

**PAPER TO BE PRESENTED DURING A ONE DAY ENCOUNTER
ON THE DRAFT FREEDOM OF INFORMATION BILL 2006**

**HELD ON 13TH DECEMBER 2006
AT SEA CLIFF HOTEL, DAR ES SALAAM**

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1. BACKGROUND

The history of media in Tanzania is recalled way back to pre – in dependence era. As far broadcasting sector, the changes have taken place from the Voice of Dar es Salaam (1951), followed by the Tanganyika Broadcasting Corporation (1956), Radio Tanzania Dar es Salaam (1965) and now the Tanzania Broadcasting Services co-existing with a myriad of private operators¹

Turning to print media, the Newspaper Ordinance, Cap. 229 introduced by the British Colonial Government continued to regulate newspapers and publications

¹ Opening Speech by the Minister of State Prime Minister's Office Responsible for Information and Political Affairs, Hon. Muhammed Seif Khatib (MP), at the Workshop on "Public Broadcasting in Tanzania; Reflecting Realities, Exploring Possibilities" held at the Court Yard Hotel, Dar es Salaam, 20-21 May 2004, Page 2

until 1976 when the Ordinance was repealed and replaced by the Newspapers Act, 1976 (Cap. 229 R.E. 2002). The replacing legislation was not celebrated by media practitioners because it retained certain provisions that were arbitrarily used to infringe media freedom.

Apart from parliamentary legislation, the Constitution of the United Republic of Tanzania, 1977 was amended in 1984 to incorporate the Bill of Rights for the first time in Tanzania. The same Bill of Rights was incorporated in the Constitution of the Revolutionary Government of Zanzibar in 1985. The Bill of Rights incorporated a provision that guaranteed freedom of Expression and right to Information. Freedom of opinion and protection of privacy were also protected in the Bill of Rights.

The Bill of Rights adopted and incorporated a number of internationally agreed principles of Human rights as contained in the Universal declaration of Human Rights, 1948. The enforcement for such rights in Tanzania, however, was not certain until 1994 when the Basic Rights and Duties Enforcement Act, 1994 was enacted.

The Act laid down the procedure for one to enforce his/her rights guaranteed in Part III of Chapter one of the Constitutions of the United Republic of Tanzania relating to Basic Rights and Duties. A number of court cases were decided since then on human rights issues whereas the supreme court of the land has even declared some provisions of Acts of Parliament to be Unconstitutional.

Counting on post independence era, it is worth noting that the State became a supreme body over all other organs. Since it was a single party government, the Ruling Party (Chama Cha Mapinduzi) became part and parcel of the Government of a day to the extent that one could not easily distinguish the party and government issues.

Media was put under state control and became a government mouthpiece. The only one national Radio Tanzania Dar es Salaam used to broadcast on government propaganda to protect the interests of the state.

Information highway was a one way traffic. People could not easily get access to information held by government. This habit was increasingly so because of the restrictive rules and legislation that prohibited government official to disclose information acquired by them during the course of official duties. All public

servants were and still are supposed to take oaths of allegiance which prohibit them from disclosing information.

Besides the legal impediments, access to information was also curtailed by the culture of secrecy given the fact that most of African countries were yet to be independent of colonial governments. Tanzania was a champion in fighting colonialism in Africa. Such mentality continued to inhibit the minds of public servants most of whom happened to be freedom fighters.

Even after the incorporation of the Bill of Rights into the Constitution of the United Republic of Tanzania and acceding to various international instruments relating to protection of Human rights, the government has continued to retain laws that restrict access to information in the country.

The introduction of liberalization policy in Tanzania early 1990s stimulated a number of changes in relation to media ownership, national economy as well as public participation in governance issues.

The 1992 amendments to the Constitution of the United Republic of Tanzania 1977, introduced the shift from single party to multiparty government. The

emergence of different political parties stimulated public awareness and open debates on various issues. Media stakeholders, as well, started to discuss the possibility of commercialization of media.

In 1993, the government responded to demands of various stakeholders by enacting two pieces of legislation, the Broadcasting Services Act, 1993 and the Tanzania Communications Act, 1993. The impact of the two pieces of legislation was establishment of privately- owned broadcasting radio and Television stations. Courier and postal services were also improved while private telecommunications companies were allowed to operate in the country together with Internet service providers.

