

Bill No. of 2010

FREEDOM OF INFORMATION BILL, 2010
(Published on , 2010)

MEMORANDUM

1. A draft of the above Bill, which it is intended to present to the National Assembly, is set out below.
2. On 8th July, 2010, the National Assembly resolved, in terms of Standing Order 60(2), to allow Honourable Dumelang Saleshando, Member of Parliament for Gaborone Central, to bring before Parliament, a Private Member's Bill allowing for the enactment of a Freedom of Information Act.
3. The object of the Bill is to extend the right of members of the public to access information in the possession of public authorities by, *inter alia* -
 - (a) making available to the public, information about the operations of public authorities and, in particular, ensuring that the rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those rules and practices;
 - (b) creating a general right of access to information in documentary form in the possession of public authorities, limited only by the exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities; and
 - (c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, misleading or not relevant to the purpose for which the document is held.
4. Part II of the Bill provides for the right of access to information, including the general right of access to an official document, (clause 5), where such access shall not be obtained, (clause 6), how one is to make a request for access, (clause 9), and the methods of access, (clause 15).
5. Part III of the Bill provides for the publication of certain documents and information by public authorities, including the requirement that certain documents are to be made available by public authorities for inspection and purchase, (clause 22), and statements are to be published by public authorities in relation to the possession of certain documents,

(clause 23).

6. Part IV of the Bill deals with the categories of exempt documents, in respect of which access thereto would not be permitted. Examples of such documents include Cabinet documents, (clause 25), national security and defence documents, (clause 27), documents subject to legal professional privilege, (clause 30), and documents affecting the national economy, (clause 34).

7. Part V of the Bill deals with miscellaneous matters, such as the duty of public authorities to act in good faith, (clause 38), the correction of personal information, (clause 39), the right to apply for judicial review of an authority's decision, (clause 42), the submission of an annual report by the Minister, (clause 43), and the Minister's regulation-making powers, (clause 44).

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DUMELANG SALESHANDO
Private Member,
Member of Parliament for Gaborone Central

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A BILL
-entitled-

An Act to provide for the right of members of the public to access information in the possession of public authorities.

Date of Assent:

Date of Commencement:

ENACTED by the Parliament of Botswana.

PART I - Preliminary

Short title and commencement

1. This Act may be cited as the Freedom of Information Act, 2010, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Interpretation

2. (1) In this Act, unless the context otherwise requires -

“applicant” means a person who has made a request in accordance with section 9;

“document” means any medium in which information is recorded, whether printed or on tape or film or by electronic means or otherwise and includes any map, diagram, photograph, film, microfilm, video-tape, sound recording, or machine-readable record or any record which is capable of being produced from a machine-readable record by means of equipment or a programme (or a combination of both) which is used for that purpose by the public authority which holds the record;

“exempt document” means a document which, by virtue of any provision of Part IV, is an exempt document;

“exempt information” means information the inclusion of which in a document causes the document to be an exempt document;

“official document” means a document held by a public authority in connection with its functions as such, whether or not it was created -

(a) by that authority; or

(b) before the commencement of this Act;

“personal information” means information about an individual, including -

(a) information relating to the race, national or ethnic origin, religion, age, sex or marital status of the individual;

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the address, telephone number, fingerprints or blood type of the individual;
- (e) the personal opinions or views of the individual except where they relate to another individual;
- (f) correspondence sent to a public authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence; and
- (g) the views or opinions of another individual about the individual;

“public authority” includes -

- (a) Parliament or a committee of a Parliament;
- (b) the Cabinet as constituted under the Constitution;
- (c) a Ministry or a department or division of a Ministry;
- (d) a local authority;
- (e) a statutory corporation or body, responsibility for which is assigned to a Minister;
- (f) subject to section 3(b), a commission established under the Constitution or any other law;

- (g) a body corporate or an incorporated body which is owned or controlled by the Government;
- (h) any other body designated by the Minister by regulation made under this Act, to be a public authority for the purposes of this Act; and

“responsible Minister”, in relation to a public authority, means -

- (a) the Minister of Government to whom responsibility for the public authority is assigned; or
- (b) such Minister as the President may, by Order, declare to be the responsible Minister of the public authority for the purposes of this Act.

