

A Critique of the Draft Right To Information Bill, Ghana

The Constitution of Ghana, 1992 is one of the few Constitutions of the world that guarantees a fundamental Right to Information¹. This right has been recognised in many International instruments and is seen not just a facet of the right to freedom of speech and expression² but also as a right that is necessary for the exercise of civil and political rights³ and socio-economic⁴ and cultural rights. Given that the Constitution of Ghana recognizes the Right to Information as a Fundamental Right, any legislation on Right to Information should seek to merely operationalise this fundamental right. It is in this context that the Draft Right to Information Bill, 1999 is being critiqued.

Right to Information means the right to:

- have access to information relating to a legal right of any person. This information could be in the form of records, files, registers, maps, data, drawings, reports etc.
- be told the information regarding some matters that could affect a person's rights. This means that a positive duty is cast on a person to give certain types of information without waiting to be asked for it. This would include information on issues concerning projects that directly affect the people or the environment, information on health, agriculture, weather conditions etc.

Right to Information is necessary in a democratic society to ensure:

- a) **Accountability:** -
In a democratic system of governance the government is run for the benefit of the public at large and not for the benefit of one person or a few persons. People have a right to know what the government is doing. A Right to Information is necessary to ensure that people can hold public bodies accountable on a regular basis.
- b) **Participation:** -
Since most of the governmental works are carried out for the people, people must be involved in the planning process and must know exactly how things are being done. To participate in planning processes and to judge whether certain plans and schemes are useful for them or not, people must have sufficient information about the nature of the projects and programmes proposed by the government. This will enable them to give their opinion well in time for required changes or modifications. This will reduce project costs and will increase project outputs manifold.
- c) **Transparency:** -

¹ Article 21 (1)(f) All persons shall have the right to information, subject to such qualifications and laws as are necessary in a democratic society;

² Article 19 UDHR; Article 19(2) ICCPR, and Article 9(1) African Charter on Human and People's Rights.

³ Articles 9(2) and 19(2) of the ICCPR.

⁴ Article 11(2)(a) International Covenant on Economic Social and Cultural Rights

There is a presumption that everything that is done by the government is done for the public good which means, it is done to further the objective of public well-being, is done honestly with optimum benefits from the funds used. It is essential that there should be complete transparency in all-public dealings. This is bound to bring about a more careful utilisation and application of funds. Transparency in government functioning will also help to hold people accountable for their mishandling of public time and money. Transparency would go a long way in helping to expose the corrupt and allowing the honest to do their jobs without fear or favour.

What a Right to Information Law Should Contain

- **Minimal Exceptions**

The right of access to official/government-held information should be a wide right. The exceptions to the rule of giving information must be limited and specific. The law must not contain a long list of exceptions couched in terms general enough to ensure that all kinds of information can be refused taking the help of the law. In instances where Right to Information is recognised as a Fundamental Right it can be subjected only to the restrictions allowed by the Constitution.

- **Accountability**

A Right to Information law must lay down clearly the principle of accountability. That is, it must state specifically as to who is responsible for providing the information (e.g.: - appointing Public Information Officers in every office and department of Government"). Penalties should be provided for officials who delay without just cause the giving of information or refuse on unwarranted grounds.

- **Independent Forum for Appeals**

The law should contain a simple and independent procedure for appeals from refusals to give information or for wilfully providing wrongful information or misleading information. The appellate forum should be an independent person or institution such as an Ombudsman.

- **Reasonable fee Structure**

The law, if it provides for a levy of a fee for getting information must ensure that the fee is reasonable and does not act as a deterrent for asking information and does not end up debaring information from the disadvantaged groups who cannot afford the fees. The law must provide for waiver of fees in certain circumstances.

- **Upgradation of systems**

The law should contain provisions for setting up specific systems for storing and disseminating information and upgrading the existing systems for enabling easy access. There must be specific provisions for priority-wise computerisation etc. of government offices.

- **Allocation of funds**

The law must contain a specific allocation of funds for the purpose of operationalising the Right to Information. Without this, the law will be a dead letter and will have no effect.

- **Methods of Communication**

The law must contain a specific directive for simplification of official language. Information giving should be in a form that can be easily understood by people. There must be a focus on traditional means of giving information. Information contained in official gazettes and publications that are usually unavailable and are of no use to the lay citizens, given the low literacy levels. The law should ensure proper use of the electronic and print media as well as use of conventional methods of communication as per the target group.

- **Duty to Inform**

The law must cast a positive duty on public bodies to inform the public in case of certain projects and activities that relate to the public. This envisages giving information without being asked for it. It must be made mandatory to give out certain kinds of information on a mandatory basis. This kind of information would include rules, information on proposed projects and schemes, and other relevant information which needs to be given out and updated routinely.

