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Active and Passive Resistance to Openness: The Transparency Model for Freedom of Information Acts in Africa – Three Case Studies

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Freedom of information allows citizens to monitor the activities of government and hold leaders accountable. Africa's modern constitutions widely recognize the importance of citizens' right to information, and a host of regional agreements have generous provisions related to this human right. The Declaration of Freedom of Expression in Africa issued by the African Commission on Human and Peoples Rights states, for instance, that public bodies "hold information not for themselves but as custodians of the public good and everyone has a right to access this information."² Policies and practices to implement the right to information are emerging gradually on the African continent. While more than 80 countries around the world have passed a Freedom of Information Act (FOIA), only six of these are found in African countries: South Africa (2000), Angola (2002), Zimbabwe (2002), Uganda (2005), Ethiopia (2008), and Liberia (2010). There are also a number of countries that have progressed significantly in 2011, including Sierra Leone, Ghana and Nigeria where bills are currently being considered by their legislature.³ This paper uses an analysis of the constitutions and FOIAs in Uganda and South Africa and the FOI Bill in Ghana to look at the ways in which the design of FOIAs allows government to exploit power imbalances between itself and citizens in order to actively and passively resist openness and transparency.

The passage of new FOI laws on the continent of Africa should be celebrated. The promise of FOI laws is a "fundamental transformation" of the relationship between citizens and their government by improving public participation, reducing corruption and promoting increased accountability.⁴ However, these laws will not automatically ensure greater access to information unless they are designed to do so. This has been experienced clearly in Zimbabwe and Angola,

¹ Special acknowledgement to Gaia Larsen, Legal Fellow at World Resources Institute for her contributions to writing and editing this work.

² African Commission on Human and Peoples' Rights. 2002. *Declaration of Principles on Freedom of Expression in Africa*. Available online at: <http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html>, accessed on 10 July 2010. See also the Banjul Charter.

³ Other countries in Africa have gone as far as to put forward FOI Bills including Kenya (Freedom of Information Bill 2005); Malawi (Access to information Bill 2004); Morocco; Mozambique (Right to Information Bill 2005); Sierra Leone (Freedom of Information Bill 2006); Tanzania (Right to Information Bill 2006); and Zambia (Freedom of Information Bill) see Freedom of Information: Current Status, Challenges and Implications for News Media By Edetaen Ojo World Press Day Freedom of Information 2010 (Speech)

⁴ Snell, Rick Freedom of Information Practices *Agenda*, Volume 13, Number 4, 2006, pages 291-307

where FOIAs have been used to further restrict, rather than enhance, access to information and questions have even been raised as to the legitimacy of these laws being named FOIAs.⁵

Civil society has long pushed for the implementation of FOIAs that meet international standards. International standards such as ‘The Public's Right to Know: Principles on Freedom of Information Legislation’,⁶ described as being “based on international and regional law and standards, evolving state practice and the general principles of law recognised by the community of nations” include requirements for the promotion of proactive disclosure, limited exceptions to the right, and clear, low cost procedures for access. Other influential contributions include the standards laid out in the 2000 Annual Report of the UN Special Rapporteur on Freedom of Opinion and Expression⁷ and more recently the Organisation of American States model law.⁸ On the African continent, the African Commission on Human and Peoples’ Rights’ (ACPHR) Special Rapporteur on Freedom of Expression and Access to Information has begun, just this year (2011), to develop an equivalent model FOIA relevant to African countries.⁹ While the Economic Community of West Africa (ECOWAS) has initiated a process to collectively adopt a framework for freedom of expression and the right to information to assist in the harmonisation and improvement of the free flow of ideas.¹⁰ Respecting these principles and standards is vital if FOI legislation is to be used by citizens as a tool in the quest for transparency, but the principles and standards might not be enough.

While significant progress has been made in African countries that have adopted FOIAs, governments continue to successfully resist the right to access information found within their constitutions. To understand the scope of discretion given to governments, it is important to look at the power dynamics in play. A nation’s government has more inherent advantages in the use of FOI legislation because of institutional memory, specialised expertise, and longer term interest in influencing case law.¹¹ FOIAs are meant to tackle the power discrepancy by providing a tool for citizen action. Yet the current design of FOIAs also functions squarely within this context of unequal power distribution. As noted by Greg Terrill, FOI laws are “not formally neutral, but create positions of relative advantage and disadvantage.”¹² Upon examining the federal legislation in Australia, Terrill suggests that the design of the law allows government to engage in “passive or even active resistance” to change.¹³ Our analysis agrees with this principle, and finds that the way in which FOIAs are written can either help counteract the discrepancy

⁵ David Banisar – Global Survey Freedom of information and Access to Government records around the world (2006)

⁶ See Principles on Freedom of Information Legislation Article XIX <http://www.article19.org/pdfs/standards/righttoknow.pdf> .

⁷ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

⁸ Model Inter-American law on access to information (Document presented by the Group of Experts on Access to Information coordinated by the Department of International Law, of the Secretariat for Legal Affairs, pursuant to General Assembly Resolution AG/RES. 2514 (XXXIX-O/09))

⁹ *ACHPR/Res.167(XLVIII)2010: Resolution on Securing the Effective Realization of Access to Information in Africa* [français]

¹⁰ The ‘Supplementary Act for a Uniform Legal Framework on Freedom of Expression and Right to Information in West Africa’ was adopted by ECOWAS ministers of information and communications in January, 2011. WAN-AFRA “ECOWAS ministers adopt a legal framework for freedom of expression and the right to information in west Africa” January 11, 2011, available at <http://www.wan-ifra.org/articles/2011/01/19/ecowas-ministers-adopt-a-legal-framework-for-freedom-of-expression-and-the-right>

¹¹ Greg Terrill, “Individualism and Freedom of Information Legislation,” *Freedom of Information Review*, issue 87, June 2000, pg 30.

¹² Greg Terrill, “Individualism and Freedom of Information Legislation,” *Freedom of Information Review*, issue 87, June 2000, pg 30.

¹³ Terrill, Greg, “Individualism and Freedom of Information Legislation,” *Freedom of Information Review*, Issue 87, June 2000, pg 30.

between the power held by government and that enjoyed by individual citizens, or they can work against citizens by providing tools for government actors to maintain an inherent advantage.

Properly designed legislation is not the only factor limiting access to information. There are also numerous elements that influence the proper functioning of a regulatory transparency system. Paul G. Thomas¹⁴ makes the case, that institutional arrangements, characteristics of the political system, professionalism and autonomy of the public service, strength of outside advocacy groups and aggressiveness of the media in pushing for openness also exert significant influence. Darch and Underwood¹⁵ point to specific conditions on the African continent that limit access to information. They write:

“the conditions that have made access rights both important and hard to implement in the global south generally, are found in their most extreme forms... (T)he fragility of post-colonial and post-settler state formations in Africa, the linguistic, cultural and ethnic diversity within particular countries, widespread violent conflict, the absence of adequate economic and social infrastructure, and the near-universal replacement of politics-as-policy-making by the politics of patronage under the aegis of the Bretton Woods Institutions and the World Trade Organization, all mean that demand-driven state compliance with the requirements of transparency and freedom of information is rarely seen... More specifically, as far as freedom of information is concerned, good record-keeping and archival practices – an essential pre-condition for compliance – are often lacking, and bureaucracies themselves are disorganised and poorly trained”.

These are all critical factors to consider in strengthening implementation efforts and can lead to the failure of FOIAs as a transparency model. We suggest that these factors reinforce the need to have a closer look at FOIAs in Africa in order to assess the extent to which the design choices and their use reveal both active and passive resistance against constitutionally guaranteed rights to information.

Active Versus Passive Resistance

Resistance to transparency can come from many levels of government and in many forms. Government agencies may resist granting access to information for a variety of reasons – the information may be embarrassing or it may reveal unreasonable decision-making, maladministration or corruption. While the executive or central government as a whole may resist change to a culture of secrecy. Some of these forms of resistance reveal more active opposition from the government. This includes, for instance, failing to put in place necessary reforms or institutions to ensure the law is working effectively, continued non-implementation of critical components of the law, failing to ensure the supremacy of FOIAs and passing or retaining legislation that inappropriately excludes certain information from FOIAs. Government

¹⁴ Thomas, Paul G. *Advancing Access to Information Principles through performance management mechanisms: the case for Canada*, World Bank (2010)

¹⁵ Darch, Colin and Peter Underwood. 2009. “Struggles for freedom of information in Africa” in *Freedom of Information in the Developing World: Demand, Compliance and Democratic Behaviours*. Woodhead Publishing Ltd. Available online at: <http://www.africafiles.org/article.asp?ID=22968>, accessed on 10 July 2010.

can also resist fulfilling the spirit of FOIAs in a more passive or subtle manner. Examples of passive resistance include complex and/or costly application processes, a failure to provide guidance on how to request information, or enforcement mechanisms that are difficult to use. Passive resistance from the government can be more challenging to combat than active resistance as it may be more difficult to pinpoint the exact transgression or the legal clause violated (if any). Governments may also more easily provide excuses related to financial and administrative constraints, or even slow government reform processes. Such resistance is, however, potentially just as damaging.