The privately owned broadcasting stations together with Newspapers have been co- existing and competing for advertising resources with state –owned media.

The continued threats to journalists, detention, beatings, high tax rates and exorbitant damages awarded by courts against media in relation to defamation cases, led to another struggle for media freedom.

The Media Institute of Southern Africa – Tanzania Chapter (MISA-TAN), the Media Council of Tanzania (MCT), the Association of Journalists and Media Workers (AJM), the Tanzania Association of Environmental Journalists (JET), Association of Sports journalists, Photographers and Cartoonists Associations of Tanzania, Tanzania Media Women’s Association (TAMWA), together with the Media owners Association of Tanzania (MOAT) have were formed to protect the rights and interests of various media stakeholders against infringements.

The joint efforts of the above named media associations together with other stakeholders, culminated into the establishment of the Media Law reform Project in 2002. The Project which was under MISA-Tanzania as a lead organization together with TAMWA, MCT, JET, AJM and the United Nations Association of Tanzania (UNA-Tanzania) carried on the campaign against all policies and legislation impacting on media.

A number of positive results of the campaign have been realized so far. Such results include the adoption of the Broadcasting and Media Policy, 2003, the ICT Policy, 2003, the enactment of the Tanzania Communications Regulatory Authority Act, 2003, the 14th amendment to the Constitution of the United

Republic of Tanzania, 1977 (as amended 2005), which amendment repealed and replaced Article 18 by removing a cluster clause, Government recognition of the role and impact of media, and finally, the government intention to enact a media friendly legislation titled Freedom of Information Act, 2006 as the draft bill indicates.

It is upon such joint efforts that we stakeholders are here today to discuss the draft bill so that the outcomes of this meeting are worked upon to advise the government on the best practice legislation. It is with the same understanding that I discuss the said Bill with you in this paper as stated hereunder.

2. ANALYSIS OF THE DRAFT BILL

2.1. The Basic Principles of Access to Information

Over the past two decades, countries of the world have been debating on the importance of Freedom of information legislation in their countries.

As early as 1946, the United Nations General Assembly recognized this right by adopting, in its first session, Resolution 59(1) which stated:

“Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.”²

The Universal Declaration of Human Rights, 1948, an instrument carrying on internationally agreed customary norms to be adopted by all countries members of the United Nations extended the Resolution by including in its declarations, Article XIX which provides:

“Article 19

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

² Mendel, T., Freedom of Information; A Comparative Legal Survey, UNESCO, New Delhi, 2003, P.1

The gist of article XIX was adopted by the Tanzanian Government when repealing and replacing Article 18 of the Constitution of the United Republic of Tanzania, 1977 (as amended in 2005).

Experts in human rights and Freedom of Information have agreed to various principles to guide countries that wish to enact Freedom of Information legislation in their countries. Such principles which were developed by Article XIX, an Organization based in the United Kingdom were adopted by the African Commission on Human and People's Rights in its 32nd Session held from 17th to 23rd October 2002 at Banjul, Gambia as **Declaration of Principles on Freedom of Expression in Africa.**³

According to the said principles, as adopted by the African Commission and now members states of the Southern Africa Development Community (SADC), freedom of information legislation must conform to them.

The principles make declarations on various issues relating to freedom of information, viz:

³ The Declaration is Attached to this Paper as Appendix 1

- (a) the legal guarantee
- (b) protection against arbitrary interference with freedom of expression
- (c) media diversity
- (d) Right to access information
- (e) Private Broadcasting sector
- (f) Public broadcaster
- (g) Regulatory bodies
- (h) Print media
- (i) Complaints mechanism
- (j) Promoting media professionalism
- (k) Attacks on media practitioners
- (l) Protecting reputations
- (m) Criminal measures
- (n) Economic measures
- (o) Protection of sources and other journalistic materials

Article XVI of the Declaration of Principles on Freedom of Expression in Africa provides:

“States Parties to the African Charter on Human and Peoples’ Rights should make every effort to give practical effect to these principles.”

Tanzania, being a party to the Charter, is thus forced to abide by the principles.

With the foregoing principles based on a requirement of **maximum disclosure and minimum exemptions** to access to information, the following discussion will focus on best practices in other countries in relation to the aforesaid principles.