- **Time Limit**

The law must contain a provision for timely imparting of information. The concerned public officials should face a penalty in case the information is not given in time. The time limit should be reasonable and should not jeopardise a person's rights. Time limits should be set in order of urgency and accessibility. Information regarding a person's life and liberty should be made available forthwith or within the shortest possible time, say within 48 hours.

- **Protection of Privacy**

The law must take into account the protection of an individual's privacy. Personal information held by the government must be exempt from disclosure. However, if the public interest in disclosure in the public interest greatly outweighs the preservation of individual privacy, then disclosure should be allowed.

- **Application to Private Bodies**

Right to Information is usually seen as a right to seek government-held information. In reality it is a right to seek greater accountability from organisations and institutions working in the public domain. Therefore, the law must make it binding on private bodies to disclose certain kinds of information that could affect the public health, safety, environment etc.

- **Protection of Whistleblowers**

The law should give protection to public officials who give certain exempted information where it is necessary to do so in overwhelming public interest or to disclose some serious corrupt practice, etc.

- **Publicity and Training**

The law must contain a mandatory procedure for publicising its contents. Often, laws are passed without their knowledge percolating down without sufficient speed or impact and therefore fail to bring about the desired change in the systems. The Right to Information law must also contain a strong aspect of training and orientation of public servants at all levels, in order to bring about an effective change in the culture.

CRITIQUE OF THE RIGHT TO INFORMATION BILL, GHANA

PREAMBLE:

The Preamble of the Bill seems to focus on "regulating disclosure and production of Information" - the language seems to indicate that the basic presumption of the law is against disclosure and in favour of regulating information. Therefore indicating that the law focuses on regulating disclosure as opposed to favouring disclosure. The preamble of legislation is important in that it describes the focus of the law and what it seeks to achieve.

Right to Information has been recognised under the Constitution of Ghana as a Fundamental Right of the people of Ghana, therefore any law on right to information should focus on operationalising this fundamental right. The object of the law should be to provide information to all people and to ensure that information reaches the poor and marginalised sections of society, the object of the law should not be to regulate information but to encourage disclosure by the administration, this must be reflected in the preamble.

PART I

1. The Right to Information guaranteed by the Constitution of Ghana can be restricted by qualifications and laws as are necessary in a democratic society. Since the term "laws as are necessary in a democratic society" is neither defined nor explained in the Constitution the law on right to information should be precise about the restrictions to the Right to Information. Therefore, all restrictions and qualifications on Right to Information should be contained only in this law. Therefore Clause 1 of Part 1⁵ should be deleted as it implies that there are others laws which can limit the fundamental Right to Information.

⁵ Part I, Clause 1: - All persons shall have the right to information, including official documents, subject to such qualifications and laws as are necessary in a democratic society and in accordance with the provisions of this Act.

2. In Clause 2 the Right to Information is available to any person who applies for information in writing from the custodian of the information. This clause limits the scope of the right, since information will be given to only those persons who seek information, thereby not taking into consideration the issue of *suo motto* disclosures by the Government. There are two aspects to Right to information firstly, the right to seek specific information and secondly the right to be given information without having to seek the same.

The Bill envisages that the application for information should be made to the Custodian of information. The definition of the term Custodian⁶ is rather vague. Since the scope of the Bill is unclear⁷, it is difficult to determine who exactly the Custodian and whether a Custodian needs to be appointed by a private body company also⁸.

The question that arises is - how do people know who they should approach for information. Government machinery being vast and complicated, a common person would find it difficult to approach and more over how does a person know which department to go to for information. Unless each and every government department makes *suo motto* disclosures on their role, functions, duties, records they maintain and the information available with them, people will not know who to approach and will not be able to determine who the Custodian of information is.

In order to make the system more effective, people friendly and to avoid confusion, every office and department of government should have a public information officer ("PIO"), who should be entrusted with the duty of receiving applications for information and ensuring that people are given the information they seek. The Bill should provide for appointment of PIO's and set out the duties and obligations of PIO's as also set out a detailed procedure for applying for information.

3. In Clause 3⁹, the language is unclear, as it seems to imply that under the Bill the Custodian has the powers to impose conditions on a person's right to access information. In the interest of clarity it would be better to delete the words " save those prescribed by this Act".

6 Custodian means a person or agency or department who has in his power or under his control or in his keeping, a document to which access may be applied for under this Act.

7 It is not clear whether the Bill proposes to cover only information to be provided by government or also information by other persons. This confusion arises due to the structure of the Exceptions set out in Part II of the Bill, this Part seems to not just cover information from government but also information disclosure by other persons e.g.: Clause 11-17 of Part II.