(2) For the purposes of this Act -

- (a) in relation to the definition of “public authority” under subsection (1) -
 - (i) a court, or the holder of a judicial office or other office pertaining to a court in his or her capacity as the holder of that office, shall not be regarded as a public authority, and
 - (ii) a registry or other office of court administration, and the staff of such registry or other office of court administration in their capacity as members of staff in relation to those matters which relate to court administration, shall be regarded as part of a public authority; and
- (b) in relation to the definition of “official document” under subsection (1), a document is held by a public authority if it is in its possession, custody or control.

Non-application of Act

3. This Act shall not apply to -

- (a) the President;

Cap. 05:02 (b) a Commission of Inquiry issued by the President under the Commissions of Inquiry Act.

Act binds State 4. This Act binds the State.

PART II - *Right of Access to Information*

Right of access 5. Notwithstanding any law to the contrary and subject to the provisions of this Act, every person shall have the right to obtain access to an official document.

Access to documents 6. A public authority shall give an applicant access to an official document where -

- (a) a request for access to the document is duly made by the applicant;
- (b) the request is approved by the public authority; and
- (c) any fee prescribed under section 14 that is required to be paid before access is granted has been paid.

Access not to be obtained 7. A person's access to an official document shall not be obtained under this Act where -

- (a) the document contains information that is open to public access, as part of a public register or otherwise in accordance with any law, and that access is subject to a charge or fee;
- (b) the document contains information that is open to public access, as part of a public register or otherwise in accordance with any law, and that access is not subject to a charge or fee;
- (c) the document contains information that is available for purchase by the public in accordance with any arrangement made by a public authority; or

- (d) the document is stored for preservation or safe custody by a public authority, being a document which is a duplicate of a document of the public authority.

Access to documents otherwise than under this Act

8. Nothing in this Act shall prevent a public authority from publishing or giving access to a document, otherwise than as required by this Act, where it has the discretion to do so or is required under any Act to do so.

Request for access

9. (1) A person who wishes to obtain access to an official document shall make a request in the form set out in the Schedule, to the relevant public authority, for access to the document.

(2) A request under subsection (1) shall identify the document or shall provide such information concerning the document as is reasonably necessary to enable the public authority to identify the document.

(3) A request under subsection (1) may specify which of the methods of access under section 20 the applicant wishes to use.

(4) Subject to section 17, a request may be made for access to all documents of a particular description that -

- (a) contain information of a specified kind; or
- (b) relate to a particular subject matter.

Transfer of request for access

10. (1) Where a request is made to a public authority for access to a document and the request has not been directed to the appropriate public authority, the public authority to which the request is made shall, as soon as is reasonably possible, transfer the request to the appropriate public authority and inform the applicant accordingly.

(2) Where a request is transferred to a public authority in accordance with this section, it shall be deemed to be a request made to that public authority and received on the date on which it was originally lodged.

Duty to assist applicants

11. (1) A public authority shall take reasonable steps to assist the following persons to make a request in a manner which complies with section 9 -

- (a) any person who wishes to make a request under section 9(1); or

- (b) any person who has made a request which does not comply with the requirements under section 9(2).

(2) Where a request is made to a public authority under section 9(1), for access to an official document, the public authority shall not refuse to comply with the request on the ground that the request does not comply with section 9(2), without first giving the applicant a reasonable opportunity to consult the public authority in order to make the request in a manner that does comply with that section.

(3) Notwithstanding section 17, a public authority shall take reasonable steps to assist any person in the exercise of any other right under this Act.

Time limit for determining requests

12. A public authority shall take all reasonable steps to enable an applicant to be notified of the decision on a request, including a decision for deferral of access under section 16, as soon as practicable, but in any case not later than 30 days after the day on which the request is made.

Deletion of exempt information

13. A public authority shall give an applicant access to a copy of a document, after a decision is made not to grant a request for access to the document on the ground that it is an exempt document, where -

- (a) it is practicable for the public authority to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and
- (b) the applicant subsequently indicates, in writing, after being informed of the possible granting of access to the document with the deletions under paragraph (a), that he or she would wish to have access to such a copy.

Fees for access

14. (1) No fee shall be charged by a public authority for the making of a request for access to an official document.

(2) Where access to an official document is to be given in the form of printed copies, or copies in some other form, such as on tape, disk, film or other material, the applicant shall pay the prescribed fee.

