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MAKING THE ACCESS TO INFORMATION LAW IN ZAMBIA EFFECTIVE

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POLICY BRIEF

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KEY FINDINGS

- In December 2023, Zambia enacted the Access to Information Act, bringing to an end three decades of lobbying for the enactment of the law.
- The Access to Information law gives citizens and residence permit holders the right to access public and private information that is necessary to protect or support the enjoyment of a right.
- The law has restrictions on information that cannot be disclosed. However, the restrictions mirror international best practices. The law may face challenges in its effective implementation because of other laws that restrict access to information.

POLICY IMPLICATIONS

- Proactive disclosure of information is the pivot of access to information. Public entities need to put in place standards for pre-disclosure of relevant information.
- There are laws that support a culture of secrecy in public service. There is need for a detailed stock-taking of such laws and an analysis of how they should be reformed to align with the Access to Information law.
- The laws inconsistent with the Access to Information law need to be amended in order to effectively implement the new law.

1. INTRODUCTION

Access to information or Freedom of Information laws have gained traction around the world. Such laws are justified on various bases. These include the good governance values of openness, transparency and accountability. It is believed that giving citizens access to state-held information and information held in private hands, that is relevant to the protection of fundamental rights, is essential for ensuring an accountable and democratic government. Access to such information, apart from facilitating informed participation in governance by citizens, enhances public confidence in government and may increase the legitimacy of public institutions. The fact that the bases of public decision making may become public or knowable, arguably discourages corruption, arbitrariness and other forms of public misconduct.

In Zambia, advocacy for the enactment of access to information law was initially led by media houses. This followed the reinstatement of multiparty democracy in 1991. The first Freedom of Information Bill was introduced in the National Assembly by the Minister of Information in 2002. The Bill was later withdrawn for various reasons. These included fears by the government that it could expose the country to security threats. Since then, various governments have failed to honour the promise to enact the access to information law. In 2021, the United Party for National Development (UPND) was elected into government. The party had run on a platform to enact the access to information law. The government fulfilled this promise when the Access to Information Act received presidential assent on 26 December, 2023. The passing of the Act brought closure to a protracted history of lobbying the government for the enactment of the law.

This policy brief reviews the Access to Information Act. It is evaluated against international best practices and comparable access to information laws of Kenya and South Africa. These are generally considered to be progressive. The Model Law on Access to Information for Africa is taken as a guide as it reflects the international human rights standards that should be reflected in an ideal access to information law. Thereafter the brief discusses some of the criticisms against the law. It further highlights laws that need to be amended or repealed in order to make the new law effective.

2. OVERVIEW OF THE ACT

Scope of Information Holders

Section 6(1) of the Act entitles a citizen and a residence permit holder to access information in the hands of an "information holder." An Information holder is defined under section 2 as a "public body or a private body." A private body is "a private entity, or non-state actor, that utilizes public funds or is in possession of information that is of significant public interest." This definition entails that not every private entity can be requested to provide information. Only private entities that receive public funds or are in possession of information of significant public interest. Individuals are excluded from the disclosure obligation. Sections 3(a) and (b) then indicate the scope of information holders from which information can be requested. The right to access information is governed by the following principles:

(a) a person has the right to access information of information holders expeditiously and inexpensively.
(b) a person has the right to access information of a private body that may assist in the exercise or protection of any right expeditiously and inexpensively.

Accessing information from a public body is unqualified while accessing information from a private body has a condition precedent. The need for the information to "assist in the exercise or protection of any right." This approach is consistent with the approach recommended by the Model Law on Access to Information for Africa,[1] the South African constitution [2] and the Kenyan Access to Information Act.[3]

The approach taken by the Act on this score is consistent with international best practice. In other words, the public is entitled to access public information in the hands of public bodies, unless there are legitimate reasons for limiting access. However, when it comes to information in private hands, the information should only be available on a "need to know" basis. The requester needs to provide reasons to justify access. The reasons must relate to the exercise or protection of a human right.[4] The private sector is entitled to keep its information to itself, unless that information is needed to protect rights.