This paper looks at five specific areas where governments have effectively resisted openness. The five areas include: a) a failure to provide manuals to allow public friendly use of the law, b) inappropriate fees to access information, c) difficult requirements for processing requests, d) failing to ensure the supremacy of FOIAs, and e) adopting ineffective enforcement mechanisms. Each of these provides a means for government resistance. A failure to provide manuals for how to access information, inappropriate fee arrangements, and overly complicated requirements for processing requests can constitute a form of passive resistance. While the government may not be actively fighting requests for information with these provisions, the hurdles that they place in the way of citizens wishing to access information can nonetheless have a similar chilling effect. Failing to ensure the supremacy of FOIAs can allow the government to actively resist the release of information by exempting entire sectors of the government or economy. Meanwhile, weak enforcement mechanisms can constitute resistance if they are so difficult to use that deliberate violations of FOIA continue without consequence. By failing to address these obstacles, governments can thus resist implementation of the right to information without actively saying no to requests.

The Case Studies

South Africa, Uganda and Ghana, are the three case studies analysed in this paper. All three countries are in different stages of preparation and implementation of their FOI law. Their laws show striking degrees of similarity in the five areas analysed. As Rick Snell suggests, countries continue to use a limited number of models to develop legislation — in particular the US model, and the Article 19 Model Freedom of Information Law¹⁶. They are implemented “with little consideration given to the way that state secrecy operates and the multi-dimensional impact of FOI which can provoke unexpected levels of non-compliance from those charged with administering the reform”.¹⁷ This holds true in our analysis.

South Africa was the first country in Africa to enact a FOIA in 2000, the Promotion of Access to Information Act. Implementation remains an issue in South Africa partly because there has been insufficient public education on the use of, and rights provided under the law. Additionally, the monitoring institution is under resourced and the mechanism of enforcement using the court is not quick, inexpensive or accessible. South Africa’s FOI law is however recognized as one of the most progressive laws in the world, but has been viewed as under threat by a recently proposed Protection of Information Bill.

¹⁶ See Freedom of Information Legislation Article XIX <http://www.article19.org/pdfs/standards/modelfoilaw.pdf>

¹⁷ Snell, Rick, *Freedom of Information Practices*, Agenda, Volume 13, Number 4, 2006, pages 291-307.

Uganda's Access to Information Act was approved in 2005 and went into effect in 2006. Implementation stalled shortly afterward, there has been a failure to pass enabling regulations, and legal challenges have been made both for refusal of information under the constitution and the FOIA. Early court cases taken under the FOIA have not been encouraging. Civil society has been active in promoting public education of the right to information, but use is low and compliance with a number of fundamental provisions is weak.

Finally, in Ghana, after years of debate over numerous FOI bills, there was approval of the FOI Bill in Cabinet and the bill is now tabled for public consultation across Ghana. Some advocates believe this round of public consultation is a delaying tactic because the process will take a long time and there was already sufficient consultation undertaken in the last 7 years on previous draft bills.¹⁸ There are critiques of the law, but there is no evidence that there has been significant reference to the experience in South Africa, Uganda or other nations with regard to the specific design of the law, or that civil society and media critiques of the bill will be adopted.

As in many other African nations, the citizens of these three countries have strong constitutional rights to freedom of information. FOI legislation is designed to allow administration of the right to information found under the constitution. The FOI laws in South Africa and Uganda and the Ghanaian Bill all include statements of objective that recognise that the law has been enacted to promote a transparent and accountable government. These statements of objective make reference to the right of access to information as a constitutional right, and state that the purpose of the FOIA is to allow the realization of this right. There has been significant progress in the development of FOIAs in each of these countries, but there is a need for vigilance and active reform agendas to ensure that these advances are not lost. The case studies below outline the scope of the constitutional right to information and reveal measures taken by government to take advantage of the structures of the law to resist full implementation of this right in various ways.

South Africa

In South Africa, the constitution provides a clear right to information and the nation's FOIA, titled the Promotion of Access to Information Act (PAIA), provides a legal basis to enforce this right.

Constitution

Section 32 of the South African Constitution of 1996 states:

- (1) Everyone has the right of access to –
 - (a) any information held by the state, and;
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights;

¹⁸Freedom of Information Act in Ghana, NDC Action Imperative Now, Ghana Web, General News of Sunday, 30 January 2011 <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=202204>.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.¹⁹

The constitutional provisions require not only that national legislation be drafted in order to give effect to the right, but also that its ambit includes access to both privately held and state information. The provisions of Section 32(2) provide for an opportunity to limit the provisions of the act giving effect to the right, over and above the limitations clause in the Constitution. The Constitution has a limitations clause in Section 36, which only allows the state to limit rights as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.”

The Promotion of Access to Information Act (PAIA), the legislation giving effect to the right of access to information, was approved by Parliament in February 2000 and went into effect in March 2001.²⁰ It implements the constitutional right of access and is intended to “foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information” and “actively promote a society in which the people of South Africa have effective access to information to enable them to fully exercise and protect all of their rights.”²¹ The history, long title, preamble, and Section 9 of the PAIA make it clear that the act is intended to ‘give effect’ to the constitutional right of access to information in Section 32 of the 1996 constitution and is enacted in compliance with Section 32. The constitutional right in South Africa is thought to give “effect to the right, with people being able to access the constitutional right, where the law for any reason does not give effect to the right.”²² In the case of *Trustees for the time being of the Biowatch Trust vs. Registrar Genetic Resources and Others*²³ a case brought under Section 32 of the Constitution, by a non-governmental organisation for information on genetically modified organisms’ used by Monsanto in agricultural practice, the courts found that the applicant had a separate right to information under Section 32(1) of the Constitution in conjunction with rights under PAIA. In addition, the court decided to apply exemptions existing in the PAIA to have retrospective effect in terms of this constitutional right, as the High Court accepted that there were limitations to the constitutional right to information that were recognised in PAIA to address exemptions for commercial confidentiality.

¹⁹ The Constitution Of The Republic Of South Africa, Act 108 Of 1996. Available online at: <http://Www.Polity.Org.Za/Govdocs/Constitution/Saconst.Html>.

²⁰ Promotion of Access To Information Act, Act 2 Of 2000. Available online at: <http://Www.Gov.Za/Gazette/Acts/2000/A2-00.Pdf>. For A Detailed Analysis Of The Act, See Currie And Klaaren, The Promotion Of Access To Information Act Commentary (Siber Ink 2002).

²¹ Preamble-Promotion of Access to Information Act, Act 2 of 2000. Available online at: <http://Www.Gov.Za/Gazette/Acts/2000/A2-00.Pdf>.

²² Currie And Klaaren, The Promotion Of Access To Information Act Commentary (Siber Ink 2002) Pg 25.

²³ (23005/2002) [2005] ZAGPHC 135 (23 February 2005).

Design of the Law

The South African legislation was originally drafted as an Open Democracy Bill, and had four components to it. The first was a classic FOIA bill, the second a data protection bill, the third an open meetings bill, and the fourth a bill protecting whistleblowers. This compendium was drafted by the Open Democracy Task Force,²⁴ established in the office of the then Deputy President, Thabo Mbeki, with the participation of one of South Africa's most respected administrative law experts, Professor Etienne Mureinik. The legislation itself was tabled in 1997 and again in 1999, a new Parliament having been elected in the meantime. An advocacy group, the Open Democracy Campaign Group²⁵ was active from 1996 through to 2000, and made regular submissions in respect of the legislation, and most importantly, provided the drafting that would allow for the introduction of access to privately held information, which was not at that point included in the Bill, despite the constitutional requirement.

Once the legislation was passed by Parliament, signed into law by the President, and brought into operation, implementation stalled in terms of the preparation of agencies and implementation of a number of key provisions. This has been a feature of the South African FOIA landscape since, reflected in a number of reports by the South African Human Rights Commission (SAHRC), the body in charge of implementation and promotion of the act. In a 2001 survey,²⁶ it was found that more than half of the respondents, civil servants in public bodies, were not aware of the legislation. In a survey published in 2006,²⁷ 62% or nearly two thirds of requests for information submitted received no response. In practice, the implementation of PAIA by public bodies has been extremely poor for a number of reasons²⁸ including the ones outlined below.