(3) Notwithstanding subsection (2), where a public authority -

- (a) fails to comply with section 12, any access to an official document to which the applicant is entitled pursuant to his or her request shall be provided free of charge; or
- (b) fails to give an applicant access to an official document within seven working days of the payment of the relevant fee pursuant to section 6(c), the applicant shall, in addition to access to the official document requested, be entitled to a refund of the fee paid.

(4) The fees payable by an applicant shall be commensurate with the cost incurred in making a document available to such applicant.

Methods of access

15. (1) Where access to a document is granted to an applicant by a public authority under this Act, such access may be given by one or more of the following methods -

- (a) a reasonable opportunity to inspect the document;
- (b) provision by the public authority of a copy of the document;
- (c) delivery by the public authority of a copy of the document in electronic form;
- (d) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images; or
- (e) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision by the public authority of a written transcript of the words recorded or contained in the document.

(2) Subject to subsection (3) and to section 13, where the applicant has requested access by a particular method, access shall be given by that method.

(3) Access by a particular method requested by an applicant under subsection (2) may be refused, and shall be given by another method, where the method of access requested -

- (a) would interfere unreasonably with the operations of the public authority;
- (b) would be detrimental to the preservation of the document;
- (c) having regard to the physical nature of the document, would not be appropriate; or
- (d) would involve an infringement of copyright, other than copyright owned by the Government, subsisting in the document.

Deferral of access

16. (1) A public authority which receives a request for access to a document under this Act may defer the provision of access to the document until the happening of a particular event, including the taking of an action required by law or an administrative action, or until the expiration of a specified time, where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices.

(2) Where the provision of access to a document is deferred in accordance with subsection (1), the public authority shall, in writing, inform the applicant of the reasons for the decision and indicate the period for which the deferment will operate.

Refusal of access before processing of request

17. A public authority dealing with a request may refuse to grant access to a document relating to the request, without having caused the processing of the request to have been undertaken -

- (a) if the public authority is satisfied that the work involved in processing the request would substantially and unreasonably interfere with the normal operations of the public authority; and
- (b) if, before refusing to provide the document on the ground under paragraph (a), the public authority has taken reasonable steps to assist

the applicant to reformulate the application so as to avoid causing such interference.

Repeated requests

18. (1) A public authority dealing with a request under this Part for access to a document, or an application under section 39 for the correction of personal information, may refuse to grant access to the document, or to correct information, in accordance with the request or application, without having caused the processing of the request or application to have been undertaken, if the public authority is satisfied that -

- (a) the request or application is made by, or on behalf of, a person who, on at least one previous occasion, has made a request or application to the public authority, or to a predecessor of the public authority, for access to the same document or for the same correction;
- (b) the request or application was refused and the High Court, on reviewing the decision to refuse the request or application, confirmed the decision; and
- (c) there are no reasonable grounds for making the request or application again.

(2) A public authority shall give the applicant notice, in writing, of a refusal under subsection (1) and shall inform the applicant of -

- (a) the reason for the refusal; and
- (b) the right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made.

Reasons for decisions to be given

19. (1) Where, in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is not entitled to access to the document relating to the request or that provision of access to the document be deferred or that no such document exists, the public authority shall cause the applicant to be given notice, in writing, of the decision, and the notice shall -

- (a) state the findings on any material question of fact, referring to the material on which those findings were based, and the reasons for the decision;
- (b) where the decision relates to a public authority, state the name and designation of the person giving the decision;
- (c) where the decision does not relate to a request for access to a document which if it existed, would be an exempt document but access is given to a document in accordance with section 13, state that the document is a copy of a document from which exempt information has been deleted;
- (d) where the decision is to the effect that the document does not exist, state that a thorough and diligent search was made to locate the document; and
- (e) inform the applicant of the right to apply to court for a review of the decision in accordance with section 42.

(2) A public authority shall not be required to include, in a notice under subsection (1), any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document.

Decisions to be made by authorised persons

20. A decision in respect of a request made to a public authority may be made, on behalf of the public authority, by -

- (a) the responsible Minister;
- (b) the chief executive officer of the public authority; or
- (c) an officer of the public authority acting within the scope of authority exercisable by the officer in accordance with any arrangements approved by the responsible Minister or the chief executive officer of the public authority.

