special rapporteur on freedom of opinion and expression and the Committee of Ministers of the Council of Europe have also advanced general FOI principles, but much more needs to be done. The adoption of a declaration on FOI by the UN would go some way to addressing this problem and would help to provide an impetus for the adoption of national legislation.

Greater openness also needs to be promoted within IGOs such as the World Bank, the International Monetary Fund and the World Trade Organization, as well as regional bodies like the European and African Unions. Institutions of global governance, no less than national governments, need to be transparent. The need for corporate openness is increasingly crucial, particularly among transnational companies.

Standards need to be developed for corporate transparency and corporations need to be convinced to implement them. ARTICLE 19 also proposes a global campaign involving NGOs and supportive governments around the world to promote FOI goals. Civil society needs to work together to elaborate authoritative FOI standards and to ensure that governing bodies, both national and international, respect them fully.

Source: Global Corruption Report 2003

# FREEDOM OF INFORMATION LAWS IN VARIOUS JURISDICTIONS

by Grace Wakio

## LONG-STANDING FOI REGIMES

Openness and transparency has been a long-standing practice in management of public affairs in various countries. The public's right to Government information is a constitutional principle that is over 200 years old.

### Sweden

In 1766, Sweden enacted the world's first freedom of information law - *The Freedom of the Press Act*, which provided that official documents should "upon request immediately be made available to anyone making a request". The 1810 and 1812 Freedom of the Press Acts retained the principle of public access to information until they were repealed by the Freedom of the Press Act of 1949<sup>1</sup>, which also carried the principle forth. The Act decrees, "Every Swedish subject shall have free access to official documents." Public authorities are required to respond immediately to requests for official documents. Requests can be made anonymously and in any form.

There are discretionary exemptions<sup>2</sup> from disclosure to protect, national security and foreign relations, fiscal policy, prevention of crime, the public economic interest, the inspection and supervisory functions of public authorities, the preservation of plant or animal species and the protection of privacy. A list of the documents that are exempted in line with the provisions of the Freedom of the Press Act is provided in the Secrecy Act, supplemented by the Secrecy Ordinance. Most of the restrictions to disclosure require an illustration that harm will be occasioned to the interest protected if the information sought is disclosed.

Each public authority is required to keep a register of all official documents and indices of information kept to be availed to the public. Appeals against withholding of information can be made to the general administrative courts or the Parliamentary Ombudsman<sup>3</sup> and finally to the Supreme Administrative Courts but only by the person requesting the information; not by the authority seeking to prevent disclosure or a third party whom the information concerns.

Individuals have a right to access and correct personal information held by public and private bodies under the Personal Data Act. The Data Inspection Board (DIB) created by the Data Protection Act of 1973 enforces this Act (DPA). The DPA provides for protection of individual privacy in relation to maintaining and disseminating personal data. The DIB issues licences to individuals and agencies that wish to create and maintain personal data banks.

Despite having the oldest freedom of information legislation there are delays in releasing official documents, improper use of the secrecy provisions and many citizens lacking knowledge of their rights under the law and how to use them.

### USA

The Freedom of Information Act (FOIA) was enacted in 1966 and went into effect in 1967. It has undergone several amendments, with the most recent one being the Electronic Freedom of Information Act (E-FOIA). There are similar laws in almost every State.

The law allows any person or organization, regardless of country of origin or citizenship, to ask for records held by federal Government agencies, which include Executive and military departments, Government Corporations and other entities which perform Government functions except for Congress, the Courts or the President's immediate staff at the White House<sup>4</sup>, including the National Security Council.

The person seeking the information need not disclose why he/she wants it. Requests should be processed within 20 working days. Reasonable fees can be charged for the copying. Public agencies are required to proactively publish information of certain nature in the Federal Register, such as their operations, places at which and how the public can access information or make requests for information,

<sup>1</sup> This along with the Instrument of Government passed in 1974 to replace the 1809 Instrument of Government, the Act of Succession of 1810, the Fundamental Law on Freedom of Expression, from 1991 and the Riksdag Act adopted in 1974 form the Swedish Constitution.