2.2. The Structure of the Bill

The Draft Bill is composed of 16 parts and two schedules. It has a total of 186 sections. Parts are divided as follows:

Part I: PRELIMINARY PROVISIONS

Part II: RIGHT OF ACCESS TO INFORMATION

Part III: EXEMPT DOCUMENTS

Part IV: APPEAL AGAINST DECISIONS

Part V: PROTECTION OF JOURNALISTS' CONFIDENTIAL SOURCES OF INFORMATION

Part VI: ESTABLISHMENT OF THE MEDIA STANDARDS BOARD

Part VII: PROFESSIONAL STANDARDS

**Part VIII: COLLECTION, USE, DISCLOSURE AND RETENTION OF
PERSONAL INFORMATION**

Part IX: PRIVACY COMMISSIONER

Part X: PRIVACY COMMISSIONER TO INVESTIGATE COMPLAINTS

Part XI: PROTECTION OF MINORS AND YOUNG PERSONS

Part XII: DEFAMATION

Part XIII: BROADCASTING SERVICES

Part XIV: NEWSPAPER PUBLISHING

Part XV: SEDITIOUS INTENTION

Part XVI: BOND

Part XVII: MISCELLANEOUS PROVISIONS

PART I: PRELIMINARY PROVISIONS

As usual this part contains provisions relating to Title, Application, Objects, and Interpretation. A notable thing in this part is that the Bill is that its application will have different dates depending on a specific part as appointed by the Minister⁴.

Section 2 describes the scope of application. The Act applies, thus, “**to accredited media practitioners, public authorities, private bodies and individual persons** in possession of records and documents in Tanzania Mainland.”

It brings in the requirement for accreditation to media practitioners. Its scope is also extended to **individuals in possession of records and documents** in Tanzania Mainland. It does not, therefore, extend its application to Zanzibar as information is not a Union matter.

However, the **Commission of Enquiry** formed by President is exempted from the application of the Bill.

In its objects, the Bill recognizes various principles like protection of privacy, protection of journalist’s confidential sources, protection of reputations of

⁴ Section 1(2) of the Draft Bill

persons, and access to information to be limited only by exceptions and exemptions. However, it imports a new principle when it requires owners of print and electronic media to execute and register a cash bond with one or more sureties.

Section 4 needs to be re- arranged alphabetically.

PART II: RIGHT OF ACCESS TO INFORMATION

The right to access to information is repeated under this part. Access is restricted to **documents**. This is a serious barrier top journalist and other persons who might wish to get access to the actual things being recorded in documents.

For example, the law does not allow any person to seek access to the chemical or physical records or equipments held by public or private bodies. One cannot seek to get a sample of materials used for construction of any building or road. What one can get under the law is the records indicated in paper or any other form indicating that the building or road was constructed by using certain materials even if such materials were not in fact used.

A record indicating that a certain machine bought from abroad was worthy the value and it was functioning is sufficient under the bill and not the view and testing of the machine itself by an interested person.

Besides, this part imposes a duty to publish information held by public and private bodies on a periodic basis not less frequently than once each year. Members of the public are exonerated from liability under the unpublished rules, guidelines or practice of any public authority if he could lawfully have avoided it.

It requires each public or private body to appoint an information officer for the purposes of the Act. Public authorities have a duty to assist requestors to access information and a transfer of requests to the appropriate public authorities.

The bill establishes also, the procedure to be followed when access is refused. The public authority has a duty to notify a third party concerned about the information sought and may allow access to a document containing exempt information only by deleting the exempt part.

A negative part of the bill under this part is the requirement that a request must be in writing and a requestor must identify the document or provide information concerning the document as is reasonable necessary to enable the public authority to identify the same.⁵

Also, Section 23 allows a public authority to defer the provision of access to the document concerned until the happening of a particular event or until the expiration of a specified time or in the public interest or having regard to normal and proper administrative practices.

PART III: EXEMPT DOCUMENTS

The Bill wishes to exempt cabinet documents, save for documents that contain purely statistical, technical or scientific material.