PART III - *Publication of Certain Documents and Information*

Publication of information concerning public authority

21. (1) A public authority shall, with the approval of the responsible Minister -
- (a) cause to be published in the *Gazette* as soon as practicable, but not later than 12 months, after the date of commencement of this Act -
 - (i) a statement setting out the particulars of the organisation and functions of the public authority, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions, and particulars of any arrangement that exists for consultation with or representations by, bodies and persons outside the Government administration in relation to the formulation of policy in, or the administration of, the public authority,
 - (ii) a statement of the categories of documents that are maintained in the possession of the public authority,
 - (iii) a statement of the material that has been prepared by the public authority under this Part for publication or inspection by members of the public, and the places at which a person may inspect or obtain that material, and
 - (iv) a statement of the procedure to be followed by a person when a request for access to a document is made to a public authority; and
 - (b) during the year commencing on the first day of January next following the publication, in respect of a public authority, of the statement under subparagraph (i), (ii), (iii) or (iv) of paragraph (a) that is the first statement published under that subparagraph, and

during each succeeding year, cause to be published in the *Gazette* statements bringing up to date the information contained in the previous statement or statements published under that subparagraph.

(2) Where a statement has not been published in accordance with subsection (1), the Minister shall promptly give reasons, to be published in the *Gazette*, for the failure to publish.

(3) Nothing in this section requires the publication of information that is of such a nature that its inclusion in a document would cause that document to be an exempt document.

(4) Where a public authority comes into existence on or after the date of commencement of this Act, it shall comply with subsection (1) as soon as practicable after the date it so comes into existence.

Certain documents to be available for inspection and purchase

22. (1) This section applies to documents that are provided by the public authority for the use of, or are used by, the public authority or its officers in making decisions or recommendations, under or for the purposes of any enactment or scheme administered by the public authority, with respect to rights, privileges or benefits, or to obligations, penalties or any detriment, to or for which persons are or may be entitled or subject, being -

- (a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents including, but without limiting the generality of the foregoing, precedents in the nature of letters of advice providing information to bodies or persons outside the public authority;
- (b) documents containing particulars of such a scheme, not being particulars contained in any other enactment; and
- (c) documents containing statements of the manner, or intended manner, of administration or enforcement of such an enactment or scheme, but not including documents that are available to the public as published otherwise than by the public authority or as published by another public authority.

(2) A public authority shall -

- (a) cause copies of all documents to which this section applies that are in use to be made available for inspection and for purchase by members of the public;
- (b) not later than 12 months after the date of commencement of this Act, cause to be published in the *Gazette*, a statement specifying the documents of which copies are, at the time of preparation of the statement, so available and the place or places where copies may be inspected and may be purchased; and
- (c) within 12 months after the date of first publication of the statement under paragraph (b) and thereafter at intervals of not more than 12 months, cause to be published in the *Gazette*, statements bringing up to date information contained in the previous statement or statements.

(3) The public authority may not comply fully with paragraph (2)(a) before the expiration of 12 months from the date of commencement of this Act, but it shall, before that time, comply with that paragraph as far as is practicable.

(4) This section does not require a document of the kind referred to in subsection (1) containing exempt information to be made available in accordance with subsection (2), but, if such a document is not so made available, the public authority shall, if practicable, cause to be prepared a corresponding document, altered only to the extent necessary to exclude the exempt information, and cause the document so prepared to be dealt with in accordance with subsection (2).

(5) Where a public authority comes into existence on or after the date of commencement of this Act, subsections (2) and (3) shall apply in relation to that public authority as if the references in those subsections to the date of commencement of this Act were references to the date the public authority so comes into existence.

*Statement to be
published of
possession of
certain documents*

23. (1) This section applies, in respect of a public authority, to any document that is -
- (a) a report, or a statement containing the advice or recommendations, of a body or entity established within the public authority;
 - (b) a report, or statement containing the advice or recommendations, of a body or entity established outside the public authority by or under any law, or by a Minister or other public authority for the purpose of submitting a report, providing advice or making recommendations to the public authority or to the responsible Minister of that public authority;
 - (c) a report, or a statement containing the advice or recommendations, of an interdepartmental committee whose membership includes an officer of the public authority;
 - (d) a report, or a statement containing the advice or recommendations, of a committee established within the public authority to submit a report, provide advice or make recommendations to the responsible Minister of that public authority or to another officer of the public authority who is not a member committee;
 - (e) a report, including a report concerning the results of studies, surveys or tests, prepared for the public authority by a scientific or technical expert, whether employed within the public authority or not, including a report expressing the opinion of such an expert on scientific or technical matters;
 - (f) a report prepared for the public authority by a consultant who was paid for preparing the report;
 - (g) a report prepared within the public authority and containing the results of studies, surveys or tests carried out for the purpose of assessing, or making recommendations on,

the feasibility of establishing a new or proposed Government policy, programme or project;