Scope of Information Disclosure and Exemptions or Restrictions

The law is intended to facilitate access to information. To this end, the Act is written with the presumption of disclosure of information. The default position, when information is required, is that the information shall be made accessible. Section (2) of the Act states that the Act shall be interpreted "on the basis that an information holder has a duty to disclose information and non-disclosure is only permitted in the circumstances set out in" the Act. Section 3(c) requires that the Act, any law or policy creating access to information be interpreted "on the basis of a presumption of disclosure". Section 3(d) requires information holders to disclose information proactively. Proactive disclosure entails that the institutions required to disclose information must do so even without anyone specifically requesting for it. Section 8 lists the kind of information that an information holder should disclose in advance even without anyone making a request for it. To facilitate access to information, section 9 requires an information holder to appoint an information officer who is responsible for processing requests for information.

This, however, does not mean there is no limit to information that has to be disclosed. Access to information is not an absolute right. Like many rights, it has limits. Some types of information are exempt from disclosure. The table in the appendix highlights the information exempted from disclosure. To show how the Act measures against international best practice, the limitations in the Model Law, the Kenyan Access to Information Act and the South African Promotion of Access to Information Act are highlighted. The table in the appendix shows that, the exemptions found in the Zambian Act are consistent with those allowable under the Model Law, the South African and Kenyan legislation.
It should, however, be mentioned that the fact that information is exempt is not conclusive that information shall not

[1] Article 2
[2] Section 32
[3] Section 4

be disclosed. Exempt information is still subject to the public interest override. Thus, Section 22 (1) states:

> Despite any other provision of this Act, an information holder ***shall disclose information where the public interest in the disclosure of the information outweighs the harm to the interest protected*** under the relevant limitation of the right to access information.

What amounts to public interest is indicated in section 22(2). This includes failure to comply with written law; abuse of authority; injustice to an individual; danger to life; imminent environmental risk; and unauthorized use of public funds.

Oversight Mechanism

The African Model Law requires that an oversight body responsible for enforcing the norms of access to information legislation should be independent and impartial. The oversight body should be independent and autonomous in its operations and administration. The officers of the oversight body must be employed in a competitive and transparent manner where positions are advertised.

Section 4 of the Act designates the Human Rights Commission as the oversight body. The Commission is established under Article 230 of the Zambian Constitution as an independent entity, not subject to the control of any person or authority. It would, therefore, seem that the Commission meets the requirements of the Model Law as an independent body. However, officers of the Commission are not appointed in a competitive and transparent manner. The law reposes the privilege to appoint them in the President. This cannot be corrected by this Act as the establishment and operational structure of the Commission are established by the Constitution and the Human Rights Commission Act. There would be need to reform the law governing the recruitment and appointment of commissioners and their removal in order to ensure that the process for the appointment of commissioners is competitive and transparent.

Internal Review

The African Model Law provides for internal review of decisions made by an information holder. The idea is to give the concerned information holder an opportunity to correct a potential wrong by their information officer. Article 40 of the Model Law provides two ways of internal review. Either a requester applies for an internal review of any decision of an information officer; or a third party applies for an internal review of a decision of an information officer to grant access to information containing its third party information.

The Zambian Act has no mechanism for internal review. Section 33(1) requires that "a person who is aggrieved by a decision of an information holder under this Act may appeal to the Commission within thirty days of the information holder's decision." Considering that the Human Rights Commission is the oversight body, this entails that there is no internal review mechanism for concerned information holders.

Judicial Review

The African Model Law requires granting information requesters unhappy with refusals to disclose information to seek judicial review of the decision of the oversight mechanism. This is contained in Article 83 of the Model Law. Similarly, section 33(2) of the Zambian Act grants an information requester aggrieved by a decision of the Human Rights Commission the right to appeal to the High Court.

3 CRITICISM OF THE ACT

The enactment of the Access to Information law has been widely acclaimed. There has, however, been some criticism. This falls into three strands. The first strand relates to the violation of privacy. The second relates to surveillance. The third one is about the protection of whistleblowers.

The Act Violates Privacy

The first criticism argues that the Act lumps together "obligations of public and private bodies whose obligations are not distinguished appropriately under the Act." This assertion is based on one's reading of the definition of "information holder" under section 2 of the Act. It is argued that the "failure to distinguish between public and private bodies provides onerous and even intrusive access to privately held information…."

