

COMMONWEALTH HUMAN RIGHTS INITIATIVE

“The Right to Information in the Ugandan Context”

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"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task, in the coming days, is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."
--- Kofi Annan

Background

Uganda's history has been littered with governance problems. As the Report of the Uganda Constitutional Review Commission noted: "Uganda's political development has been characterised by authoritarianism...in spite of attempts to establish democratic structures". Uganda continues to try to deal with the political legacy that years of dictatorship have left behind. The Constitution developed and adopted soon after the National Resistance Movement took over signified a major step in the process restructuring Uganda's political institutions and norms. However, work is still to be done to implement the provisions of the Constitution. Added to this is the fact that even now, the Constitution is being reviewed. While this process offers opportunities to reinforce and strengthen constitutional accountability mechanisms, the risk also exists that the Review will allow for key provisions to be revised and weakened instead.

In any case, Article 41 of the current Constitution of Uganda makes an excellent contribution to ensuring increased government transparency and accountability by explicitly guaranteeing the right to access information and requires Parliament to enact an access to information law:

41. (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

41. (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

Despite these provisions, to date no law has yet been enacted. This is a serious problem. Even where a constitutional guarantee exists, the fact remains that there is still a need for legislation to detail the specific content and extent of the right. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform across public and private bodies. Moreover, without legislation, which usually includes simple dispute resolution mechanisms, people cannot be expected to pursue a constitutional case against the government every time they want to gain access to any piece of information.

In this general context, it is very positive that Ugandan civil society has already seized upon the opportunity presented by the Ugandan Government's recent statement in parliament of their intention to develop right to information legislation within the next few months, as well as the commitment by an individual member of parliament to developing a private members bill on the topic. This is an excellent chance for civil society organisations and the public more generally to kickstart the process of entrenching new norms of participatory governance in Uganda. The contribution that strong right to information legislation can make in this respect cannot be underestimated.

The Importance of the Right to Information for Uganda

It is a crucial oversight that the Ugandan Government has still not enacted access to information legislation, for it has proven extremely beneficial for other jurisdictions because:

- *It strengthens democracy.* The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
- *It supports participatory development.* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess for themselves why development strategies have gone askew and press for changes to put development back on track.
- *It is a proven anti-corruption tool.* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
- *It supports economic development.* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
- *It helps to reduce conflict.* Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

There has been some indications in the press that the Government may actually be looking at the constitutional review process as an opportunity to restrict constitutionally-protected monitoring bodies and mechanisms, rather than entrenching them more effectively. While civil society needs to be vigilant against this threat, as long as the current Constitution prevails there remains a real opportunity to press the Government to implement right to information legislation and thereby to make major inroads into increasing citizen engagement with their own governance processes.

The right to information offers a simple, cost-effective means for institutionalising a framework of transparency within which the Government will need to adapt as it continues to develop and reform.

Developing Legislation

The following section outlines some key standards, guidelines and principles that should be kept in mind when developing right to information legislation.

International RTI Standards and Guidelines

For over 50 years, the United Nations General Assembly has recognised that: “*Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated*”¹. Enshrined in the Universal Declaration of Human Rights, the right’s status as a legally binding treaty obligation was affirmed in Article 19 of the International Covenant on Civil and Political Rights which states: “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. This has placed the right to access information firmly within the body of universal human rights law.

It is important that access to information is recognised as a *right* because it:

- Accords it sufficient importance, as being inherent to democratic functioning and a pre-condition to good governance and the realisation of all other human rights.
- Becomes part of the accepted international obligations of the state. This means that the right to access information attracts the *guarantee of protection* by the state.
- Distances it from being merely an administrative measure by which information is gifted by governments to their people at their discretion since a legally enforceable right cannot be narrowed or ignored at the whim of government.
- Creates a duty-holder on the one hand and a beneficiary of a legal entitlement on the other. Non-disclosure of information is therefore a violation and the beneficiary can seek legal remedy.
- Signals that information belongs to the public and not government. The idea that everything is secret unless there is a strong reason for releasing it is replaced by the idea that all information is available unless there are strong reasons for denying it. The onus is on the duty-holder to prove its case for refusing to disclose documents.
- Sets a higher standard of accountability.
- Gives citizens the legal power to attack the legal and institutional impediments to openness and accountability that still dominate the operations of many governments. It moves the locus of control from the state to the citizen, reinstating the citizen as sovereign.