- (h) a report on the performance or efficiency of the public authority, or of an office, division or branch of the public authority, whether the report is of a general nature or concerns a particular policy, programme or project administered by the public authority;
- (i) a report containing final plans or proposals for the re-organisation of the functions of the public authority, the establishment of a new policy, programme or project to be administered by the public authority, or the alteration of an existing policy programme or project administered by the public authority, whether or not the plans or proposals are subject to approval by an officer of the public authority, another public authority, the responsible Minister of the public authority or Cabinet;
- (j) a statement prepared within the public authority and containing policy directions or instructions for the drafting of legislation;
- (k) a report of a test carried out within the public authority on a product for the purpose of purchasing equipment;
- (l) an environmental impact assessment statement prepared within the public authority; and
- (m) a valuation report prepared for the public authority by a valuator, whether or not the valuator is an officer of the public authority.

(2) A public authority shall, with the approval of the Minister -

- (a) cause to be published in the *Gazette*, as soon as practicable after the commencement of this Act, a statement specifying the documents to which this section applies which have been

created since the date of commencement of this Act and are in the possession of the public authority;

- (b) within 12 months after publication of the statement required under paragraph (a) and thereafter at intervals of 12 months, cause to be published in the *Gazette*, statements bringing up to date the information contained in the previous statement or statements.

(3) The public authority may not comply fully with paragraph (2)(a) before the expiration of 12 months from the date of commencement of this Act, but it shall, before that time, comply with that paragraph as far as is practicable.

(4) This section does not require a document of the kind referred to in subsection (1) containing exempt information to be referred to in a statement published in accordance with subsection (2)(a), if the fact of the existence of the document cannot be referred to in the statement without exempt information being disclosed.

(5) Where a public authority comes into existence on or after the date of commencement of this Act, subsections (2) and (3) shall apply in relation to that public authority as if the references in those subsections to the date of commencement of this Act were references to the date the public authority so comes into existence.

*Notice requiring
specification of
document in
statement*

24. (1) A person may serve upon a public authority a notice, in writing, stating that, in the opinion of the person, a statement published by the public authority under section 22(2) or section 23(2) does not specify a document as described in section 22(1) or 23(1) that was required to be specified in the statement.

(2) The public authority shall -

- (a) make a decision within 21 days of receiving a notice and publish the decision in relation to the document referred to in subsection (1), no later than seven days thereafter in the *Gazette*; and
- (b) cause the person to be given notice in writing of its decision.

(3) Where the decision is adverse to the person's claim, the notice shall -

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision; and
- (b) inform the person of his or her right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made.

PART IV - *Exempt Documents*

Cabinet documents

25. (1) A document is an exempt document if it is -

- (a) the official record of any deliberation or decision of Cabinet;
- (b) a document that has been prepared by a public authority, by a Minister or on a Minister's behalf, for the purpose of submission for consideration by Cabinet;
- (c) a document which has been considered by Cabinet and which is related to issues that are or have been before Cabinet;
- (d) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet;
- (e) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b), (c) or (d); or
- (f) a document, the disclosure of which would involve the disclosure of any deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.

(2) Subsection (1) shall cease to apply to a document brought into existence on or after the commencement of this Act when a period of 10 years has elapsed since the last day of the year in which the document came into existence.

(3) Subsection (1) does not apply to a document that contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of Cabinet.

(4) For the purposes of this Act, a certificate signed by the Secretary to the Cabinet or a person performing the duties of the Secretary, certifying that a document is one of a kind referred to in a paragraph of subsection (1), establishes conclusively that it is an exempt document of that kind.

(5) In this section -

- (a) “Cabinet” includes a committee or subcommittee of Cabinet; and
- (b) a reference to a document includes a reference to a document whether created before or after the commencement of this Act.