<sup>2</sup> This means that there is no automatic duty to deny access and the exemption may be waived

<sup>3</sup> The Ombudsman can investigate and issue non-binding decisions

<sup>4</sup> The President's ability to receive confidential advice was found to have a constitutional basis by the Supreme Court in the 1974 case of *United States v Nixon*. In this case, the President's need for confidentiality had to give way to the needs of the criminal justice system for specific information, but no general right of access to the President's papers was found. Another landmark case where the Supreme Court had to adjudicate the validity of a controversial claim concerning public access to Government information was the 1971 "Pentagon Papers" case. The case arose when the Government sought to prevent the Washington Post and the New York Times newspapers from publishing a classified study of US policy-making in Vietnam. The newspapers had obtained the study through an unauthorized disclosure by a former government employee. The Supreme Court allowed the newspapers to publish the Pentagon-Papers since the Court felt that the Government had not made a sufficient showing that national security would be endangered by the materials in question

## **FOIs in various jurisdictions**

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their rules, decisions, policies and manuals<sup>5</sup>. The E-FOIA requires that agencies create “electronic reading rooms” where people can access information electronically.

There are nine classes of discretionary exemptions: national security, internal agency rules, information protected by other statutes, business information, inter and intra agency memos, personal privacy, law enforcement records, financial institutions and oil wells data. In 2003, a provision was inserted to the Homeland Security Act prohibiting disclosure of voluntarily –provided business information relating to Critical Infrastructure. The FOIA provides that if the document requested contains some material that is exempt and some that is not, the agency must edit the document and provide the non-exempt portion.

Appeals against withholding information or complaints about long delays in processing requests can be made internally and a further appeal lies with the courts. There is no independent oversight body such as an Ombudsman or Information Commission. Management of FOIA is carried out by the public agencies but the Department of Justice provides policy guidance and training for the agencies.

The FOIA is complex and has been used by commercial interests for competition purposes. There are inordinate delays in processing requests and litigation on FOI in courts takes long. Despite this, there is a mass of jurisprudence on FOI issues, most of them deciding on privacy rights and protection of the national security.

Building on the foundation of the FOIA, in 1976, the Government passed *The Government in the Sunshine Act* providing for open meetings of multi-member federal agencies so that they are open to public scrutiny<sup>6</sup>. The exemptions to the requirement for open meetings are similar to the ones in the FOIA. The FOIA exempts disclosure of information on pre-decisional policy discussions, as the rationale is that policy advisers will be less candid if they know that their views will be made public. The Government in the Sunshine Act has no such exemption. ‘Sunshine’ Acts have been enacted in all the States. However, there has been no study to gauge whether policy discussions suffer or are improved when conducted in public.

Another development is the Federal Advisory Committee Act of 1972, which facilitates access by the public to information held by non-governmental bodies that are state-funded. Advisory Committees covered by the Act must also open their meetings to the extent required by the Government in the sunshine laws and disclose their records as required by the FOIA.

Another important legislation is the 1978 Ethics in Government Act, which addresses the problem of conflict of interest by Government officials. It requires Executive agency employees, legislative and judicial personnel to file detailed

financial statements with an Office of Government Ethics, which reviews them to see if there is a conflict between an individual’s public job and his private holdings. The statements are made available to the public.

Underlying these laws is the First Amendment to the Constitution that prevents the Government from censoring the media, thus ensuring the public, through the media, are privy to what their government is doing,

Despite the FOIA providing that information can be withheld under the exemption of protection of privacy, the Federal Privacy Act of 1974 was enacted to empower individuals to require that Government records about themselves are accurate and are not being misused. Individuals can access records about themselves and request inaccurate information to be corrected and where the agency refuses to do so, the individual can appeal to the Courts. Government agencies are allowed to disseminate information about individuals only to valid channels

In the aftermath of September 11, secrecy has made a comeback, threatening to erode the gains made in inculcating openness in public affairs. Control of information has been seen as a key plank of the war against terror. In line with policy directives, agencies are using the most restrictive responses to FOIA requests. However, openness will be in the long run be more effective in fighting terrorism as it empowers citizens by providing them with information, enables them to hold their Governments accountable and provides citizens a chance to do away with policies that can provide conditions for terrorist activities to flourish.

### **RECENT FOI LEGISLATION**

#### **South Africa**

Section 32 of the South African Constitution of 1996 states: (1) Everyone has the right of access to- (a) any information held by the state, and; (b) any information that is held by another person and that is required for the exercise of protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.<sup>7</sup>

The Promotion of Access to Information Act (PAIA) facilitates the exercise of this constitutional right of access to information.<sup>8</sup>

Any person can demand records from Government bodies without showing a reason and the request should be processed within 30 days. Individuals and Government bodies can access records held by private bodies when it is necessary to enforce people’s rights. The response should also be provided within 30 days

## **FOIs in various jurisdictions**

*Cont'd from pg 9*

The Act exempts from disclosure records of the Cabinet and its Committees, judicial functions of courts and tribunals and individual Members of Parliament and provincial legislatures. There are mandatory and discretionary exemptions including for personal privacy, commercial information, confidential information, safety of persons and property, law-enforcement proceedings, legal privilege, defense, security and international relations, economic interests and the internal operations of public bodies. Most of the exemptions require some demonstration that release of the information would cause harm and they must further be balanced against the public interest test.

