

A brief critique on the draft Freedom of Information Bill 2005

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Preamble

This response largely draws firstly from the author's work at the South African History Archive² which has several years of consistent work within its FOI program using the South African Promotion of Access to Information Act (Act 2 of 2001). Additionally, it draws from the author working as an information professional in British Columbia Province in Canada and using the FOI legislation there.

1.0 Introduction

The author has taken note of the fact that the Commonwealth Human Rights Initiative³ has prepared a comprehensive analysis of the draft Bill and will therefore seek only to expand on a few aspects for emphasis purposes.

2.0 Analysis

Date for Act to come into force

1. While no indication is given when this Bill will come into force, the possibilities for citizen participation in a vibrant democracy are very appealing. If the Government is serious about its recent utterances made by various members of the Cabinet on openness,⁴ then there has to be a date attached to this legislative effort to

² South African History Archive is a Non – Governmental Organisation physically located at the University of Witwatersrand and dedicated to documenting and supporting the struggle for justice in South Africa. It has three core programmes, one of which is the Freedom of Information Programme (FOIP) which was launched in 2001, the year after South Africa 's Promotion of Access to information Act (PAIA) came into affect. FOIP at SAHA aims to create awareness of, compliance with and use of the Act through requests for access to information. The programme provides access to released materials and conducts research, information dissemination, lobbying, education and training in the use of the Act. For more information visit <http://www.wits.ac.za/saha/> .

³ Charmaine Rodrigues (2005), "Analysis of the Republic of Kenya draft Freedom of Information Bill 2005 & Recommendations For Amendments" February. <http://www.humanrightsinitiative.org> accessed on March 17, 2005

⁴ Presidential Press Service (2005), "No more secret tender deals, says Kibaki" East African Standard http://www.eastandard.net/archives/cl/hm_news/news.php?articleid=13427 February 16th accessed Friday, 18 March 2005; B. Namunane And D. Mugonyi (2005) "Ministers taken to

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institutionalise such openness. There is danger in leaving this open ended because then the Government keeps postponing the passing of the Bill. Examples in Africa include Zambia and Mozambique amongst others.

Recommendation: It is critical to include a maximum transition period for the Act coming into force which ideally should not be more than two years from the date the Bill becomes an Act after the President's assent.

Definition of documents, records and information

2. The definitions that have been used for document⁵ and information⁶, while they attempt to be comprehensive, are confusing especially in an increasingly electronic age and these definitions demonstrate a paper mindset.
3. This therefore makes it difficult to demonstrate whether access is to "raw information" or to "documents or records". While this issue may be considered petty, it is critical at an implementation level. In examples drawn from FOI requests made in North America and Europe, it is critical to define whether government departments should be research sources (providing information they already have), or become research institutions (compiling information from disparate areas to meet research needs).⁷
4. For purposes of this Act, it would be reasonable to consider departments as research source rather than a research institution. For example, considering that we have been informed by the print media that every Member of Parliament has a certain amount of money to support developments within their individual

task over corruption" <http://allafrica.com/stories/200503071646.html> March 8th accessed Friday, 18 March 2005

⁵ Includes (1) any of, or any part of, the following things: (i) any paper or other material on which there is writing; (ii) a map, plan, drawing or photograph; (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; (v) any article on which information has been stored or recorded, either mechanically or electronically; (vi) any other record or information; or (2) any copy, reproduction or duplicate of such a thing; or (3) any part of such a copy, reproduction or duplicate; but does not include: (i) library material maintained for reference purposes; or (ii) Cabinet notebooks

⁶ Includes data, text, images, sound, codes, computer programs, software and databases or microfilm or computer generate microfiche

⁷ I. Currie and J. Klaaren (2002) **The Promotion of Access to Information Act Commentary** Siber Ink, Claremont, pg. 42

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- constituencies. What exactly could I ask for? The financial files, email messages, recorded telephonic messages, or text messages? It is therefore essential for the Act to provide clear definitional direction so that the public authority from whom information is requested is not unreasonably burdened with ambiguity.
5. It is worth noting that numerous efforts have been made globally by archivists and records professionals to address the issue of definitional ambiguity. This is particularly critical because in many cases, they are responsible for the information and record keeping systems that are used to provide access to information.
 6. In contemporary information management thinking it is critical to view data as the basic element which builds into information that is contained in documents and records.
 7. In mid 20th Century an American Archivist, Dr. Theodore Schellenberg, conceptualised the definition of records
 - a. "All books, paper, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any public or private institution in pursuance of its legal obligations or in connection with the transaction of its proper business and preserved or appropriate for preservation by that institution or its legitimate successor as evidence of its functions, policies, decisions, procedures, operations or other activities or because of the information value of the data contained therein"⁸

One notices that this definition is somewhat similar to the definitions provided in the draft bill. Schellenberg's definition even though formulated soon after the 2nd world war has been widely used in US public administration⁹ and jurisprudence.¹⁰