8 The Definition of the terms Custodian says "Custodian means a person or agency or department.....", while the Bill defines the term "Department" it does not define the term "agency" - is one to understand that an agency means a private body?

9 Part I Clause 3: - A person's right of access to information, not otherwise designated exempt by sections 7 to 20 below. Shall not be hindered or fettered by conditions precedent imposed on him by the custodian. Save as prescribed by this Act.

4. Procedure:-
 - a) In clause 4(c) if the applicant has not provided the custodian with sufficient details of this request, the time limit for grant of response does not begin until all details are provided to the custodian.

While it may be difficult for a Custodian to identify information due to lack of clarity in an application, one cannot at the same time expect applicants to provide extensive details regarding the information they seek. A provision such as this will become a tool for misuse at the hands of government officials; applicants will be denied information on the ground that the application does not provide for necessary details. The provision should be deleted

The law has taken a very positive step by laying down a detailed procedure for providing information. However, the system is rather complicated because it assumes that people (including Custodians) would know what information is available with various other custodians. The Right to information would work effectively only if one person in every department was made responsible for providing information.

5. Application for exempt information: - Section 5 requires that the permission of the Supreme Court be obtained before submitting an initial application for exempt information is made to a Custodian. This provision is an extremely interesting one, in that it provides access to exempt information if the Supreme Court allows it.

However, the problem with implementing the current provision is that there is an assumption made that the person applying already knows that the information he is seeking is exempt. Given that the most of the information that is exempt as stated in Part II of the Bill is subject to a harm test and is based on a relative assessment of the situation. It maybe more practical if the information was asked for and once it is denied by the government officer, then the Supreme Court could be approached for challenging the order.

6. Fees: - The fees charged should be at the very minimum and should not be so high as to dissuade people from seeking information, fees charged should not be greater than the cost incurred in providing a copy of the information sought. The Law should also contain a provision for waiver of fees where the applicant is unable to pay the same.
7. Exemptions: - Since the Constitution of Ghana in Article 21(1)(f) states that “every person has the right to information subject to such qualifications and laws as are necessary in a democratic society” and the constitution is silent on what laws are necessary in a democratic society, this provision may be interpreted in light of ARTICLE 10 (2) of The European Convention for the Protection of

Human Rights and Fundamental Freedoms¹⁰. The Exemptions in Part II are wide and cover aspects that go way beyond information that is provided by the government. It may be more appropriate to deal with the issues set out in Clause 11- 17 of Part II in a separate section as they deal with personal information.

WHAT THE BILL LACKS

1. The Bill does not contain any penalty provisions. The Bill fails to answer the question, as to what would happen if the Custodian denied information to an applicant or deliberately provided wrong information. It does not contain any penalties for Custodians who willfully obstruct the flow of information.
2. The Bill does not contain any provisions for suo motto disclosures. Suo Motto disclosures are important from the point of view that the common person is not aware of the working of the Government. There is certain information that should be forth coming from government even without being asked for the same. Information that affects public health, safety, environment should be forthcoming from the government in public interest.
3. The Bill does not to provide for the speedy release of information in cases relating to life and liberty.
4. The Bill does not specify what proportion of the cost of providing information would be passed on to the citizen. It leaves this critical issue to the discretion of the authorities.
5. It fails to provide protection for whistle-blowers who reveal corruption or mismanagement in government.
6. It places no obligation on private actors including corporations to reveal information about their products or activities that might have a prejudicial effect on public safety or the environment, although it does allow for the release of confidential commercial information held by the government in the public interest.
7. The Bill does not contain any provision for independent appeals nor does provide for a monitoring authority to over see the working of the Law.¹¹

10 Article 10 (2) - The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹¹ The South Africa Protection of Access to Information Act gives the role of monitoring the Law to the Human Rights Commission in the Act. Duties of the HRC include making of a guide informing people on how to use of the Act, submit reports to the National Assembly, promote understanding amongst the public

The focus of any law on Right to Information should be on detailing and operationalising the Right to Information. The Law should be one that is developed out of interaction with a vast section of the public, the approach to law making should be participatory especially since this is one of the basic ideals of democracy that the Law seeks to uphold. The Law will be effective only if it is able to ensure access to information to each and every person, this would be possible only if the language of the Law is not ambiguous, is clear and leaves no discretion at the hands of the provider of information. In the context of Ghana where the Right to Information is a guaranteed Fundamental Right, the law should stress that there is a corresponding duty on the government to provide information in order to give effect to this Fundamental Right.

etc. HRC can monitor the working of the Act and recommend amendments to develop and improve the Act. Training of information officers is also included within the mandate of the HRC in the Act.