Internal working documents and policy documents

26. (1) A document is an exempt document if it is a document the disclosure of which under this Act would be contrary to the public interest and -

- (a) would disclose matter in the nature of an opinion, advice or recommendation prepared by an officer or a Minister, or consultation or deliberation that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the deliberative processes involved in the functions of a public authority; or
- (b) would prejudice the formulation or development of policy by the Government, by having an adverse effect on -
 - (i) the free and frank provision of an opinion, advice or recommendation, or
 - (ii) the free and frank exchange of views for the purposes of deliberation.

(2) In the case of a document of the kind referred to in section 22(1), the matter referred to in subsection (1)(a) does not include -

- (a) matter that is provided for the use or guidance of, or is used or may be used for, the purpose of making decisions or recommendations, or enforcing written laws or schemes, referred to in section 22(1);
- (b) factual information;
- (c) the analysis, interpretation or evaluation of, or any projection based on factual information;
- (d) a statistical survey;
- (e) a report by a valuator, whether or not the valuator is an officer of the public authority;
- (f) an environmental impact statement or similar record;
- (g) a report of a test carried out on a product for the purpose of purchasing equipment for a public authority or a consumer test report;
- (h) a report or study on the performance or efficiency of a public authority, whether the report or study is of a general nature or is in respect of a particular programme or policy;
- (i) a feasibility or other technical study, including a cost estimate, relating to a policy or project of a public authority;
- (j) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (k) a final plan or proposal to change a programme of a public authority, or for the establishment of a new programme, including a budgetary estimate for the programme, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to Cabinet or a committee or subcommittee of Cabinet;

- (l) a report of an interdepartmental committee task force within a public authority, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to Cabinet or a committee or subcommittee of Cabinet;
- (m) a report of a committee, council or other body which is attached to a public authority and which has been established for the purpose of undertaking inquiries and making reports and recommendations to the public authority;
- (n) the reasons for a final decision, order or ruling of a public authority made during or at the conclusion of the exercise of discretionary power conferred by or under a written law or scheme administered by the public authority, whether or not the written law or scheme allows an appeal to be taken against the decision, order or ruling, and whether or not the reasons -
 - (i) are contained in an internal memorandum of the public authority or in a letter from an officer or employee of the public authority, or
 - (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

(3) Where a decision is made under Part II that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 19 shall state the public interest considerations on which the decision is based.

(4) Subsection (1) shall cease to apply to a document brought into existence on or after the commencement of this Act when a period of 10 years has elapsed since the last day of the year in which the document came into existence.

*National security
and defence
documents*

27. (1) A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure would prejudice the security or defence of Botswana.

(2) A document is an exempt document if it contains information, the disclosure of which would be likely to prejudice the lawful activities of the security or intelligence services.

(3) For the purposes of this Act, a certificate signed by the responsible Minister certifying that a document as described in a request would, if it existed, be one of a kind referred to in subsection (1) or (2), establishes conclusively that if such a document exists, it is an exempt document of that kind.

International relations documents

28. A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest, and the disclosure -

- (a) would prejudice relations between the Government of Botswana and the Government of any other State;
- (b) would prejudice relations between the Government of Botswana and an international organisation of States or a body thereof;
- (c) would divulge any information or matter communicated in confidence by or on behalf of the Government of another State to the Government of Botswana; or
- (d) would divulge any information communicated in confidence by or on behalf of an international organisation of States or a body thereof to the Government of Botswana.

Documents affecting enforcement or administration of the law

29. (1) A document is an exempt document if its disclosure under this Act would, or is likely to -

- (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;
- (b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

- (d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- (e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.

(2) This section does not apply to any document that is -

- (a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;
- (b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law;
- (c) a document containing any general outline of the structure of any programme adopted by a public authority for investigating breaches of, or enforcing or administering the law;
- (d) a report on the degree of success achieved in any programme adopted by a public authority for investigating breaches of, or enforcing or administering, the law;
- (e) a report prepared in the course of routine law enforcement inspections or investigations by a public authority which has the function of enforcing and regulating compliance with a particular law other than the criminal law; or

- (f) a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation, if it is in the public interest that access to the document should be granted under this Act.

Documents subject to legal professional privilege

30. (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document of the kind referred to in section 22(1) is not an exempt document by virtue of subsection (1) by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 22(1).

Documents affecting personal privacy

31. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information of any individual, including a deceased individual.