8. However, as implied earlier, these definitions do not offer respite to information managers working under the constant pressure of information overload in an

⁸ See T. Schellenberg, *Modern Archives*, p. 16 quoted in Trevor Livelton (1996), **Archival theory, records and the public**, Scarecrow Press, Maryland. Pg 63

⁹ See US Government, *44 U.S.C. Chapter 33 Definition of Records*, **National Archives and Records Administration**
http://www.archives.gov/about_us/basic_laws_and_authorities/disposal_of_records.html#def
accessed Sunday, September 1, 2002

¹⁰ James O'Reily (2000) **Federal Information Disclosure** 3ed Vol. 1 pg 81 citing *Nicholas v US* 460 F 2d 671 (1972) quoted in I. Currie and J. Klaaren (2002) **The Promotion of Access to Information Act Commentary** Siber Ink, Claremont, pg. 42

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increasingly in an electronic environment. Therefore, various definitions of a record have been posited.

- a. "A record can be any document (physical or electronic) that has content, context, and structure. The content is the information the document contains. Context shows such things as intended use, purpose, or recipients of the document (its history). Structure is the appearance, physical layout, or type of document (such as memo, letter, proposal etc)."¹¹
- b. A record is "a document created by a physical or juridical person (an entity having the capacity to act legally and constituted by a collection or succession of natural or physical persons) in the course of practical activity"¹²
- c. A record is "a document made or received and set aside in the course of a practical activity"¹³
- d. Records are "documents or other items containing recorded information, which are produced or received as part of a business activity."¹⁴

9. Flowing from the definitions in (8) above, all records are documents but qualified (i.e. not all documents are records), it would be useful to provide several definitions as examples.

- a. A document is "information consigned to a medium."¹⁵
- b. A document is "recorded information"¹⁶

10. Flowing from (8) and (9) above, information is at the core of both documents and records. Several examples of definitions of information include

- a. Information is "meaningful group of data intended for communication, either across space or through time"¹⁷
- b. Information is "an assemblage of data in comprehensible form capable of communication"¹⁸

¹¹ Doculabs (1998), "Special report on Records Management Systems" 1st edition pg 5

¹² UBC MAS research team and US DOD RM task force, Glossary, <http://www.interpares.org/UBCProject/gloss.htm> accessed on Sunday, September 1, 2002

¹³ InterPARES (2001), The InterPARES Glossary, pg 6 http://www.interpares.org/book/interpares_book_q_gloss.pdf access on Sunday, September 1, 2002

¹⁴ Elizabeth Parker (1999), **Managing your organization's records**, Pg 3.(emphasis in original)

¹⁵ UBC MAS research team and US DOD RM task force, Glossary, <http://www.interpares.org/UBCProject/gloss.htm> accessed on Sunday, September 1, 2002

¹⁶ InterPARES (2001), The InterPARES Glossary, pg 5 http://www.interpares.org/book/interpares_book_q_gloss.pdf access on Sunday, September 1, 2002

¹⁷ Heather MacNeil (2003), **Trusting records: legal, historical and diplomatic perspectives**, Kluwer Academic Publishers, London pg. 90.

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11. Therefore it is easy to see from these definitions that while the Act should provide access to information, it is critical that this is information that is meaningful, recorded and the resulting from practical activity and attributable to a physical or juridical person. Currie and Klaaren note that it is significant that in the South African Act, the definition of records is “built around the concept of *recorded information* rather than that of document in paper form.”¹⁹

Recommendation: The definitions of documents and information should be revised. In addition, records should be included and could be “any recorded information regardless of form or medium, in the possession or under control of a public authority, whether or not it was created by that public authority.”

Require proper records management

12. In the mid 1990's Dr Justus Wamukoya (formerly of Moi University) conducted his doctoral studies, which examined the impact of information management as a strategic resource in administrative reform in Kenya. He investigated his theme within the context of three sections of government; Directorate of Personnel Management, the Ministry of Finance and the Civil Service Reform Secretariat. His study revealed that poorly managed records are consistently undermining government efficiency and accountability. He noted that “it is regrettable that the Kenya Government has not taken full advantage of the opportunities afforded by the reforms to re-examine policies concerned with the management of public sector records and to promote the management of information as a strategic resource.”²⁰

13. We are constantly reminded that even though the UK Act is dated 2000, public authorities were given five years to allow the gradual application of the Act's

¹⁸ InterPARES (2001), The InterPARES Glossary, pg 7
http://www.interpares.org/book/interpares_book_q_gloss.pdf access on Sunday, September 1, 2002

¹⁹ I. Currie and J. Klaaren (2002) **The Promotion of Access to Information Act Commentary** Siber Ink, Claremont, pg. 41