Appeals against withholding of information by public bodies are first handled by the responsible Cabinet Minister and can be further reviewed by a High court, while for private bodies, decisions to withhold information are appealed directly to the court.

The Act sets out criminal fines and jail terms for destruction, damaging, altering or falsifying records against the Act's provisions. Public and private organizations must publish manuals describing their structure, functions, contact information, access guide, services and description of the records they hold.

The South African Human Rights Commission is designated to oversee the functioning of the Act, which entails issuing a guide on the Act, promoting the Act, making recommendations and monitoring its implementation<sup>9</sup>. Studies done by different organizations have shown that the Act's use has been limited and it has been impartially and inconsistently implemented.<sup>10</sup>

The Protection of Information Act of 1982<sup>11</sup> sets rules on the classification and declassification of information. To enforce the constitutional right to privacy, the process of enacting Privacy and Data Protection legislation was recently started. The National Archives of South Africa Act of 1996 provides for the release of records in the custody of the National Archives after 20 years.

### **United Kingdom**

Nearly 20 years of lobbying resulted in the adoption of the Freedom of Information Act in November 2000.

The Act gives any person a right to access information held by over 100,000 public authorities and they are entitled to receive a response within 20 working days.

There are three classes of exemptions:

Absolute exemptions include court records, personal information, and information relating to security services, information obtained under confidence or that protected under another law.

Qualified class exemptions include information relating to government policy formulation, safeguarding national

security, investigations, royal communications, legal privilege and public safety.

There is a more limited class exemption requiring the public authority to demonstrate prejudice will be occasioned to protected interests if information is disclosed. This class includes information relating to defense, international relations, economy, crime prevention, commercial interests or information that would prejudice the conduct of public affairs. The public interest test is applied to the latter two classes of exemption

Public bodies are required to proactively publish information about their structures, activities and information that can be accessed automatically through publications schemes. There are model publication schemes that have been developed by the Information Commissioner.

Oversight and enforcement of the Act is by the Information Commissioner. A Minister in charge can issue a Ministerial Certificate overruling a decision by the Commissioner ordering release of information in the public's interest. Appeals of the Commissioner's decisions can be made to the Information Tribunal with a final appeal on points of law lying to the High Court. The Department of Constitutional Affairs oversees the Act's implementation. It will provide guidance to the public authorities on the FOIA and, with the Information Commissioner, will provide advice on FOI issues<sup>12</sup>.

The Act will enter into force in January 2005.<sup>13</sup> The current framework in place for accessing information from public bodies is the Code of practice on Access to Government Information, which has broad exemptions. The Official Secrets Act 1989 criminalizes the unauthorised release of Government information by officials. The Public Records Act provides that files that are 30 years old be automatically released. The Data Protection Act 1998 enables individuals to access and correct files containing personal information about themselves.

The Freedom of Information (Scotland) Act was approved in May 2002 but also takes effect in 2005. It has a stronger harm requirement for restricting access under the exemptions and Ministers have limited power to veto the Information Commissioner's decisions. The Welsh Assembly has adopted a Code of Practice on Public Access to Information based on the FOIA. To access information about the policies and practices of local authorities, one is facilitated by the Local Government (Access to Information) Act 1985.

### **India**

In India, the Courts were ahead of Parliament in dealing with the issue of access to information. In *S.P. Gupta vs. President of India and Others* the Supreme Court ruled that:

## FOIs in various jurisdictions

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“The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression... disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.”<sup>14</sup>

The Indian Parliament finally caught up with the Supreme Court, when in January 2003, it approved the Freedom of Information Act<sup>15</sup>. The Act is yet to be effected.

The Act provides that all Indian citizens can request information from public authorities and are entitled to a response within 30 days or 48 hours if it concerns danger to a person's life or liberty.

Mandatory exemptions included are for information that would harm national security, public safety and order, centre-state relations, Cabinet Papers, trade or commercial interests and breach of Parliamentary privileges. The information can be released if it is over 25 years old. There are some discretionary exemptions.

One can appeal within the public authority if information is withheld, while a second appeal lies to the central or state Government and thereafter to the High Court or Supreme Court. Public authorities will be required to proactively publish certain categories of information and have public information officers. The Department of Personnel and Training will implement the Act.