Active and Passive resistance to Openness

(a) Preparation of Manuals

PAIA (Section 14) requires that each public authority prepare a manual on the information they hold to facilitate requests by the public. While much of the act came into operation in March 2001²⁹ sections requiring the South African Human Rights Commission (SAHRC) (Section 10) to produce a guide on the act for the public, as well as the requirement that manuals be published by private and public bodies, only came into operation almost one year later on 15 February 2002. Manuals detailing how public and private bodies hold their information should have been

²⁴ Illuminating the Politics and the Practice of Access to Information in South Africa by Richard Calland Pg 4 in Paper Wars Kate Allan ed Wits University Press 2009.

²⁵ Idasa, the Black Sash, Human Rights Committee, Legal Resources Centre, Environmental Monitoring Group, South African NGO Coalition, National Association of Democratic Lawyers, South African Council of Churches, the South African Catholic Bishops Council, and the Congress of South African Trade Unions.

²⁶ Right to Know, Right to Live Calland and Tilley ed 2001 ODAC.

²⁷ Transparency and Silence A Survey of Access to Information Laws and Practices in Fourteen Countries Open Society Justice Initiative 2006.

²⁸ Other reasons that have been given include "a perception that PAIA is "legalistic" and "overly burdensome;"

b. high staff turn-over in the public sector; and c. a reluctance to provide information where there is a perception that this may open up public bodies to litigation" – ODAC Submission to Parliament, Parliamentary Portfolio Committee on Justice and Constitutional Affairs. September 2010 available online at: <http://www.opendemocracy.org/za/wp-content/uploads/2010/10/Submission-to-parliament-on-PPI-Bill.pdf>.

²⁹ (GG No 22125 of 9 March 2001),

published by 15 August 2002 according to the law. However, according to the SAHRC Report 2002 – 2003,³⁰ many public and private bodies made representations to the Commission requesting it to approach the Minister of Justice and Constitutional Development for an extension of the due date for the submission of manuals. The Minister granted an extension of the due date for the submission of manuals until 28 February 2003.³¹ This, however, was not the end of the problem. When the public and private sectors started to send their manuals to the Government Printer for printing before the February 2003 deadline, the Government Printer realized the magnitude of the manuals, and dealt with it by raising their charges in respect of such manuals from R100 (South African Rand – almost \$15 USD) for the full manual to more than twice that much per page. This resulted in a number of organizations cutting the size of their manuals to save costs. The SAHRC reported further:

...a delegation of senior members of the Commission and the Department of Justice and Constitutional Development met on the 27 February 2003 to discuss the possibility of another extension of the deadline... The due date for submission of the manuals was accordingly postponed by another 6 months to 31 August 2003.³²

On the 29 August 2003, the Minister of Justice and Constitutional Development invoked the section of the act that allows the Minister to exempt any private body or category of private bodies from the provision requiring them to produce a manual. Exemptions are provided under Section 14(5) of the law which states:

“For security, administrative or financial reasons, the Minister may, on request or of his or her own accord by notice in the Gazette, exempt any public body or category of public bodies from any provision of this section for such period as the Minister thinks fit”.

All private bodies except publicly listed companies, on the Johannesburg Securities Exchange were exempted and would not have to produce a manual until 31 August 2005. They would all have to do so then, without regard to the size or turnover of the private body. Another exemption was published in 2005, on the 31 August, whereby smaller private bodies with a staff turnover of less than 50 people and an annual turnover of above 2 million in some sectors were exempted from compiling the manual for a period of five years until 31 December 2011. Many small businesses had by that stage completed manuals as they were not certain of the exemption being extended. The Minister also exempted the National Intelligence Agency from compiling a manual until the end of 2008, ‘for security reasons.’³³ This exemption has been strongly criticised by civil society.

In October 2006, PAIA Regulations³⁴ were passed to attempt to address the weaknesses and failures of public and private agencies to compile and publish a manual. Sections 3a (1) & (2) of the regulations provided that an information officer of a public body or the head of an office... or

³⁰ “Strengthening the role of the SAHRC in relation to PAIA,” Report by the South African History Archive July 2003 available online at:

http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/hrc_final_report.pdf.

³¹ SAHRC Report 2002 – 2003 pg 61.

³² SAHRC Report 2003 – 2004 pg 62.

³³ GG No 24706 11 April 2003.

³⁴ (GG 29738, GN 990 2006)

private body who willfully or in a grossly negligent manner fails to comply with the provisions of the regulation (on manuals) or contravenes the regulation commits an offence and is subject to a prison terms and/or a fine.

As of 2010, many private bodies are still not in compliance with the law, despite criminal penalties for gross negligence in failing to complete them, in that they either do not have a manual or they have not submitted a copy to the SAHRC. The failure to properly deal with the issue of non compliance has led many businesses to ignore the provision requiring a manual. In terms of public bodies, there is no sufficient data provided by SAHRC in its 2009-2010 report of compliance on development of manuals as budgetary constraints did not enable SAHRC to assess compliance with this provision. SAHRC reported that of the audits conducted in the Gauteng Region, little had changed since 2007 in terms of compliance. Most government departments “demonstrated attempts at beginning the process of developing their information manuals in terms of Section 14, but have not finalized these due to delays in obtaining the necessary approval from senior management and councils, as well as delays in translating services provided by the Department of Arts and Culture, and poor records management.”³⁵

The fact that a criminal provision was included in the law for failure to provide a manual seems inappropriate where civil penalties or fees could have been charged. However, the failure to act in accordance with the law in the light of significant non-compliance may also be a testimony to the SAHRC’s weakness as a monitoring agency. While a manual not being made available does not of course mean that the Act is not being implemented in other ways, it is a significant reminder of how the law’s requirements can be thwarted and halt proper implementation.³⁶ This continued state of affairs undermines the credibility of the FOIA regime, and undermines SAHRC effectiveness.

(b)Fees

In South Africa, 25.3% of the population lives on under \$2USD a day.³⁷ Fees are provided for under Sections 22 and 54 of the PAIA and in its implementing regulations. Fees are required for requesting information, as well as search time and for copies of the records. The fees are payable by the public when they request information and are therefore a significant barrier to requests being made. The fee for requesting information is currently R35/\$5USD for public bodies and R50/\$7.14USD for private bodies per request.³⁸ This must be paid before the request will be processed. In addition, an access fee must be paid. If the search will take a long time, the information officer can ask for a deposit of up to one third the access fee up front (s 22). The size of the fee depends on how long it will take to find the records that are being requested, the number of pages that are being looked for, and the actual cost of reproducing the record. The first hour of searching is free. After that, in addition search time must be paid for at R15/\$2USD an hour in public bodies and R30/\$4USD for private bodies. There is also a charge for making

³⁵ http://www.sahrc.org.za/home/21/files/Reports/Annual%20Report%2009_10%20Annexures.pdf.

³⁶ ODAC’s view is that the Ministry of Justice will ignore the deadline, or only introduce changes at the last minute, leaving small businesses to decide whether they will not produce manuals, and risk being in contravention of the law, or whether they will produce them, knowing that the Ministry will likely extend the exemption again.

³⁷ Millennium Development Goals Country Report 2010 http://www.statssa.gov.za/news_archive/Docs/MDGR_2010.pdf accessed on 27 March 2011

³⁸ (Govt. Notice R223, 9 March 2001.)

copies of the record, as well as the cost of making the record. For example, a public body will charge 60c for making a copy of a page, and then charge you 60c for the actual photocopy.

The fee system under the law was recognized by the government as having a significant impact on the use by the public of the law. In October 2005, the Minister exempted indigent persons (earning less than R14, 712 net a year, around \$2,100USD) from paying access and certain request fees. Search fees and copying fees however remain. Threshold limits for the application of the exemption are again out of date as reported by SAHRC in their 2010 report with inflation.³⁹

(c) Processing of requests

One of the most disliked aspects of the South African FOIA regime is that the requester must use the form which has been printed in the Government Gazette⁴⁰ to make a request. Requesters dislike it, as it means they cannot simply ask for what they want by e-mail or by letter, but must submit very specific prescribed forms. Officials in favour of access do not like it, as they have to delay proceedings in order to receive the form, if requestors are not aware of this requirement. While difficult processing requirements is a small form of passive resistance, it is clearly a hurdle for those who have disabilities or who are illiterate. The PAIA requires an Information Officer at a public body to give requesters the help that they need in order to fill in the form - a requirement that is often ignored. In addition anonymous requests are not permitted under PAIA because of the requirement to provide a name in the form. SAHRC has reported in 2010⁴¹ that it has pressed the Department of Justice and Constitutional Development to consider amending the legislation to permit such requests to address both perceived bias and actual prejudice or bias in the processing of and response to requests.

(d) Supremacy of Legislation

The PAIA contains one of the strongest and most progressive provisions on ensuring the dominance of the FOIA as a framework law governing transparency and openness in government. S. 5 of PAIA provides that

"This Act applies to the exclusion of any provision of other legislation that—(a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object or a specific provision, of this Act."