It is doubted why the government of the people for the people should exempt from disclosure, information regarding the cabinet deliberations and decisions. One might ask for whose benefits are the cabinet decisions made if not for

⁵ Supra. Section 12(2)

people whom they govern? This leaves a challenge to every bonafide citizen who would like to participate in the governance of the country. What would restrict the state (cabinet) from passing arbitrary decisions against its own people if the wish so to do?

Much as restrictions and exemptions may be retained for cabined discussions and debates, it is important that the public is informed of every decision reached by the cabinet in order to promote transparency and accountability of the government to its people.

The danger of exempting cabinet decisions and deliberations from disclosure supercedes the public interest.

Similar exemption is guaranteed on policy formulation. In a multiparty and democratic society, one might again wonder why policy formulation should be a secret. If the intended policy is to govern the whole society by indicating government direction towards development, why shouldn't the formulation process be a participatory one? People's views and ideas contribute to the formulation of better policies. They should, therefore, be encouraged rather than discouraged.

Exemptions under sub- sections (3) and (4) of section 32 are subject to debate.

The exemption of disclosure for trade secrets, business affairs, incomplete research information, personal privacy and incomplete investigation, is recommended. Such exemptions have been internationally agreed as best practices.

The general disclosure guarantee in the public interest as contained in Section 38 of the draft bill is important. Section 38 provides for the matters to be considered when one determines whether there is public interest to disclose exempt information.

Section 40 (2) of the Draft Bill adopts the thirty years rule that restricts disclosure of information as contained in Section 16 of the **Records and Archives Management Act (Cap. 309, R.E. 2002)**. The said Section 40(2) waives the application of certain provisions restricting disclosure of information held by public authorities for more than thirty years.

The duty to disclose information is waived by section 41 of the draft bill whereas a body holding information may refuse a request for access for various reasons such as: “ **if the request is manifestly frivolous or vexatious**” or that “ **to process the request would substantially and unreasonably divert the resources of the body**”. Such powers adversely shift the burden to the requestor to prove that the information requested is not frivolous or vexatious.

Similar discretionary powers are also extended to the Minister or the body to declare certain documents to be exempt “**if the disclosure would cause exceptional damage to the national or public interest**”. The test for public interest is in the mind of the Minister or the body. This is to widen the scope of exemptions unnecessarily because the Minister might wish to declare exemptions on the majority of information held by the body hence curtailing rather than promoting freedom of information. The only test required is good faith and endeavours of the Minister.

PART IV: APPEAL AGAINST DECISIONS

The Draft Bill has recognized the right to appeal by any person aggrieved by a decision of public body. Section 43 requires all public and private bodies to put an internal appeal mechanism involving people who were not involved in the original decision making process.

The bill guarantees, under section 43 (2), two grounds of appeal:

“(2). A requester may lodge an internal appeal against a decision by a **public body to refuse access to all or part of a record, or to levy a given fee** for access to information;

The second appeal is allowed to the Media Standards Board within thirty days. (Section 44(1)). The decision for appeal must be made within ten working days.

A new legal development imposed by the Draft Bill is the recognition of the judicial review process when one wishes to appeal against a decision of the Media Standards Board. The key question now is whether the board is composed of people capable of judiciously determining the disputes. This question is subject to debate.

This Part contains also some provisions on the protection of whistleblowers and people who disclose information on good faith.

Finally Access to documents under the Act is free from defamation proceedings and proceedings relating to breach of confidence.

PART V: PROTECTION OF JOURNALISTS' CONFIDENTIAL SOURCES OF INFORMATION

This part contains five sections. It aims to protect the journalist's sources of information. Such protection applies regardless of any other written law.

The order to lift the privilege may be granted by the High Court after satisfaction of the conditions contained in Section 53. The conditions include National Security, absence of alternative source for similar probative or investigative information and where information is necessary to investigation or prosecution of a serious criminal offence, in the defense of a person charged with serious criminal offence or to protect life.

PART VI: ESTABLISHMENT OF THE MEDIA STANDARDS BOARD

This Part establishes the Board and stipulates its functions, composition and powers. The composition of the board is representative of media stakeholders.

It also establishes the Media development Fund to be managed by the Board.

The contradiction arises between section 62 and 63 in relation to tenure. Is it two terms of three or five years?

The Bill has specified matters which can be adjudicated by the board in relation to the Act (Section 75).