The Public Records Act, 1993 provides that archives can only be accessed after 30 years. The Official Secrets Act, 1923 prohibits the unauthorized disclosure of information.

A number of States have Right to Information Acts but the national law will prevail.

### Japan

Like the United Kingdom and USA, advocacy for freedom of information legislation took about 20 years to bear fruit. In May 1999 the law on Access to Information held by Administrative Organs was passed. The law went into effect in April 2001. It allows any individual or company to request documents held by administrative agencies. Agencies must respond within 30 days.

It has six categories of exemptions which cover the usual exempt information. Appeals on

withholding of information are referred by the agency involved to the Information Disclosure Review Board, which is a Committee in the Office of the Prime Minister. Since its enactment, the requests for information made have been quite high.

The law has provisions for whistleblowers only in the private sector.

### Zimbabwe

The Access to Information and Protection of Privacy Act (AIPPA), enacted in 2002, practically gives the Government extensive powers to control the media and greatly curtails freedom of expression. The Act requires the registration of journalists and media houses with the Media and Information Commission<sup>16</sup>.

The Act gives any Zimbabwean citizen or person resident in the country, a right to access records held by a public body but expressly excludes an unregistered media agency or foreign government. Requests are to be processed within 30 days.

Exemptions cover, *inter alia*, Cabinet documents, advice given to public bodies, deliberations of local government bodies, client-attorney privilege, law-enforcement proceedings, national security, public safety, commercial information. The Government can release information to the public on various matters of public interest without a request for information having been made.

<sup>6</sup> In his famous dictum, the late Supreme Court Justice Louis Brandeis, stated, “Sunshine is the best disinfectant.”

<sup>7</sup> The Constitution of the Republic of South Africa, Act 108 of 1996. The legislation to facilitate this right was supposed to be enacted within three years of the coming into force of the 1996 Constitution.

<sup>8</sup> Act 2 of 2000

<sup>9</sup> The Commission has a National Commissioner on Access to Information

<sup>10</sup> The Open Democracy Advice Centre and the Centre have carried out these studies for the Study of Violence and Reconciliation.

<sup>11</sup> Act No. 84 of 1982

<sup>12</sup> In its Report to Parliament on Review of Legislation Governing the Disclosure of Information (2002) The Department indicated that about 400 statutes limit the right to access under the FOIA

<sup>13</sup> In November 2001, the Government pushed forward this date to 2005 and this may have been tied to the aftermath of September 11.

<sup>14</sup> 1982 [AIR] (SC) 149, p. 234.

<sup>15</sup> Act No. 5 of 2003

<sup>16</sup> The registration application forces media outlets to disclose details such as the companies' business plans, as well as the curriculum vitae and political affiliations of the companies' directors

<sup>17</sup> The Associated Newspapers of Zimbabwe (ANZ), the company that owns the Daily News, the country's only independent daily, challenged the legislation as being unconstitutional, but the Supreme Court ruled that because ANZ had not registered with the Media and Information Commission, it was “operating outside the law,” and that the court would only hear the company's constitutional challenge once it had “submitted itself to the law” by registering. Following the ruling, the newspaper was shut down for operating illegally under the provisions of AIPPA.

<sup>18</sup> Article 19 of the ICCPR and Article 9 of the African Charter on Human and People's Rights provides for the right to information.

## FOIs in various jurisdictions

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The Act has been applied to stifle the media with journalists being jailed after having been found guilty of committing offences under the Act and others being denied accreditation<sup>17</sup>.

The Media and Information Commission is the oversight body with powers to review decisions of a public agency regarding information requests, conduct inquiries into implementation of the Act and order documents to be released. Appeals from decisions of the Commission can be made to the Court.

### CONSTITUTIONAL PROVISIONS

As most states in Africa are parties to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights (ACHPR), in fulfilling their obligations under these Covenants<sup>18</sup>, they have Constitutions that protect the right to information either impliedly or expressly. However, most countries have not facilitated the exercise of this right by enacting freedom of information legislation, but the Constitutional provisions are a good starting point.

Article 20 (1) of the Zambian Constitution states: "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say,

freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom of interference with his correspondence."

Article 37 of the Constitution of Malawi states: "Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights."

The article's efficacy is limited by the fact that it is subject to a threshold test and to any Act of Parliament.

From this comparative analysis, it is obvious that Kenya has a variety of models of FOI laws to borrow from and taking into account our unique legal, political and social development, we should be able to have an effective FOI law that will play a major role in facilitating the country's development.