This provision effectively extinguishes inconsistent provisions of secrecy that were in effect prior to the passage of PAIA.

The view has been held by civil society in South Africa that section 5 ensures PAIA's supremacy over other legislation that is enacted before PAIA came into effect and also requires new

³⁹SAHRC 2009-2010 Annual report found at

http://www.sahrc.org.za/home/21/files/Reports/Annual%20Report%2009_10%20Annexures.pdf

⁴⁰ (Govt. Notice R223, 9 March 2001)

⁴¹ http://www.sahrc.org.za/home/21/files/Reports/Annual%20Report%2009_10%20Annexures.pdf

legislation to be measured against the terms of PAIA.⁴² The South African Government has indicated however that this is not their interpretation of the provision. In 2010 the Government tabled the Protection of Information Bill which is the equivalent of an ‘Official Secrets Act’ protecting military and police secrets. South Africa civil society has been extremely critical of this Bill as undermining and being inconsistent with PAIA. The Bill attempts to set up a parallel regime for refusing access to information, and for classifying documents. Once information is categorized as sensitive, it can then be classified as confidential, secret, or top secret.

The Ad Hoc Parliamentary Committee on the Protection of Information Bill in its meeting of 12 Nov 2010⁴³ discussed whether s.5 of PAIA would have to be considered in reviewing the terms of the Protection of Information Bill. Their deliberations are instructive. The Committee wanted to know what would happen if it included something that was in conflict with Promotion of Access to Information Act. There were disagreements between members on the constitutional supremacy of the Promotion of Access to Information Act. The Committee noted that

“It was aware that as a legislative body it could change its own laws. It was not being suggested that PAIA should be interfered with but as a legislature there was the right to change it. It could be changed by direct mention or by implication. The legislature could change its legislation like the judiciary could change its judgments. No Parliament or Executive would bind the next administration and state that an Act made in 2000 would not be interfered with”.

In reaching this determination the Committee found that in South Africa on the issue of hierarchy of laws, there was a presumption in law that a latter Act superseded the current Act. The fact that two or more pieces of legislation apply to the same subject matter did not necessarily mean that there was a conflict. In the event of a conflict, the provision of the specific as opposed to the general legislative provisions would be applicable. While the deliberations on the Protection of Information Bill are still ongoing the Committee made it clear that rather than PAIA being reviewed per section 5 to ensure the harmonization of new legislation, the Parliament would look to the constitution to determine any new bills’ legitimacy.

(e) Enforcement

In the amicus curiae arguments of the South African Human Rights Commission in *Brummer vs. Department of Social Development*⁴⁴ the SAHRC gave evidence as follows:

“Enforcement of PAIA rights is uniformly experienced as burdensome, expensive, confusingly procedure-driven, and time-consuming. This is particularly so given that the required step after exhaustion of internal remedies of appeal is to apply to court. The court-based bias of PAIA enforcement acts as an effective deterrent particularly for those who do not belong to an “elite (group) of experts” who tend to monopolize the enforcement of PAIA rights in practice. The decision to appeal to courts where a request is refused is difficult for many requesters, notably because of:

a. complex procedural requirements associated with litigation;

⁴² Interview with Mukelani Dimba, Executive Director ODAC April 14, 2011

⁴³ Parliamentary minutes are found at <http://www.pmg.org.za/about>

⁴⁴ (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009).

- b. the cost of litigation;
- c. the length of time before judgment could be expected to be handed down;
- d. the fact that most South Africans are not fully sufficiently rights conscious to assert their rights within formal rights assertion frameworks;
- e. cultural barriers to litigation as a viable vehicle for engagement with government;
- f. the fact that, in practice, most litigation is conducted by civil society and non-governmental organisations, which means that the matters which are ultimately litigated are often driven by their prospects of success and their suitability for development of the law, rather than by the wish to assert individual rights.⁴⁵

From 2001 to 2008 disputes around PAIA have only been resolved in the High Court. This situation has played itself out primarily because there were no rules dealing with PAIA in the Magistrates Court. Access to Magistrate courts would provide a less complicated and cheaper method for citizens to approach the courts. Originally, the Rules board was supposed to make rules 12 months after the PAIA came into operation, which would have been 9 March 2002. PAIA was amended by the Judicial Matters Second Amendment Act 55 of 2003 to extend the deadline to 31 March 2005; and then again by the Judicial Matters Amendment Act 66 of 2008, which provided a further extension to 28 February 2009. The final version of the rules was published in October 2009,⁴⁶ a full seven years after they were originally supposed to be provided.

However, publication of the rules governing appeals to the Magistrates Court still does not guarantee access to these courts. In a Government Notice 938 in 2003,⁴⁷ the Minister designated all Magistrates' Courts as courts for the purpose of PAIA applications. Up to that point none had been so designated, and until 2002 not just the court but also individual magistrates had to be approved to hear PAIA cases as well. In 2002,⁴⁸ the section was changed to provide that only magistrates designated by the head of an administrative region as a presiding officer could hear applications under PAIA, and that only magistrates who have completed a training course may be so designated. The Judicial Service Commission Annual Report of 2004 indicated that a "bench book" has been prepared for PAIA, that training programmes have been put in place, and that "judges and magistrates throughout the country have been trained." However, to date many Magistrates, have not undergone such training and so jurisdiction is still not extended to some Magistrates Courts.

Uganda

As in South Africa, the Ugandan constitution also grants citizens a right to information. The Ugandan FOIA is the Access to Information Act 2005, which has as its objective to promote government transparency and openness and also to protect persons disclosing evidence of contravention of the law, maladministration or corruption in government bodies.

⁴⁵ Government Notice R223, 9 March 2001.

⁴⁶ Government Notice R965, 9 October 2009.

⁴⁷ Government Gazette 25142 of 27 June 2003.

⁴⁸ Section 1, Act 54 of 2002.

Constitution

Article 41 of the Uganda Constitution states

“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.”

Article 41 (2) stipulates;

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

The Constitution came into force on October 8th, 1995 and required the passage of a FOI law. Parliament did not enact a law for access to information until almost 10 years later, in 2005. During that period of 10 years, the public was only able to access information directly under the provisions of the Constitution and through the access provisions set out in the various sectoral laws. Access to information provisions are embedded in a number of laws enacted before and after the constitution came into force. It is important to note that most of these laws are related to natural resources specifically, including the National Environment Act and a number of regulations made thereunder, the Water Act, the Wildlife Act, the National Forestry and Tree Planting Act, and others.

The long title, statement of objective and section 5 of the FOIA of Uganda, similar to PAIA, make it clear that the Act is intended to ‘give effect’ to the constitutional right of access to information. The Ugandan FOIA only governs access to information from public bodies.

Section 5 of the Act reiterates Article 41 of the Constitution and states:

(1) Every *citizen* has a right of access to information and records in the possession of the state or any public body, 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.

The constitutional right to information creates an enforceable right to information separate from that provided under the FOIA. In the case of Uganda, the constitutional right contains limitation to the right to information specifically on three grounds mentioned above. Section 43, of the general limitations clause on fundamental rights and freedoms provides that

“In the enjoyment of the rights and freedoms prescribed..no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest ...2(c) Public interest under this article shall not permit any limitations of the enjoyment of the rights and freedoms prescribed beyond what is acceptable and demonstrably justifiable in a free and democratic society or is provided in the Constitution.”

The Courts have recognized the strength of the constitutional guarantees in a number of cases brought by Ugandan public interest organizations. The right to information was successfully upheld in a number of precedent setting constitutional cases in the High Court including *Major-General David Tinyefunza vs. Attorney General* and *Greenwatch vs. Attorney General and*

Uganda Electricity Distribution Company (UEDCL). In the case of *Attorney General vs. Major General David Tinyefuza*,⁴⁹ the then Chief Justice Wako Wambuzi while rejecting the claim of an exemption by the Attorney General on the grounds of state security noted that;

“...the Constitution has determined that a citizen shall have a right of access to information in state hands...it is no longer for the Head of Department to decide as he thinks fit. That unfettered discretion has been overturned by Article 41 of the Constitution. And now it is for the Court to determine whether the matter falls in the exceptions in Article 41 or not. And to do this, the state must provide evidence upon which the court can act.”

Even more forcefully in the case of *Greenwatch vs. Attorney General and Uganda Electricity Distribution Company (UEDCL)*,⁵⁰ the court recognised its duty to interpret the constitutional provisions narrowly. In this case, Greenwatch challenged the government on the refusal to make public a Power Purchase Agreement that was signed between the government and AES Nile power Ltd in respect of the Bujagali project. The Honorable Justice F.M.S. Egonda – Ntende held that, since the Minister of Energy signed the Implementation Agreement on behalf of the Republic of Uganda, being a member of the executive organ of the government of Uganda, and this Implementation Agreement being an act in her official capacity, the agreement in question was indeed a public document and therefore the government could not refuse to release it to the public. The court found further that every citizen (it defined a citizen to include companies in which Ugandans held majority shares and local nongovernmental organisations) was entitled to information in the hands of the state, except information that is specifically excluded by the Constitution under Article 41 (1), that is, information that relates to the security, national sovereignty and privacy of an individual. Both of these cases were taken to court before the passage of the FOI law.