PART VII: PROFESSIONAL STANDARDS

This Part contains restrictions for journalism practice in Tanzania. It makes it mandatory for all journalists to be accredited by the Media Standards Board and have academic and professional qualifications recognized by the board.

Full accreditation is also mandatory for persons serving as editors of newspapers, radio and television stations.

Accreditation should not be unreasonably denied to journalists as doing so might lead to unfair treatment of journalists and media professionals. Criminalization of employers who engage non-qualified persons to practice journalism should be removed (Section 76 (3)).

The bill does not stipulate what would happen when one is denied accreditation. Neither appeal mechanism nor alternative redress is stated in the bill. Should one go to the High Court by way of judicial review? The bill needs to be reviewed.

PART VIII: COLLECTION, USE, DISCLOSURE AND RETENTION OF PERSONAL INFORMATION

This part protects the manner of obtaining, use and disclosure to third party of personal information by a public body. The determining factors for disclosure of personal information are set in section 83 of the bill. The gist of this part is to protect privacy.

Such protection is also recognized by the international instruments on freedom of information.

PART IX: PRIVACY COMMISSIONER

This part establishes the office of the Privacy Commissioner to be appointed by the President upon recommendation of the screening committee of parliament. Qualifications for a privacy commissioner are the same as the High court judge. (Section 88)

The functions of the Privacy Commissioner are set out in Section 92 to include, among others, **“to receive and investigate complaints** about alleged violations of the privacy of persons and in respect thereof may make reports to complainants”.

PART X: PRIVACY COMMISSIONER TO INVESTIGATE COMPLAINTS

As stated in the previous part, this part provides for the procedure of complaints and investigation process by the Privacy Commissioner.

Complaints must be in writing, and **every investigation must be in private.** **(Section 98(1)** This requirement contradicts the provisions of Section 96 which read: “**96. Before commencing an investigation of a complaint under this Act, the Commissioner shall notify the chief executive officer of the public authority concerned of the intention to carry out the investigation and shall inform the chief executive officer of the substance of the complaint.**”

It is doubtful whether the Privacy Commissioner would be able to act with impartiality taking into account the fact that they are both public officials. Why should the Chief Executive be informed before conclusion of the investigation process? This might lead to “cooked” evidence for the Privacy commissioner thus affecting his report.

Besides, the Privacy commissioner is toothless as he has no power to make binding decision. His report is not even taken to the Media Standards Board for further action.

It is important then, that the powers of the Privacy commissioner are vested in another body with enough expertise. The Commission for Human Rights and Good Governance would suit the purpose.

PART XI: PROTECTION OF MINORS AND YOUNG PERSONS

The interests and rights of children and young persons are protected in this part. Publication of pornography and unsuitable materials. Higher punishment is imposed on violations of the rights of children and young persons.

PART XII: DEFAMATION

This part intends to protect reputation of individual persons through court cases.

Section 113 seems to be incomplete as it depends on another section. It appears that defamatory matter must have been made without good faith and the Act

continues to elaborate what statements are not in good faith. Section 114 brings a presumption of good faith until the contrary is “**made to appear**”.

Locus standi for defamation cases is limited. Certain entities are exempted from bringing a defamation case. (Section 115). Another new creativity is that defamation cases can be determined on summary judgment. This judicial process might bring more danger to media houses than is the case now, since in certain circumstances, the defendant is denied right to make representation.

While media practitioners are tired of long time take to determine a single case in court, they should notice that summary judgments are sometimes bad because no time to defend is normally entertained.

The expressions of opinion, truth, absolute privilege, and conditional qualified privilege are exempted from liability in defamation proceedings. Only an author, editor, or publisher of statements can be liable for defamation.

Section 125 stipulates that “**Any remedy for defamatory statement should be based on the principle that the purpose of the remedy is to redress the harm done to the reputation of the plaintiff, not to punish the defendant.**”

That is a good principle to be considered. However, there is a need to protect reputation of members of the public whose reputations are intentionally and unreasonably injured by unfaithful journalists who do so for the purpose of economic gains.

The pre-condition for voluntary remedy contained in Section 126 is important to give time for settling the disputes out of courts.