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## THE CHALLENGE OF IMPLEMENTATION: HARMONISING INFORMATION SUPPLY AND DEMAND

by Charmaine Rodrigues

*"Effective implementation is a two-way deal: between the holders of information (government or the private sector) and the requesters (citizens and civil society organisations). Recognising that there is a dual responsibility helps us understand the nature of the challenge and contributes to the design of viable solutions"*

Richard Calland, Open Democracy Advice Centre South Africa, 2003

In the heyday of the 1990s, when national democratic movements swept across the world and good governance and transparency were the catch-cries of many new governments, right to information legislation was seen as a key step towards entrenching open government in practice. With the hindsight of years however, experience around the world has demonstrated that the passage of a good access law is merely the first step on what is usually a very long – and too often, winding – road towards effective implementation. Faltering political will, bureaucratic resistance, poor infrastructure and information systems often combine to cause supply blockages, while demand from the public is often limited to elites in the community with the practical benefits of access bypassing the common person.

At the outset of the law-making process, civil society needs to be fully aware of the many challenges implementation poses – so that strategies can be developed to tackle them head on. Legislation should include strong provisions designed specifically to support implementation. Targeted action plans then need to be drawn up which specifically identify likely problems and attempt to address them preemptively. With Kenya on the brink of taking up the issue of

right to information in earnest, this article seeks to discuss some of the implementation issues common to many of the right to information campaigns and some of the strategies that have been developed for dealing with them.

### Strong Political Will and Leadership

It is obvious but important to recognise that an access to information regime will only be fully effective if there is strong political leadership leading the charge towards open government. Thus, in countries where leadership has been strong, great strides can often be taken within a very short time in terms of implementation. In Mexico for example, where the President appears to have taken a strong and committed stance on open government, all reports indicate that implementation has exceeded all expectations. Approximately 27,000 applications were received in the first six months the Act was in force and almost 24,000 of these were disposed of. Conversely, in Pakistan it has taken more than 18 months just to promulgate rules in support of what is anyway a very weak Freedom of Information Ordinance, while in India rules have still not been notified though the Act was passed in December 2002.

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## **...Harmonizing information supply and demand**

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There are no simple solutions to the problem of political will. But at the very least, the civil society needs to be aware of the issue so that it can exploit political opportunities when they arise. Thus, if there is a single minister or senior bureaucrat who is supportive of openness, they need to be targeted and supported in their efforts. Likewise, the media can be a useful tool for maintaining pressure on the government after the law has been passed. The key is to remain vigilant and not to allow the leadership off the hook once legislation has been enacted.

### **Overcoming Bureaucratic Resistance**

Even where there is political will, breaking down bureaucratic resistance can take time. As the Canadian Information Commissioner has noted, more than twenty years after the enactment of Canada's Access to Information Act, "there remains a deep nostalgia in the bureaucracy for the days when officials controlled information and the spin of the message"<sup>1</sup>. Bureaucrats often resent opening themselves up to scrutiny, believing that they serve not the public, but the government. Considering that these officials are responsible not only for releasing information, but also for collecting and managing it in the first place, it is important to overcome this resistance to avoid the subtle undermining of access legislation in practice.

At the outset, public service rules and regulations as well as any Official Secrets Act covering government officials need to be reviewed to ensure that they reflect the new commitment to transparency and accountability. There is no use having one law that promotes openness and another that entrenches secrecy. Even if the access law specifically states that it will override inconsistent laws, officials may understandably remain wary about disclosing information while the secrecy laws – and their often draconian penalty provisions – are still in the books.

Training is also a useful method for breaking down resistance and re-engineering the mindset of the bureaucracy. Right to information, although a simple concept at its core, can be complex to implement, such that training is important to ensure that officials are clear on what their duties are and are confident of discharging their obligations effectively. Training can inculcate new norms of openness and to teach officials about how the new law works and what they can do to support its implementation. For example, officials may need to be re-trained on how to properly keep records and maintain a file. Training can also provide a key opportunity to reassure bureaucrats of the government's commitment to openness and to make sure they understand that they will not be penalised for disclosing information to the public.

### **Overhauling Systems and Structures**

As bureaucratic norms are being re-engineered, bureaucratic policies, systems and structures will also likely need to be reviewed and overhauled. Thus, although the law provides the overarching framework for providing access, supporting

guidelines and policies will likely need to be developed to provide practical guidance to officials on how to implement the law's provisions in practice. In England and Scotland, which are currently preparing for implementation in 2005, most of these papers have been developed by the newly established Information Commissioners. For example, guidance notes have been prepared explaining how to apply exemption clauses, a code has been developed to provide direction on records management and model publications schemes have been designed.