Design of the Law

From the year 2000, there was a debate in Uganda about the necessity to enact an access to information law, with civil society and the media being divided over the necessity of its enactment. There were two opposing views; while some argued that such a law was important in the democratization process and in ensuing transparency, accountability and fighting corruption, others took the view that the government would use the access to information law to restrict the access provisions set out in the Constitution and include additional exemptions beyond that provided in the constitution.

As a result of the debate, civil society organizations, in collaboration with a progressive Member of Parliament Honourable Abdu Katuntu, individual journalists and spirited public individuals drafted a private members bill. It was hoped that this would help allay the fears of those who thought the FOI law would be drafted in a more restrictive manner than the constitution. It was also a response to the government’s unexplained and inordinate delay in presenting to Parliament

⁴⁹ Const. Appeal No.1 of 1997 (unreported).

⁵⁰ HCCT – 00 – CV – MC – 0139 of 2001

an access to information bill in compliance with Article 41 (2) of the Constitution.⁵¹ The private members bill was never presented however; as the Attorney General drafted its own bill. Civil society activists were not involved in the drafting process prior to tabling of this bill. The Attorney General's Bill was eventually passed and assented to on 7 of July 2005 as the Access to Information Act, Act Number 6 of 2005.

Once the legislation was passed by Parliament, signed into law by the President, and brought into operation, implementation stalled with a failure to pass regulations and complete implementation of time bound requirements. This was despite the appointment of an implementation lead agency, the Directorate of information and National Guidance, one of the departments under the office of the Prime Minister.

Active and Passive resistance to Openness

(a) Failure to pass Regulations

Subsidiary legislation is required under the Ugandan FOIA to bring into effect a number of important provisions of the law relating to making requests, fees, roles and functions of public authorities and information officers (Section 49). Section 47 of the Access to Information Act 2005, provides that the Minister has it within his discretion to issue these regulations. To this date, no regulations have been put in effect since the Act was brought into force over five years ago. There has been a clear failure by the Government of Uganda to act despite many promises to this effect. This resistance by government to move forward on the passage of regulations has limited the implementation of the law in such a significant way as to cause one commentator to note that "The absence of regulations greatly abuses the protection and promotion of the right to access information."⁵²

(b) Preparation of Manuals

Section 7 of the Uganda Access to Information Act provides for the development of a manual of functions and index of records of a public body in almost the exact terms of the South African PAIA law to assist the public in ascertaining how to make requests under the law. The law stipulates that the information officer shall compile a manual containing, amongst other things, a description of the public body and its functions in sufficient detail, including the nature of all formal and informal procedures available to facilitate a request. Section 7: (1) states that within six months after the commencement of this section or the coming into existence of a public body, the information officer of the public body shall compile this manual which shall be updated and published once in every two years." There is no substantive action that can be taken by citizens against failure of a public authority to put in place this manual within a specific timeline. There is also no independent intermediary body which has the jurisdiction to undertake audits of compliance with fulfilling the requirements of the law and make the case for action to be taken

⁵¹ Survey report on requests for information, Human rights Network, Uganda (2010).

http://www.hurinet.or.ug/index.php?option=com_docman&task=cat_view&gid=61&Itemid=60; this was also confirmed from Kenneth Kakuru, Executive Director of Greenwatch.

⁵²Mboizi, Maureen, "Uganda celebrates the international right to know day," 12/28/2008,

<http://humanrightshouse.org/Articles/5189.html> edited and prepared for publication by HRHF / Niels Jacob Harbitz

against public officials. The law in fact requires regulations to prescribe the availability of the manual. There are therefore no readily available statistics on compliance by public authorities, but Ugandan civil society have stated that compliance is low because of the failure by many government agencies to appoint information officers.⁵³

(c) Fees

As mentioned above Regulations are required under the Ugandan FOIA to set standards for charging fees and to provide for fee waivers. There are currently no regulations that operate to set standards across government on the charging of fees for the provision of government information or for waivers. Setting of fees is left to the discretion of each public authority in the absence of regulations. Section 47 of the FOIA provides some guidelines for formulating regulations to implement the act and states that "The fee for access to be prescribed by regulations under this section shall be a fee representing the actual cost of retrieval and reproduction of the information." This provision also allows a fairly wide discretion in charging fees for search and retrieval of information which may be beyond the capacity of many citizens if not carefully crafted. In a study of access to information monitoring experiences carried out by HURINET, a Ugandan human rights watch group, in 2010 it was found that of the 31 respondents in the study that had incurred costs to access information, amounts paid ranged from less than 25,000/= (\$10.50USD) to more than 60,000/= (\$30USD). These costs were paid for actual costs of retrieval and reproduction of the information. It was noted "that in some instances, that they were exorbitant compared to the average pricing the same process (such as photocopying) have cost to have such work done on the prevalent commercial value."⁵⁴

(d) Processing of requests

Section 11 of the Ugandan FOIA states that a request for access to a record or information shall be submitted in writing in the prescribed form to the information officer of the public body in control of the record or information. The requestor is required to provide sufficient details to enable an experienced employee of the body to identify the record or information and specify their address. Section 43 of the law stipulates that each Minister shall submit an annual report to Parliament regarding those public bodies for which he or she is responsible, describing the requests for information made to those public bodies, whether or not access was given and, if not, the reasons for the action taken as such. However, in 2010 HURINET reported that this provision "has remained a myth since the commencement of the Act. To this end, no minister has ever submitted an annual report on requests made as per the provisions of section 43."⁵⁵ HURINET in its study of requestor's use of the law found that there have been a low number of requests submitted in Uganda. Reasons for low demand include both ignorance of the law but more importantly people responded that they wished not to make requests for information as the law excludes anonymous requests. People would rather refrain from requesting the information

⁵³ Human Rights Network Uganda, Survey Report on the Requests for Public Information, available online at http://www.hurinet.or.ug/index.php?option=com_docman&task=cat_view&gid=61&Itemid=60.

⁵⁴ Human Rights Network Uganda, Survey Report on the Requests for Public Information, available online at http://www.hurinet.or.ug/index.php?option=com_docman&task=cat_view&gid=61&Itemid=60.

⁵⁵ Human Rights Network Uganda, Survey Report on the Requests for Public Information, available online at http://www.hurinet.or.ug/index.php?option=com_docman&task=cat_view&gid=61&Itemid=60.

than providing personal information such as their real names because they imagine it may have future repercussions. Another frequent response was that the procedure for accessing information is viewed as complex as oral requests which would be written down by information officers are not permitted.

(e) Supremacy of legislation

Section 2(3) of the FOIA states that: "Nothing in this Act detracts from the provisions of any other written law giving a right of access to the record of a public body." This provision recognizes that if legislation is in place that includes provisions prescribing how the citizen can obtain access, this alternative form of access is preserved. There are no provisions in the Ugandan FOIA, however, that indicate how the law works where a statute is passed later in time that has non-disclosure provisions. In Uganda the rule of statutory interpretation is that the "latter in time prevails". Last year, the President of Uganda released the Petroleum (Exploration, Development, Production, and Value Addition) Bill. This bill regulates the exploration and extraction of recently discovered oil in Uganda. The Petroleum Bill includes several provisions that will allow the government to classify oil sector information as secret and withhold it from the public despite the provisions of the Uganda FOIA. Provisions of concern include Sections 153 and 155 of the Petroleum Bill which itemize certain information that the holder of a license in oil exploration, production, trading, refining, processing, transportation and storage "shall keep at an address in Uganda notified to the Authority," but not file with the government. This includes information on the quantities of oil and natural gas extracted, produced and consumed or flared. Uganda's FOIA only gives citizens a right of access to information that is in the possession of the state or a government authority.⁵⁶ The FOIA does not apply to information held by private citizens or private companies.

In addition section 156 of the Petroleum bill speaks to refusal of information on the basis of "confidentiality of the data and commercial interests" without reference to any standard by which this information can be assessed to harm commercial interests. Other provisions of concern include Section 84 of the Petroleum Bill that requires that all confidential information be withheld for the period of time as "specified in the license or other agreements". Lastly section 165 of the Petroleum Bill makes it a crime to release confidential information and provides for criminal penalties: "a fine not exceeding five hundred currency points or imprisonment not exceeding five years or both" (the cost of each point is established in a separate Schedule to allow for regular updating).