(2) Subject to subsections (4) and (5), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request by a person other than a person referred to in subsection (2) is made to a public authority for access to a document containing personal information of any individual, including a deceased individual, and the public authority decides to grant access to the document, the public authority shall, if practicable, notify the individual who is the subject of that information, or in the case of a deceased individual, that individual's next-of-kin, of the decision and of the right to apply to the High Court for judicial review of the decision.

(4) Nothing in this Act shall be taken to require a public authority to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of a public authority, would cause the last-mentioned document to be an exempt document by virtue of this section.

(5) Where a request is made to a public authority for access to a document that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the public authority that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the public authority may direct that the document containing that information, that would otherwise be given to that person is not to be given to him or her but is to be given instead to a medical practitioner to be nominated by that person.

Documents relating to trade secrets, business affairs, etc.

32. (1) A document is an exempt document if its disclosure under this Act would disclose information acquired by a public authority from a business, commercial or financial undertaking, and -

- (a) the information relates to trade secrets or other matters of a business, commercial or financial nature; or
- (b) the disclosure of the information under this Act would be likely to expose the undertaking to disadvantage.

(2) In deciding whether disclosure of information would expose an undertaking to disadvantage, for the purposes of paragraph (b) of subsection (1), a public authority may take account -

- (a) whether information is generally available to competitors of the undertaking;
- (b) whether the information would be exempt information if it were generated by a public authority;
- (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking;
- (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of regulation by a public authority of corporate practices or environmental controls; and

- (e) any other consideration which, in the opinion of the public authority, is relevant.

(3) Prior to making a determination under subsection (1) as to whether the disclosure of information would expose an undertaking to disadvantage, a public authority shall notify the undertaking which has supplied the relevant document or documents that the public authority has received a request for access to the document and shall -

- (a) seek the undertaking's view as to whether disclosure should occur; and
- (b) notify the undertaking where the public authority after consultation has decided to disclose the document and in such a case notify the undertaking of the right to apply to the High Court for judicial review of the decision.

(4) A document is an exempt document if -

- (a) it contains the following information that would, if disclosed under this Act, be likely to expose the public authority to any disadvantage -
 - (i) a trade secret of a public authority, or
 - (ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature;
- (b) it contains the results of scientific or technical research undertaken by a public authority, and -
 - (i) the research could lead to a patentable invention,
 - (ii) the disclosure of the results of an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage, or

(iii) the disclosure of the results before the completion of the research would be reasonably likely to expose the public authority unreasonably to any disadvantage; or

(c) it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed.

Documents containing material obtained in confidence

33. (1) A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a Government to a public authority, and -

(a) the information would be exempt information if it were generated by a public authority; or

(b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.

(2) This section does not apply to information -

(a) acquired by a public authority from a business, commercial or financial undertaking; and

(b) that relates to trade secrets or other matters of a business, commercial or financial nature.

Documents affecting national economy

34. (1) A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have an adverse effect on the national economy.

(2) The kinds of documents to which subsection (1) may apply include, but are not restricted to, documents containing information relating to -

(a) currency or exchange rates;

- (b) interest rates;
- (c) taxes, including duties of customs or of excise;
- (d) the regulation or supervision of banking, insurance and other financial institutions;
- (e) proposals for expenditure;
- (f) foreign investment in Botswana; or
- (g) borrowing by the Government.

Documents to which secrecy provisions apply

35. A document is an exempt document if there is in force a written law applying specifically to information of a kind contained in the document and prohibiting persons referred to in the written law from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or conditions.

Documents disclosure of which would be contempt of court, etc.

36. Notwithstanding any law to the contrary and any immunity of the State, a document is an exempt document if public disclosure of the document would -

- (a) be in contempt of court;
- (b) be contrary to an order made or given by a commission, tribunal or other person or body having the power to take evidence on oath; or
- (c) infringe the privileges of Parliament.

Disclosure of exempt document in the public interest

37. Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where, in the circumstances, the giving of access to the document is justified in the public interest, having regard both to any benefit and to any damage that may arise from doing so in matters such as, but not limited to -

- (a) abuse of authority or neglect in the performance of official duty;
- (b) injustice to an individual;
- (c) danger to the health or safety of an individual or of the public; or

- (d) unauthorised use of public funds.

PART V - *Miscellaneous*

Duty of public authority to act in good faith

38. In considering whether or not to claim that a document is an exempt document under this Act, a public authority shall act in good faith and in the public interest, and shall endeavour, as much as possible, to afford to members of the public maximum access to official documents.