Over the years, the importance of the right to access information has been acknowledged again and again in myriad international agreements, including the African Charter on Human and Peoples Rights, the European Convention on Human Rights and the Inter-American Convention on Human Rights. The African Charter on Human and Peoples’ Rights, signed by all nineteen of the Commonwealth’s African member states, explicitly recognises the right to receive information.³ In 2002, the African Union’s Commission on Human and Peoples’ Rights adopted the Declaration of Principles on Freedom of Expression in Africa and reiterated that “public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information”.⁴ Part IV deals explicitly with the right to information. Though not binding, it has considerable persuasive force as it represents the will of a sizeable section of the African population.

¹ UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

² Emphasis added

³ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, Art. 9(1).

⁴ *Resolution on Freedom of Expression*, African Commission on Human and Peoples’ Rights, 7 May 2001, http://www.achpr.org/Recommendations___Resolutions-_ACHPR_88-02.pdf as on 20 September, 2003.

African Union Declaration of Principles: Part IV (2002)

- Everyone has the right to access information held by public bodies.
- Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
- Refusals to disclose information shall be subject to appeal to an independent body and/or the courts.
- Public bodies shall be required, even in the absence of a request, to actively publish important information of significant public interest.
- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment.
- Secrecy laws shall be amended as necessary to comply with freedom of information principles.⁵

Principles Underpinning National RTI Legislation

The development of national RTI legislation which is owned by both the public and the government can take time. Participation in the legislative development process requires that government proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*, provides more detailed discussion of these standards, but a summary is provided below:

Maximum Disclosure: The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access. Those bodies covered by the Act therefore have an *obligation* to disclose information and every member of the public has a corresponding *right* to receive information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to "information" rather than only "records" or "documents" is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies "*that carry out public functions or where their activities affect people's rights*". This recognises the fact that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act 2000* provides a very good example to draw on.

Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public.

⁵ *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights, 7 May 2001, Part IV, <http://www.article19.org/docimages/1600.pdf> as on 20 September, 2003.

In order to support maximum information disclosure, the law should also provide protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

Minimum Exceptions: The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing.

In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

Even where exemptions are included in legislation, they should still ALL be subject to a blanket “public interest override”, whereby an document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

Simple Access Procedures: A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. Applications should be simple and devised to ensure that the illiterate and/or impecunious are not in practice barred from utilising the law. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that no charges should be imposed for applications nor for search time; the latter, in particular, could easily result in prohibitive costs and defeat the intent of the law.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record-keeping and record management systems are in place to ensure the effective implementation of the law. The law should provide strict time limits for processing requests.

Independent Appeals Mechanisms: Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access to information.

In practice, this require that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation, for example, via an Ombudsman or an Information Commissioner with review and enforcement powers. Additionally, final recourse to the courts should be permitted. The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

Monitoring and Promotion of Open Governance: Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often be empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

Although not commonly included in early forms of right to information legislation, it is increasingly common to actually include provisions in the law itself mandating a body to promote the Act and the concept of open governance. Such provisions often specifically require that the government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act.

Conclusion

Developing the content of an access to information law presents formidable challenges. Design matters, as do details. Bureaucratic and political resistance cannot be underestimated, as openness can be threatening to officials unused to being scrutinised by the people to whom they are supposed to be accountable. Much depends on the balance that the system is able to achieve between ensuring the right of every citizen to be adequately informed of public affairs, and reassuring bureaucrats that interests such as national security and public safety will at the same time be protected.

A right to information law has a crucial place in the overall institutional framework for transparency and its importance to the overall governance context cannot be underestimated. Importantly, while a law alone cannot *always* ensure an open regime, a well-crafted law, which strengthens citizens' democratic participation, is half the battle won.

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