As noted by a World Resources Institute 2011 Working Paper,⁵⁷ it may be argued that these provisions are directly inconsistent with Uganda's constitutional right to information. Furthermore, they seek to undermine the provision of the Uganda FOIA because of a failure of the FOIA to provide clearly that it takes precedence over other sectoral legislation.

⁵⁶ Section 153 provides that "(1) [a] holder of a Petroleum Exploration licence and a Petroleum Production Licence shall keep at an address in Uganda notified to the Authority, complete and accurate records containing full particulars" on a large number of oil matters. Section 155 provides an additional list of information that the licensee must "keep at an address in Uganda notified to the Authority."

⁵⁷ Veit, Peter, Excell, Carole, Zomer Alisa, "Avoiding the Resource Curse: Spotlight on Oil in Uganda," Working Paper WRI 2010.

(f) Enforcement

It was reported by Global Integrity⁵⁸ in 2009 that often when citizens are denied information in Uganda, they do not appeal at all because they are not aware of the appeal mechanisms. The FOIA includes a provision for internal review of decisions of public authorities for a number of grounds including refusals and non-response to requests, extension of timelines as well as charging inappropriate fees. Because of the failure to appoint information officers in a number of public authorities, requestors often have to make their first request to the chief officers of authorities which eliminate the right of internal review. Once this stage of review is complete however, the act requires requestors to make appeals to the Chief Magistrate Court. Section 37 of the act provides for complaints to the Chief Magistrate's Court against the decision of an information officer. If applicants are again unsatisfied with the decision of the Chief Magistrate they are able to appeal to the High Court within 21 days after the decision of the Chief Magistrate being communicated to the applicant. Taking appeals to the court is often both expensive and technical. There is no legal aid provided for FOI cases. As per Section 41, external appeals are made to the court as a civil case and the rules of evidence apply. This provision highlights the need for legal representation by applicants in presenting their appeals.

In Uganda as in South Africa the Chief Magistrate Court is also given a specific role for enforcement of rights of access to information. Similar to the PAIA in South Africa, Section 39 of the act states "The Rules Committee shall, within six months after the commencement of this act, make rules of procedure for the courts to regulate the procedure in respect of applications made under Section 35 and 40". However, the rules of procedure for the Chief Magistrate Court to handle FOI cases have not been finalised to allow easy access to the court by citizens. They were submitted to the Chief Justice Office, as the Chair for the Rules Committee, in 2009 for finalization but feedback is yet to be received.

The enforcement mechanism under the law has not been effective as it has been reported that there have been very few appeals of decisions for refusal of access to information under the FOIA brought before the lower courts for decision. In 2010, two cases were brought to court for the refusal of the government to grant access to the same type of information. In the first case the applicants utilized their right to information under the FOIA, while the second case was brought directly under the constitution. In the FOIA case, *Charles Mwanguhya and Izama Angelo v. Attorney General* Miscellaneous Cause Number 751 of 2009 the applicants sought to obtain information from oil production sharing agreements in the public interest. The Chief Magistrate found in favour of the government that the release was prohibited by a confidentiality clause in the FOIA. The court held that the applicants have failed to prove that the release of agreements was in the public interest to mandate disclosure of the documents versus the harm to third parties. The second case filed by Greenwatch for access to the same oil production sharing agreement has been brought under the constitutional right to information directly to the High Court with no reference to the FOIA. While the case is still yet to be heard this has raised the question whether utilising the FOIA rather than the constitutional provision for access assists applicants. It also raises the question how the courts will address the application under the

⁵⁸ Global integrity, Uganda 2009 assessment, online at <http://report.globalintegrity.org/Uganda/2009>

constitutional right, whether they will recognize the lower court's decision and how will they interpret the FOIA and its exemptions as well as those in the constitution.

Ghana

In Ghana, the 1992 Constitution provides a right of access to information as a separate human right. Ghana, unlike South Africa and Uganda, has not yet passed a FOIA but has a bill that is being actively considered by the Legislature and reviewed through a public consultation process. There have been no recent reported efforts by civil society to exercise their constitutional right to information and take refusals of access before the courts.

Constitution

Article 21 (1) (f) of the 1992 Constitution of Ghana guarantees that all persons shall have the right to information. Specifically, it provides as follows:

“All persons have the right to *(f)* information subject to such qualifications and laws as are necessary in a democratic society;”

The 1992 Constitution is subject to two important derogations. The first of these is that the right to information is subject to the rights and freedom of others and the public interest. The FOIA Bill seeks to give substance to this provision by providing;

(a) access to official information held by government agencies, and

(b) the qualifications and conditions under which the access should be obtained.

This notwithstanding, there is no statute which provides for a general right of access to information in Ghana. The State Secrets Act (1962) which is the primary law affecting official information primarily seeks to prevent access to information rather than make information more accessible. It creates criminal sanctions for the unauthorized disclosure of state secrets. This has contributed to a ‘culture of secrecy’ among Ghanaian officials where information is not made readily available and the most mundane and routine official information is hidden. This has also led to various discussions and advocacy campaigns geared towards making information accessible to the public.

Design of the law

In 2002, the first draft of the Right to Information Bill was prepared by the Attorney-General's Department and since then, there have been several reviews of the Bill (2003, 2005, 2006, and 2008). The Bill was approved by Cabinet in November 2009, and has been forwarded to Parliament for its approval which is still pending. The Bill has the objective of providing a legal framework for the right of access to information held by government agencies.⁵⁹ The FOI Bill

⁵⁹ Commonwealth Human Rights Initiative, “Annual Report 2004-2005”, online at <http://www.humanrightsinitiative.org/publications/areport/2005/areport05.pdf>.

mentions the African Charter on Human and Peoples' Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights as some of the conventions on human rights which provide guidelines as to the import of the right to information. The Bill identifies the underlying factor in the qualifications to the right of information as 'to protect the safety and integrity of the state and the privacy of individuals.'

The design of the FOI Bill has not been solely a government affair as it has been accompanied by an active civil society group campaign. In 2003, a Coalition on the Right to Information in Ghana was formed with the aim of strengthening the Bill into a model law based on established principles of international best practice and to facilitate its passage into binding law.⁶⁰ Since its formation, the Coalition has been the leading advocate for the promulgation of the right to information legislation in the country. The Coalition is made up of various civil society groups and even state institutions.⁶¹ Over the years more and more groups have joined the Coalition.

The contribution of the Coalition to the FOI process in the country has included; undertaking a consolidated critique of the bill and making recommendations for improvement (which was disseminated to key members of Parliament, the Commission of Human Rights and Administrative Justice, and other stakeholders); educating and raising public awareness of the Bill; undertaking media advocacy; meeting with executive Cabinet Ministers, Attorneys-General and various parliamentary committees; and organizing peaceful public demonstrations on the Bill.

The bill was a campaign promise of President Mills. Elections are scheduled to take place in 2012. Currently, Parliament has indicated that it needs to hold broad public consultations to be able to take into account the views and opinions of the Ghanaian public before it will consider the bill. So far, the utterances of relevant public officials give an indication of a commitment to the passage of the bill but this is yet to be translated into concrete action.

Active and Passive Resistance to Openness

(a) Preparation of Manuals

The Ghana Bill similar to both the South African and Ugandan FOIA includes a requirement for the compilation and publication of an up-to-date manual on official information. These manuals are to be utilized by the public to understand the type of information which may be requested and the procedures and associated costs. Civil society has stated that in Ghana:

“Government machinery being vast and complicated, a common person would find it difficult to approach it 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,

⁶⁰ Osabutey, Phyllis D., “Ghana: Freedom of Information Bill”, June 17, 2010, online at <http://allafrica.com/stories/201006180597.html>.

⁶¹ Commonwealth Human Rights Initiative, Media Foundation for West Africa (MFWA), Centre for Democratic Development (CDD), Centre for Environmental Law and Development (CELD), Ghana Integrity Initiative (GII), the Ghana Bar Association (GBA), Ghana News Agency (GNA), Ghana Journalists Association (GJA) and the Foundation for Christian Workers International.

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.”⁶²

Each Minister is responsible for the preparation of appropriate manual for their Ministry. The Minister is responsible to comply with this provision within twelve months from the date of the coming into force of the act, and every twelve months after that date, in accordance with guidelines issued by the Public Services Commission. There are no provisions to enable the citizen to enforce or complain about the non-compliance with this provision. If South Africa and Uganda’s experiences are instructive the law needs to be designed to ensure there is sufficient time for compilation of the manual. Civil sanctions/fees should also be considered for deliberate non-compliance or workplace disciplinary sanctions. In addition, auditing compliance with this provision should be the role of an independent agency. Also critical, will be the designation of information officers with sufficient time and resources to carry out the work within the required time periods under the law.