*... an access to information regime will only be fully effective if there is strong political leadership leading the charge towards open government*

More specifically, considerable preparation will likely be needed to ensure that the proactive disclosure clauses in any access law are properly implemented. Collating the

required information and ensuring it is in a form that can be easily disseminated will take time. Use of the internet can be an effective tool in this context, but if information and community technologies are to be effectively utilised, proper planning will need to take place. Likewise, record-keeping, records management and archiving processes will need to be reviewed and overhauled where necessary. Information cannot be provided if it cannot be found and/or accessed in a timely manner. Although this work will result in efficiency/cost savings in the long-term, in the initial stages it will require considerable inputs of time and money. This observation draws attention to another practical manifestation of lack of political will – under-resourcing. Shortage of funds can pose a serious problem for implementing agencies, which will need to be proactive in lobbying for additional funds from government at least in the initial years when systems are overhauled.

### **Widespread Public Education**

Even where the so-called "supply side" of the information equation functions adequately, an access regime will make few inroads into government accountability and transparency if the public do not exercise their rights and "demand" information. The value of the law is in its utilisation to scrutinise and oversee government and expose mismanagement and corruption. Experience has shown that, for right to information legislation to be effectively utilised, it needs to be respected and 'owned' by both the government and the public. Public ownership of the law is most likely where legislation has been developed participatorily and the public are aware of the law and its benefits during the law-making process, as well as afterwards.

More concretely, in recognition of the importance of active public engagement with the law, new access laws are increasingly including specific legislative provisions which place responsibility for public education on a government body. Thus, in South Africa, the National Human Rights Commission has the duty "to the extent that financial and

## ... Harmonizing information supply and demand

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other resources are available [to] develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act”.

In the same vein, in Trinidad & Tobago the newly formed Government Access to Information Unit has been very active in undertaking public education programmes on the new law, including maintaining a dedicated FOI website, distributing more than 200,000 brochures to national households by post, producing radio and television features, and newspaper ads on the Act.

### Independent Monitoring & Sanctions

With habits of secrecy often so deeply entrenched, implementation should be monitored by an independent body, which can evaluate the performance of agencies under the Act and has the power to impose sanctions for poor performance and/or non-compliance. Access laws are increasingly including specific provisions requiring regular monitoring and reporting to Parliament. The most effective way is to place monitoring responsibilities on an impartial body such as an Information Commissioner, National Human Rights Commission or Ombudsman.

In Canada, the Information Commissioner’s Annual Reports to Parliament are highly regarded and contain detailed analysis regarding implementation as well as recommendations for improvements. The Information Commissioner is even credited with introducing a novel “report card” system designed specifically to measure the performance of specific departments.

While monitoring and reporting can be useful deterrents in terms of non-compliance by agencies, sanctions are an even stronger, more effective mechanism for encouraging effective implementation of the law. In this context, the first step is to ensure that proper penalty provisions are included in the law. The second step though, is to ensure that they are actually utilised. This has been an issue in India where, for example, in the State of Maharashtra, although individual fines can be imposed on officers for unreasonable delay, it appears that the sanctions provisions have been used only a handful of times. Directives have now been issued by senior bureaucrats instructing officials to impose the fines strictly.

### Active NGOs

Civil society can, and often has, played an active role in supporting – and sometimes supplementing – the awareness-raising, training and monitoring activities of government bodies. While some might consider NGO involvement in implementation a symbol of government failure, in fact, government-civil society partnerships at the implementation stage can be an effective means of reducing the threat perspectives many officials have towards NGO activists. In South Africa, the Open Democracy Advice Centre has been very active in promoting the law, both to the public and within the bureaucracy. Likewise, in some

Indian states, civil society activists have been invited to participate in government training courses to provide officials with a more realistic understanding of the needs of the public. Commonly, NGOs have also undertaken public education activities, either specifically or in support of other subject specific training (e.g. health records and the right to information).

NGOs have also been active in utilising the law strategically. At the most basic level, many NGOs have taken the initiative to submit requests exposing corruption in the early days of an Act so that the information can then be publicised by the media and public attention drawn to the usefulness of the new law. Other NGOs have submitted applications as a means of conducting an “implementation audit”. Thus, in the State of Karnataka in India, CHRI and another NGO organised volunteers to submit applications and track the responses from government. This information was then used to analyse how well government agencies were discharging their obligations under the Act and provided a strong base from which to encourage the Karnataka Government to put more effort into implementing the law more effectively.