Correction of personal information

39. (1) Where a document, whether or not it is one to which access has been given under this Act, contains personal information of an individual and that individual alleges that the information is inaccurate, the public authority which holds the document may, on the application of that individual, correct the information.

(2) For the purposes of this section -

- (a) “inaccurate” means incorrect, incomplete, misleading or not relevant to the purpose for which the document is held; and
- (b) information may be corrected by amending, supplementing or deleting it.

(3) An application under subsection (1) shall -

- (a) be in writing;
- (b) as far as practicable, specify -
 - (i) the document or official document containing the record of personal information that is claimed to require amendment,
 - (ii) the information that is claimed to be incomplete, incorrect or misleading,
 - (iii) whether the information is claimed to be incomplete, incorrect or misleading,
 - (iv) the applicant’s reasons for so claiming, and

- (v) the amendment requested by the applicant.

(4) Where a public authority is not satisfied with the reasons for an application under subsection (1), it may refuse to make any correction to the information and inform the applicant, in writing, of its refusal together with its reasons for so doing as soon as practicable, but in any case not later than 21 days after the day on which the application is made.

Protection against actions for defamation or breach of confidence

40. (1) Where access to a document has been given in good faith or in accordance with the requirements of this Act, in the belief that it was required to be given in accordance with this Act, unless malice is proved -

- (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;
- (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against -
 - (i) any person who was the author of the document, or
 - (ii) any person as a result of that person having supplied the document or the information contained in it to the public authority.

(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorization or approval of the publication of the document or its contents by the person to whom access is given.

(3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.

*Protection in
respect of offences*

41. A person shall not be guilty of an offence by reason only of having authorized, or having been involved in, the giving of access to a document -

- (a) in good faith, and
- (b) in accordance with the requirements of this Act.

Judicial review

42. (1) Any person aggrieved by a decision of a public authority under this Act may apply to the High Court for judicial review of the decision.

(2) The High Court, after considering an application under subsection (1), may confirm, vary, remit or set aside the decision.

(3) In this section, “decision of a public authority” includes the failure of a public authority to comply with any provision of this Act.

Annual Report

43. (1) The Minister shall, as soon as practicable after the 31st of March of each year, prepare a report on the operation of this Act during that year, and cause a copy of such report to be laid before the National Assembly.

(2) Each responsible Minister shall, in relation to the public authorities within his or her portfolio, furnish to the Minister such information as he or she requires for the purposes of the preparation of a report under this section, and shall comply with any administrative requirements set out by the Minister, in writing, concerning the furnishing of that information and the keeping of records for the purposes of this section.

(3) A report under this section shall include, in respect of the year to which the report relates, the following information -

- (a) the number of requests made to a public authority;
- (b) the number of decisions by a public authority in relation to which an applicant was not entitled to access to a document pursuant to a request, including the provisions of this Act under which these decisions were made and the number of times each provision was invoked;

- (c) the number of applications for judicial review of decisions under this Act and the outcome of those applications;
- (d) the number of notices served upon a public authority under section 24(1), including and the number of decisions by the public authority, in respect of such notices, which were adverse to a person's claim;
- (e) the amount of fees collected by a public authority under this Act;
- (f) any other information which indicates an effort by a public authority to administer and implement this Act.

Regulations

44. The Minister may make regulations -

- (a) for the better carrying out of the provisions of this Act; and
- (b) prescribing anything that under this Act requires to be prescribed.

SCHEDULE

THE FREEDOM OF INFORMATION ACT

Request for Access to Official Document
(section 9)

1. Name of Public Authority:

.....

2. Name of Applicant:

.....

3. Address of Applicant:

.....
.....
.....
.....

4. Telephone Number of Applicant:

.....

5.
(a) Description of Document(s):

- 1.
- 2.
- 3.

(NOTE: Applicants shall identify the document(s), or provide sufficient information to enable an officer/employee of the public authority who is familiar with the relevant documents, to identify the document(s) requested with reasonable effort. Continue on a separate page if necessary.)

(b) Requested Forms of Access:

- 1.
- 2.
- 3.

The making of this request is free of charge, but where access to a document is to be given in the form of a copy (printed or otherwise), the applicant shall be required to pay the prescribed fee.

Date of
Application:.....

Signature of
Applicant:.....

L2/4/1053 I
Freedom of Information Bill6.wpd