(b) Fees

As noted in the experience of South Africa and Uganda, fees should be set taking into account the economic context of the country. Setting fees directly affects demand and uptake of the law and can frustrate the use of the law by the public. While fees may be necessary to fund the direct cost of reproduction of copies of documents by requestors, any additional fees should be set carefully and justified. The Ghanaian Law puts a considerable burden on the requester in terms of fees. Fees are required firstly as an application fee in advance. In addition, fees may also be charged for purchase of information as well as inspection. Fees are also payable under the Bill for processing an application whether or not the application is granted or refused.

Advance deposits may be requested to address “the cost to the agency.” Provisions under the bill require the agency to address how the deposit has been calculated. Section 26 of the bill allows calculation of fees by individual agencies, while the Bill also speaks to the setting of a binding fee schedule across government under Section 76 by the Attorney General. This may be an attempt to build discretion in calculation of certain fees or prescribing others e.g. search fees and review fees. The provisions for fee charges are both complicated and vague. They raise the possibility of a wide discretion being given to agencies in the implementation process to provide separate charges for applications, search, duplication and review. While Section 51 does provide that an information officer of an agency may waive a fee or a charge if it will impose financial hardship on the person making the request, the schematic currently adopted on fees can easily be used to limit use and demand by the public. There are also no exemptions automatically provided for media, non profit or educational institutions. Fees additionally are provided for an internal review by the Minister of decisions for refusal.

(c) Processing of requests

⁶² Commonwealth Human Rights Initiative, “A Critique of the Draft Right to Information Bill, Ghana”, online at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/ghana/CHRI%20critique%20of%20draft%20RTI%20bill.pdf.

Clause 19 of the bill includes procedures for a citizen to access information. An application for access to information shall (a) be made in writing to the agency, (b) contain sufficient description or particulars to enable the information to be identified, (c) indicate the type of access required, (d) state the capacity of the applicant to the satisfaction of the officer to whom the application is made, if the application is made on behalf of another person, (e) state an address in the country to which a communication or notice can be sent, and (f) be accompanied with the relevant fee. Oral requests are only permitted for persons who are illiterate or have a disability. The Ghanaian Bill does not require the use of a prescribed form as found in South Africa and Uganda. However for a valid request subsection (d) requires the applicant to state the “capacity of the applicant”. It is not clear whether this requires presentation of a valid identification or authorization by persons to make requests, or it is an attempt to eliminate the submission of anonymous requests. The justification for eliminating the possibility for oral requests by any citizen is unclear with the Ghanaian public having a largely oral tradition. Civil society in their critique of the bill have commented that the procedure for accessing information under the bill, is considered “cumbersome” and failing to include “applicant-friendly procedures” and therefore needing to be reviewed.⁶³

(d) Supremacy of Legislation

There is no clear overriding provision in the Ghanaian FOI Bill in relation to other laws restricting information access. Section 66 of the bill provides that “Where an enactment in existence immediately before the coming into force of this Act, provides for the disclosure of information by a person or an authority, the disclosure of the information is subject to this Act.” This section seeks to generally harmonise the bill to related laws on disclosure with no specific overriding effect over such laws. In case of conflict, the bill is therefore more likely to be sidelined in favour of non-disclosure laws if this is not resolved.

Section 20(1) of the Minerals and Mining Act 2006 for instance provides that records, documents and information furnished or attained under Sections 19 (records and reports of mineral holders) and 63 (radio active mineral rights) shall, as long as the holder or the holder’s successor-in-title retains the mineral right, or any mineral right granted in substitution over the area to which the records, documents and information relate, be treated as confidential and shall not be divulged without the prior written consent of the holder. Records, documents and reports furnished or attained under Sections 19 and 63 will only be made available where there is the written consent of the mineral holder. It is not clear, therefore, whether Section 20 of the Minerals and Mining Act which creates an unqualified exemption for mineral holder’s reports is consistent with the proposed Bill. It is questionable whether mining information could be released by the government authority if it fell outside of the exemption for the release of commercially confidential information under the Bill when passed. Without the bill explicitly overriding any secrecy provisions in other legislation there will continue to be both legal uncertainty and difficulties in implementation by public authorities seeking to reconcile the two laws.

(e) Enforcement

⁶³ Ghana News Agency, “A civil society Organisation Launches Critique on RTI Bill”, June 25 2008, online at <http://www.modernghana.com/news/171383/1/a-civil-society-organisation-launches-critique-on-.html>.

Clause 38 on internal review and appeals permits a person aggrieved by a decision of an information officer of an agency to apply in writing to the Minister for an internal review of the decision within 21 working days of receiving notice of the decision. The application has to be accompanied with a fee. The procedure for review by the Minister is outlined in Clause 40. The Minister has discretion to require the person affected by the review to make a submission either in writing or in person in respect of the review. The Minister must hold the review in private and not disclose exempt information to either the applicant or to any person other than the information officer of the agency. Under Clause 40, the Minister is obliged within 21 working days of receiving an application for a review to give notice to the applicant of the decision on the application. The Minister may delegate this function. The provision for the Minister to conduct internal review has been critiqued as burdensome and inappropriate by civil society when considering current Ministerial responsibilities.

Similar to both South Africa and Uganda, there is no independent intermediary review mechanism before taking cases to court to handle appeals for rejected requests. Clause 42 of the bill may however be interpreted to allow direct applications to the court for judicial review of an agency's decision without the conduct of an internal review. The enforcement mechanism in Uganda and South Africa is also proposed for adoption in Ghana. As in these countries, recourse to the court for refusals of access to information is likely to both limit appeals and provide an inappropriate forum for the resolution of failures by agencies to comply with procedural requirements of the Law e.g. complying with time periods under the law, addressing mute refusals (the monitoring term for requests for information that do not receive a positive or negative response during the appropriate time frame) and other inadequacies of public authorities. The court is not an appropriate institution to monitor and conduct enforcement for the whole access to information regulatory system.⁶⁴

There is no provision in the Ghanaian Bill to appeal to Resident Magistrates Courts as is found in both the South African and Ugandan laws. Instead, Clause 43 speaks to the powers of the Supreme Court in relation to judicial review. The Supreme Court, under Clause 44, has the right in an application for review, to make an order that the court considers just and is obliged, where it orders access, to specify the period within which access should be given. Applicants will likely have to undertake considerable expense to take such cases before the court and hire appropriate experts and lawyers to represent them. Civil society in Ghana have suggested that a more appropriate review procedure would be to let an autonomous body such as the Commission on Human Rights and Administrative Justice (CHRAJ) play the role of the information commissioner. However, this has not been included under the current draft of the proposed bill.

Conclusion

FOIAs have to be carefully drafted to provide clarity to the citizen about their rights, and ensure strong enforceable safeguards against active and passive resistance by government. In the case studies presented above, we highlighted ways in which the design of FOIAs can frustrate their

⁶⁴ Anyidoho, Nana Akua, "Review of Rights Discourses-Ghana", available at <http://www.polis.leeds.ac.uk/assets/files/research/research-projects/anyidoho-review-rights-discourses-march09.pdf>.

use and uptake by citizens. There are simple ways in which FOIAs can be designed to achieve the clearly stated objectives of a right to information.

Giving effect to constitutional rights

FOIAs must be drafted to fall squarely within the scope of constitutional language. FOIAs should not be designed to include any limitations to the enjoyment of the right to information “*beyond what is acceptable and demonstrably justifiable in a free and democratic society*” in countries with constitutional rights to information. This terminology must be interpreted nationally within the context of each country's legal system. FOIAs institutionalise the right to information and should provide a regulatory framework that can be used successfully to promote greater, user friendly access to information. Laws need to be adopted that are relevant to national circumstances and take into account local history and context, “one size fits all” approach will not work. More detailed comparisons of experiences across the continent are needed as well as forums to bring government policymakers together. Where the courts have accepted that there is a constitutional right to access information separate from rights under FOIAs, there is a need to reconcile the legislation with the constitution to ensure its appropriate application.

Preparation of Manuals

Manuals are roadmaps to enable citizens to understand the requesting process and the type of information that is available and how to access it. The requirements to produce manuals as part of the implementation of the law are found in each of these case studies. It is possible to include specific provisions in FOI laws allowing citizens the right to complaint for non-compliance with the requirement to produce a manual. Audit powers are needed for agencies monitoring implementation to assess compliance, while appropriate sanctions including fees or civil fines should be considered. Reasons should be required to be given by the responsible officer of each public authority for failure to comply with a provision to draft the manual within set timeframes. Timeframes must also be set which are achievable within the context of government and private sector capacity. Manuals also need to be drafted in a manner that is accessible and useful to the public. Clear standards for drafting manuals, transparent and participatory processes for their creation could also be included within subsidiary rules to ensure minimum standards are met.