In a novel approach, some NGOs have also used litigation as a means of improving the environment for ordinary people to access information. Thus in Bulgaria and South Africa, NGOs have engaged in litigation to clarify ambiguities in the law and ensure that government agencies are kept to account and not simply allowed to interpret the law at will. NGOs fill an important role in this context, particularly in countries which have no other independent appeal mechanism available other than the courts, because ordinary people can usually not afford to run such test cases.

Implementation of right to information laws is an ongoing challenge for civil society and the public. A good law is an important start, but experience has shown even once legislation is passed, politicians and officials can work to undermine the effectiveness of the law. Thus it is particularly notable that experience in jurisdictions with laws on the books for some time has shown that even where laws were enacted with much fanfare and a genuine commitment to openness, over time governments have grown frustrated with public oversight. Consequently, they have come to resent having their dirty laundry aired, such that they have begun to surreptitiously but deliberately pass amendments and impose policy guidelines narrowing the scope of the law. This is a stark warning which civil society and the public need to take heed of – without constant vigilance, laws can be ignored and over time they can be watered down. We need to be alert and remain active, or our right to information may become nothing more than a paper tiger.

<sup>1</sup> Reid, J. (2003)

*Annual Report: Information Commissioner 2002-2003*, Ministry of Public Works and Government Services, Canada, p.12.

## ANTI-CORRUPTION CAMPAIGN LAUNCHED IN ROMANIA

**T**ransparency International has started a campaign against corruption in Romania under the slogan “don’t bribe!”

Launched together with other NGOs and the EU, the campaign mainly targets the young and is publicised via a TV programme and webpage along with various shows in 13 towns in Romania.

The organisers are producing leaflets and files about corruption in the country setting out what a bribe is and assessing its impact on society.

The campaign will also show how much of household budgets go on small everyday bribes.

The money comes from the EU programme, PHARE.

One of the main aims is to explain that bribes are an unnecessary sum of money given to employees in public administrations who are already paid via taxes paid by Romanian citizens.

Some of the organisers say that the aim of the campaign is to prove that taking a bribe is stealing.

### **Corruption – the big fish**

Corruption touches all levels of society in Romania and is one of the outstanding problems the country still faces

as it prepares itself for EU membership - set to be in 2007.

The EU brings the issue up in all talks with Romania. Corruption was also the subject of a very critical report by the European Parliament earlier this year, which called into question Bucharest’s ability to achieve their stated goal of joining the EU by 2007.

Enlargement EU commissioner Günter Verheugen said twice this year already that Romania should attack the big problem of corruption - “the big fish” as he put it.

Romania had already developed a national anti-corruption plan mainly targeting small-time corruption.

However, the government’s strategy has been shown by Transparency International Romania not to have been very efficient - particularly regarding political corruption.

In a study published this year by the organisation, it explained that many of the decisions put on paper have not yet been implemented, leaving Romania still among the most corrupt countries in the world.

*EUobserver.com, 09 August 2004*

## ANTI-CORRUPTION ACADEMY OPERATIONAL BY NEXT YEAR

**P**UTRAJAYA (Malaysia), Aug 9 (Bernama) — Anti-Corruption Agency (ACA) Director-General Datuk Zulkifli Mat Noor said the RM17 million Anti-Corruption Academy at Jalan Duta, Kuala Lumpur, would be operational by the middle of next year.

He said efforts were being made to upgrade and repair the structure of the complex building which was the ACA Headquarters’ old building.

“When it (the academy) is completed and operational, it will be the first of its kind to have been built in the Asia Pacific region,” he said at his office here today.

The proposal for the establishment of the Anti-Corruption Academy and the approved financial allocation from the government was announced by the Prime Minister Datuk Seri Abdullah Ahmad Badawi in November last year.

He also said ACA had received many positive feedbacks from

foreign countries, especially the anti-corruption agencies on the idea of setting up the academy.

“Many countries are interested in the idea of setting up the academy. In the ADB-OECD Anti-Corruption Initiative Steering Committee Meeting in Manila that I attended on July 5 and 6 recently, I proposed the idea and it was agreed upon by the participants,” he said.

He said the participants comprised anti-corruption agency heads from 23 countries and representatives from world bodies such as the World Bank, US Aid, Transparency International and Pacific Basin Consultative Council.

“They also agreed that Malaysia was eligible to be chosen as the anti-corruption initiative development centre in the region,” he said.