Section 129(1) needs to be reviewed. Why should the court's inherent powers to grant injunction be conditioned to initial publication? What if the initial publication causes more danger or causes irreparable injury to one's reputation? Should pecuniary damages in such circumstances remain to Minister's ceiling or should they be increased? **(Section 128)**

The repeal of Common law principles in section 131 is not necessary as their application by courts is important where there is a lacunae.

PART XIII: BROADCASTING SERVICES

The draft bill retains (with slight amendments) the functions of the Tanzania communications Regulatory Authority (TCRA). As far as broadcasting is concerned, the Bill encourages broadcasting pluralism and diversity while taking notice of the importance for preserving communication frequencies as national resources which need to be preserved.

The bill recognizes also, the importance of Intellectual Property Rights in relation to broadcasting corporations. It requires the establishment of the code of practice for broadcasters. (Section 140). The punishment imposed upon a license holder who breaches the code of practice is important for preserving abidance. However, the power to Suspend or revoke the broadcasting license should be vested to courts of law and not the Authority. That would guarantee impartiality and absence of arbitrary decisions by the Authority which is composed of appointees of the Executive organ of government.

The forfeiture of broadcasting apparatus as a punishment for contravention of the Act is Unconstitutional as far as right to own property is concerned. The Act should impose other punishments than forfeiture. (Section 144).

Section 143 seems to be misplaced in relation to the powers to investigate. Since the Act already establishes the office of the Privacy Commissioner, investigative powers should be vested in the same office.

PART XIV: NEWSPAPER PUBLISHING

This part deals with registration of newspapers to be published in Tanzania. It also establishes a mechanism for inspecting newspapers kept by the registrar.

One positive development about the bill is that the power to cancel or ban a newspaper from publication is vested in the Court. (Section 163(3) The Minister has to instruct the registrar to institute cases in court. The former powers of the Minister to ban newspapers are now shifted to courts which exercise their judicial minds in reaching the decisions.

PART XV: SEDITIOUS INTENTION

This part makes a definition of what is a seditious intention. It also establishes the seditious offences. Time limit for legal proceedings is six months and one must obtain written consent of the Director of Public Prosecutions to proceed with prosecution of seditious offences.

Other offences like incitement to violence and publication of false news likely to cause fear and alarm to the public have been created under this part. (Sections 74 and 75)

PART XVI: BOND

The Act makes it mandatory for publishers of newspapers, radio or television broadcasting to execute a cash bond in the prescribed form. The bond is conditioned for the payment of any monetary penalty and damages against the publisher. (Section 177).

PART XVII: MISCELLANEOUS PROVISIONS

This part, as usual deals with miscellaneous matters.

Section 182 (2) provides a general exemption of publication in relation to documents accessed under the Act as follows:

“(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 or breach of confidence, to constitute an authorization or approval of the publication of the document or of its contents by the person to whom the access was given”

The Bill intends to repeal the Broadcasting Services Act, 1993 and the Newspapers Act, 1976.

SCHEDULES

The Draft Bill contains two schedules. Schedule 1 intends to make amendments to the Constitution of the United Republic of Tanzania. Although the proposed amendments are titled 2002, I find it important for the constitution to have specific provisions of “freedom of the press and all other media”.

Schedule II proposes amendments to the National Security Act, 1970 and the Tanzania Communications regulatory Authority Act, 2003. A positive development in the National Security Act is the substitution of Section 3 by another provision. The exception to the rule under section 3 that aims to protect whistleblowers is a positive incorporation in the Bill.

The TCRA Act is amended in terms of its functions only.

3. CONCLUSION

Despite all the good things identified in the Bill, there are some curtailing provisions which need to be revised.

National Security issues, for instance, need to be construed in accordance to Principles 2 and 6 of the Johannesburg Principles of on National Security, Freedom of Expression and Access to Information, 1996.

Many parts of the Draft Bill are in compliance with the Declaration of Principles on Freedom of Expression in Africa (**Appendix 1**)

The Bill, however, is drafted in a language which cannot easily be understood by a common member of the society. The language should be simplified to allow maximum use of the Act by members of the public.

Since freedom of information is vital for realisation of other human rights, the freedom of information legislation should be separated from the legislation governing media. Media is a conduit of information from source to a destination (audience). The governance of the two under a single legislation is to classify information for journalists only while leaving outside other stakeholders and members of the public generally.

THANK YOU.