Processing of requests

While recording FOIA requests in writing is critical to ensure accountable handling of the public's requests, the use of prescribed forms that are mandatory requirements can restrict the public's willingness to use the law. In a number of countries in Africa with a strong oral tradition the ability of members of the public to make requests orally which can then be taken down in writing by information officers, or allowing requestors to write letters would ease the formality of request making. FOIAs can restrict the need for unnecessary paperwork and provide simple means for persons to make requests and receive assistance in identifying and explaining information.⁶⁵

⁶⁵ Tromp, Stanley, “Fallen Behind Canada's Access to Information Laws” found at <http://www3.telus.net/index100/report> (2008)

FOIAs can also mandate a requirement to allow requests to be made anonymously.⁶⁶ In each of the case studies mentioned above requirements to fill out prescribed forms or identify the capacity of the person making the request are likely to exclude anonymous requests. In principle the name of the applicant is irrelevant to the determination of whether or not an application should be accepted or rejected. Only an address is needed to communicate effectively with requestors. To exclude any perceived bias or retribution in countries where there is a large level of mistrust in government; FOIAs can legitimately restrict the possibility of applicants feeling intimidated into refraining from making requests.

Fees

Clear principles need to be articulated in FOI legislation on charging of fees to ensure that the fee structure does not reduce demand for use of the law. The general principle that the right to information is a fundamental right guaranteed by the constitution and essential to keep government accountable, suggests that costs of providing citizens with information should be kept to a minimum. Following this principle FOIAs can be designed to ensure that fee waivers are clearly articulated for those with an inability to pay or who use the law in the public interest. FOIAs have to be responsive to the economic reality of the country in which they apply. Where fees are charged, reasonable fees should not exceed actual costs for reproduction and preparing information. In that regard best practice in most countries has dictated that fees should be charged for the provision of information rather than requests themselves and no fees should be charged for inspection. In other countries the introduction of application fees was documented as reducing the number of request by half.⁶⁷ New FOI laws in a number of countries for instance have included provisions to eliminate fees to ensure use of the law.⁶⁸

Supremacy of Legislation

FOIAs need to provide a clear legal precedence to override other legislation that is either inconsistent with its principles or contain secrecy provision that are already contained with the FOIA itself. This is the only mechanism to ensure that the principles of transparency and accountability apply to all sectors of government. Advocates from Uganda have argued that “The most striking challenge to the right of access to information...remains the archaic and inconsistent laws still prevalent on the statute books. These laws act as a cloak for duty holders to unjustifiably withhold information, further limiting access”⁶⁹. FOIA laws can mandate countries with a range of secrecy laws to review these laws within a specific timeframe to remove illegitimate provisions which are inconsistent with the law and retain important exclusions. Some laws for instance have stated a commitment over time to review all laws which restrict the disclosure of information, with a view to making them consistent with the freedom of

⁶⁶ Position Paper on Anonymity and Fees Information Commissioner Office Cayman Islands (2011)FOI law Review.

⁶⁷ Office of the Information Commissioner, Annual report 2004, Chapter 1, page 5, available at http://www.oic.gov.ie/en/Publications/AnnualReports/2004/File_519_en.pdf.

⁶⁸ Cayman Islands, The Freedom of Information Law, 2007, Part II, section 10 “cost of access”, available at <http://www.foi.gov.ky/pls/portal/docs/PAGE/FOIHOME/DOCLIBRARY/FOILEGSLATION/FREEDOM%20OF%20INFORMATION%20LAW%2C%202007.PDF>; Also Mexico, Ley Federal de Transparencia y Acceso a la Informacion Publica Gubernamental, Chapter V, Article 27, online at <http://www.diputados.gob.mx/LeyesBiblio/pdf/244.pdf>.

⁶⁹ HURINET-U & Ngabirano, Dan, “An Analysis of Laws Inconsistent with the Right of Access to Information”, p3, available at http://www.hurinet.or.ug/index.php?option=com_docman&task=cat_view&gid=61&Itemid=60

information law⁷⁰. FOIAs dominance over other laws in the legal system is critical to ensure a harmonized legal framework, and this dominance should include requiring the review of new laws to ensure consistency with the FOIA as well as laws on the books that were in existence prior to the passage of the law. As has been suggested by Mendel “If the principle of maximum disclosure is to be respected, indeed, if the culture of secrecy is to be addressed, the freedom of information law must take precedence over these laws.”⁷¹

Enforcement

FOIAs need an enforcement model that is accessible, affordable, and timely, enabling people to have sufficient access to justice.⁷² In both South Africa and Uganda there have been very few cases that have been taken before the courts on appeal relative to the number of requests made. It would be difficult to expect the court to have the role of investigator and monitor of a large number of requests refused on procedural and substantive grounds.⁷³ In the case of South Africa, civil society has consistently lobbied for the redesign of South African adjudication structure. After a long process of consultation and deliberation, the Cabinet decided against the original ideas of an Information Commission. However it acknowledged the potentially negative implications of creating a system without an intermediary enforcement mechanism. Hence, the ad hoc committee on the Open Democracy Bill resolved when finalising the bill, to recommend that the Executive conduct an appropriate enquiry into the feasibility of creating an alternative adjudicatory body:

“The Department of Justice and Constitutional Development is requested to investigate the feasibility of establishing an enforcement mechanism like the Information Commissioner and to report back to the Committee within 12 months after the Bill has been put into operation.”⁷⁴

In a commissioned research document in 2003, the Open Democracy Advice Centre made the following submissions:

At present, an applicant whose request for information is denied or ignored must go the High Court. The creation of a designated Magistrates’ Courts to hear PAIA cases may improve the accessibility of the remedy, but it is unlikely to make a substantial difference in terms of cost, speed and specialism. The Magistrates Court remains a lawyer and law-centric forum, a far cry from the administrative tribunal systems that operate in other jurisdictions....Hence, our major point of departure is that part of the overall “championing” need (as more widely defined in the context of this research), is the need for an effective enforcement mechanism that offers a speedy, specialist, affordable and accessible remedy.⁷⁵

⁷⁰ UK freedom of Information Law

⁷¹ Mendel, Toby “Freedom of Information: A Comparative Legal Survey” UNESCO, Paris 2008

⁷² Neuman, Laura Access to information Working paper series “ Enforcement models content and context “ 2009 World Bank

⁷³ Anyidiho Akua “Review of Rights Discourses- Ghana” Human Rights, Power and Civic action” Universities of Oslo Leeds & Ghana (2009)

⁷⁴ Announcements, Tablings And Committee Reports, No. 4 – 2000, 24 January 2000, Paragraph 7, Page 19.

<http://www.info.gov.za/speeches/index.htm>

⁷⁵ The Open Democracy Advice Centre Cape Town, “The Promotion Of Access To Information Act; Research On The Feasibility Of The Establishment Of An Information Commissioner’s Office”, online at

http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/sahrc_info_commissioner_research_odac.pdfhttp://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/sahrc_info_commissioner_research_odac.pdf

These statements made in relation to South Africa are likely to resonate in Uganda and Ghana. Where there are large numbers of “mute refusals,” these types of cases are not appropriate for a lower magistrate court even if costs can be awarded against the state. This issue of enforcement is now again being reviewed in South Africa with two committees of parliament (the ad hoc committee on Review of State Institutions Supporting Democracy and the Justice Committee considering the Protection of Personal Information Bill) both recommending the amendment of PAIA to provide for Information Commission/Regulator as an alternative dispute resolution mechanism. This fact emphasises the need for consideration of alternative enforcement mechanisms.

In Uganda, there are a number of different views on the reform of the enforcement mechanism. While there have been clear calls to have an independent enforcement mechanism created to allow greater access by the public to have their matters heard at low cost, the High Court has heard a number of constitutional cases and found in favour of applicants arguments supporting broad interpretation of the constitutional provisions. More research is needed into the current status of affairs both in terms of request numbers, refusals and reasons for refusal to understand why there are been so few matters taken before the Magistrates and the High Court on refusal for access to information.

The Ghanaian Bill as it currently stands does not provide for an independent body to be responsible for promoting and giving effect to the right to information. Use of the courts for the average Ghanaian is also likely to be an inappropriate mechanism for resolution of all disputes on access to information. A lot can be learned from the experience of the other countries highlighted in these case studies.

To conclude, FOIAs with more prescriptive regulatory rules can provide detailed standards of responsiveness over time. They can outline roles and responsibilities of public authorities and senior officials in implementation and address constraints in capacity and resources. They can provide a powerful mechanism for citizens to take action in the case of failure to conduct full implementation of the law. Regardless of the specific design features used, what is most important is that FOIAs are written with awareness of the unequal power dynamics that underpin the relationship between government agencies and members of the public. In order to provide a successful tool for demolishing historic walls of secrecy and constructing new transparency infrastructure, FOIAs must be constructed in a way that limits government control and places greater power to demand accountability in the hands of citizens.