*Malaysian National News Agency ,*

**09 August 2004**

## Upcoming Events

17-10 August: United Nations Youth Summit  
 Organizers: Friendship Ambassadors Foundation  
 Venue: UN, HQ, New York City U.S.A  
 Website: [www.faf.org](http://www.faf.org)  
 Email: [friendlyam@faf.org](mailto:friendlyam@faf.org);

22-28 August: The first African International Youth Summer Camp  
 Venue: Lake Bogoria Resort, Rift-Valley, Kenya  
 Phone: 00-254 7 2284 8475  
 Website: <http://www.younginfluencers.com>  
 Email: [summercampkenya@yahoo.com](mailto:summercampkenya@yahoo.com)

## Think about it...

Corruption is worse than prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country.

Karl Kraus

## On a lighter note

A young businessman had just started his own firm. He'd rented a beautiful office and had it furnished with antiques. Sitting there, he saw a man come into the outer office. Wishing to appear busy, the businessman picked up the phone and started to pretend he had a big deal working. He threw huge figures around and made giant commitments. Finally, he hung up and asked the visitor, "Can I help you?" The man said, "Sure. I've come to install the phone!"

## READERS' FORUM

I read the sixteen-page Issue of Adili 58 on Freedom of Information. I don't know any of the authors in person but I will offer a few criticisms.

First of all, the articles are, without exception, 'high-sounding' (as opposed to 'down-to-earth') and are tightly wrapped in NGO-politically-correct vocabulary and mindset. This makes them lack an authentic touch and realism. There is the old, artificial construction of a country as being divided between the state and its citizens, with the former overseeing and perpetuating corrupt practices and playing puppeteer and the latter fitting the mold of the hapless, dispossessed puppet, a sitting duck for mealy-mouthed, manipulative demagogues in the monolithic state.

This is an outdated and simplistic concept because Kenya today, is divided between the rich and the poor. A rich individual has as much clout and access to the government machinery as a government minister - the 'two states' thus are not divided along the old quasi-Marxist structure. Even the old tribal divisions are being overrun by the ever-growing insuperable gap between the rich and the poor. It's precisely because of this (rich-poor dichotomy) that Kibaki sees Nyachae as an ally as they rush past an embittered Koigi.

From this alone, one infers that the authors are out of touch with the Kenyan reality and are still examining Kenya through the old, textbook dichotomy of state/citizenry.

To illustrate what I mean, Andrew Bauer writes: "Often the State is dishonest, deceptive, closed, insincere and arrogant, believing itself to be greater than those it is meant to serve... result of this view has been lack of accountability, policies that favour politicians over people, general feeling of powerlessness, and unresponsive government"

It reads more like a concept paper, than a paper on Information Secrecy and Media Role in Kenya, because it's lacking in specific examples of information secrecy in Kenya. This hands-off approach makes the ideas abstract and not generic to the Kenyan situation even though they have been dressed to look like they are

addressing the Kenyan situation. Pleonastic phrases like 'Parliament in Nairobi' (as if there is a Parliament anywhere else in Kenya) bespeak the artificiality of a foreign mind assessing a Kenyan situation.

In fact, I daresay that another writer in an NGO outfit out to impress his bosses can pick up one of the articles, cut 'Kenya' and paste 'Nigeria'. Cut 'Kibaki' and paste 'Obasanjo' and voila! an intellectual take on corruption in Nigeria.

One cannot be blamed for thinking that none of the authors live in Kenya - even though one would assume otherwise from their articles. The bulk of the material is 'boardroom and conference' material given the cornflake touch and NGO-speak. They are more like sensitization articles for prospective financiers of the causes they so eloquently articulate. They make general arguments of hackneyed state practices that have been criticized to death over the ages.

What do I suggest? First of all, it's mind-numbing to criticize the government for hiding information on its corrupt practices - unless we are assuming that those in the government are bone from the neck up. It's ineffectual to articulate what they are articulating from the fringe (or the confines of their elegant offices and polished desks), how the government is secretive about information. The government even has a law about official secrets for Christ's sake! This is a legitimization of secrecy.

What TI and like-minded organizations need to do is (1) Abandon the elitist, conference outlook and over-articulation and adopt a man-on-the-ground look. Have offices in the rural areas, talk to the toothless farmers in Makuani and so on, not only to professors in USIU who at best, try to map Kenya to textbook motifs. (2) Tie up with donor communities like IMF and the UK to put a serious and focused squeeze on the government on specific information practices. (3) Find ways of involving ordinary people by simplifying their abstract conceptualizations and adopting a hands-on, practical approach.

(4) Have in their possession specific bills they are proposing for passing in parliament and meaningfully and actively engage the Members of Parliament to that end.

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