²⁰ Justus Wamukoya (1996), “Records Management and Administrative Reform Programmes in Kenya,” Unpublished Phd Thesis, University College London pg 237

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obligations.²¹ These included the significant improvement of their record keeping systems in order to ensure that whenever the public make requests for information, compliance will not be hindered due to inability to efficiently and cost effectively retrieve information. The UK National Archives was intricately involved assisting public authorities upgrade their record keeping systems by providing policy, procedural and practical assistance.²² The same has happened in several other countries including Canada, Australia and Pakistan.²³ The South African National Archives is also doing the same although in their situation retroactively and to a lesser degree not as much practically but rather through the provision of policies and procedures.²⁴

14. SAHA has noted that in the years of making requests to public and private bodies, generally it is those with functioning recordkeeping systems that respond within the stipulated time periods. A recent example can be cited, SAHA made a request to the Department of Trade and Industry (DTI) on the 25th of January 2005 for "P2 Format Confirmation s of Patent Application Grants". Their response was received on the 11th of February 2005.²⁵ This is to be contrasted with a request sent to the same department on the 7th of August 2003 which was promptly transferred to the Department of Mineral and Energy (DME) on the 1st of September 2003. The request was titled "Any and all records pertaining to nuclear devices exported". However, DME response of deemed refusal was received on the 7th of February 2005. SAHA has lodged an internal appeal with among other things "failure to provide affidavit that records cannot be found or do no exist, as required by Section 23 of the Promotion of Access to Information Act"²⁶

²¹ Masons Solicitors (2002) "Briefing paper on the Freedom of Information Act 2000"
<http://www.jisclegal.ac.uk/publications/foirosemarijaye.htm> January 10 accessed Friday, 18 March 2005

²² The National Archives (2004), "Freedom of Information: Procedures and Guidance relating to Public Records transferred to and held by places of deposit" December
http://www.nationalarchives.gov.uk/policy/foi/pdf/foi_guide.pdf accessed Friday, 18 March 2005

²³ Commonwealth Human Rights Initiative, "Publications and articles: Records Management"
http://www.humanrightsinitiative.org/programs/ai/rti/articles/intl_articles.htm accessed Friday, 18 March 2005

²⁴ South African National Archives, "Records Management"
http://www.national.archives.gov.za/rms/best_practice.htm accessed Friday, 18 March 2005

²⁵ SAHA Request No 0023/DTI/2005 Records No. 363. Tracking information available in the FOI Tracking Database at the SAHA office.

²⁶ SAHA Request No 0028/DTI/2003 Records No. 149. Tracking information available in the FOI Tracking Database at the SAHA office.

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Recommendation: It is critical that a provision be included that requires appropriate standards based record keeping systems to be implemented to ensure compliance to the law.

Reasonable cost

15. Additionally, the draft gives no indication the costs for information requests. This is particularly concerning because it is an issue that, in other countries, formed the basis of inaccessibility of the right to access. The drafters should therefore engage their minds in fees, how they are calculated, certain minimum and maximum levels as well as when they may not be required.
16. Rolf Sorensen, the FOI Coordinator for SAHA, has argued that the current fee required prior to processing of requests in South Africa is exorbitant for the vast majority of South Africans, especially since many would likely make requests for information held about them by the previous Apartheid Government.²⁷

Recommendation: it is critical to have a provision that indicate reasonable fees and include details on how they are calculated, certain minimum and maximum levels as well as when they may not be required.

Ministry responsible for the execution of the Act

17. Lastly, there's concern that this Act may not have as much clout as would be required to ensure it promote maximum disclosure of information in the public interest, to guarantee the right to every citizen to access information and to provide the effective mechanisms to secure that right. As if arm-twisted or as a last resort in some argument, the drafters of the Bill very briefly note in the very last section of the document "The Official Secrets Act is repealed". The full impact of such as repeal can hardly be fully visualized at this point. However, not only is the Ministry Information and Communication the responsible Ministry for the Act rather than Justice that has greater clout, it is also not clear exactly how

²⁷ Rolf Sorensen (2003), "Impact of South Africa's Promotion of Access to Information Act after three and a half years: a perspective" **ESARBICA Journal** Vol. 22 pg. 57

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- the suggested Tribunal (that's expected to operate at the level of the High Court) will interact with the rest of the judicial system.
18. It is possible to constitute an inter-ministerial committee that oversees the workings of all the stakeholder departments needed to ensure the efficient implementation of the Act. These ministries could include the Ministry of Information and Communication, Ministry of Home Affairs (which is the home ministry for the National Archives), and the Ministry of Justice.
 19. In addition, since there is no champion for the Act, I would recommend that the Kenya National Human Rights Commission (KNHRC) which is in the Ministry of Justice be that Champion. It should be responsible for development and dissemination of a manual that would guide public authorities on how to implement the Act.

Recommendation: It is suggested that the custodian of the Act be the Ministry of Justice.

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