First of all, the argument is misleading as the Act makes a clear distinction between private and public entities in terms of their obligations. Section 6(1) of the Act entitles a citizen and a residence permit holder to access information in the hands of an "information holder." Information holder is defined under section 2 as a "public body or a private body." What constitutes a private body is defined under section 2 as "a private entity, or non-state actor, that utilizes public funds or is in possession of information that is of significant public interest." This definition entails that not every private entity can be requested to provide information. Only private entities that either receive public funds or those in possession of information of significant public interest. Individuals are excluded from the disclosure obligation. Sections 3(a) and 3 (b) then both require public and private information holders to disclose requisite information.

Although both public and private bodies have a duty to disclose information, a distinction should be drawn in terms of their obligations. Accessing information from a public body is unqualified while accessing information from a private body has a condition precedent of needing the information. This is to "assist in the exercise or protection of any right." In other words, the public is entitled to access public information in the hands of public bodies, unless there are legitimate reasons for limiting access. However, when it comes to information in private hands, the information should only be available on a "need to know" basis. The requester needs to provide reasons to justify access. The reasons must relate to the exercise or protection of a human right. Therefore, the private sector is entitled to keep its information to itself, unless that information is needed to protect rights.

This criticism displays a misunderstanding of the relationship between the state and private actors in the area of public law. First of all, human rights in the modern world are no longer seen as the mere concern of the state and affected individual citizens (vertical approach). Private entities are seen as capable of violating human rights, and as a result, public law remedies have expanded into the private terrain to protect rights (horizontal approach). This is because the services provided by private entities have expanded exponentially. One has to think of private medical facilities, schools, media houses, digital and telecommunication companies and water and sanitation services amongst many others.

Constitutional and administrative law experts have coined the term "the contracting state"[5] to describe the situation where many services of public interest are provided by the private sector rather than government. In providing these services, the private sector cannot do as it wishes and disregard human rights.

This entails that when a citizen needs information to assert or protect their right, there should be a duty on private entities holding that information to provide it.

There are several comparative cases demonstrating the appropriate use of this device to support the enjoyment of rights and foster accountability.

The Kenyan case of Republic v Nairobi Women's Hospital Petition No. 172 of 2020 is one such case. This dealt with a woman who was attended to at a private hospital as a patient for pre-natal and post-natal care. She underwent a caesarean operation but unfortunately, the child died. She then requested the hospital to provide her a medical report of her pregnancy. The hospital did not do so. In court, the hospital argued that it was a private entity, and, therefore, not under a duty to provide the woman with the information. The High Court held and stated in disagreement: "I, therefore, find that the respondent's argument that they cannot be compelled to issue the information sought does not hold water as the right to access information is a sacrosanct right which applies to actions by both public and private bodies."

Finally, it should be noted that privacy is not an absolute right. Like an onion, privacy has layers that can be interfered with to varying degrees to protect the rights of others or to serve some other public good. Public law, for example, in many countries already requires public officials to make public declarations of their assets. Should this be stopped on account of violation of privacy? A narrow and superficial view of privacy has been rejected already by many progressive judiciaries. For example, Ackermann J in the Constitutional Court of South Africa in Bernstein and Others v Bester No and Others [1999] ZACC2 stated:

> The truism that no right is to be considered absolute, implies that from the outset of interpretation, each right is always limited by every right accruing to another citizen. In the context of privacy, this would mean that it is only the inner sanctum of a person, such as his or her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community…. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

The Act Facilitates Surveillance

The second criticism argues that by requiring disclosure of privately held information, the Act potentially exposes citizens, journalists, civil society actors and opposition party members to state surveillance. First of all, there is no provision in the Act that gives this impression. The State is not a qualified requester of information under the Act. Section 2 of the Act only includes a citizen and a resident permit holder as persons competent to request for information. Moreover, as shown above, the limited requirement for disclosure of privately held information is consistent with international human rights standards. Privately held information can only be disclosed where it is needed to support the exercise of a right by the requester. The State is not the subject of human rights but a duty bearer.

Further, it must be acknowledged that there are existing laws that empower security entities to intercept communication. Laws, such as the Cyber Security and Cyber Crimes Act 2021 even enjoin digital communication service providers to only use equipment the State can easily access. This, coupled with a poor judicial culture of enforcing human rights, as exemplified in the precedents of Liswaniso v ***The People (1976) ZR 272 and Liswaniso Sitali and Others v Mopani Copper Mines PLC (2004) ZR 176.*** The precedents dealt with admission of evidence obtained in violation of the right to privacy. Therefore, the culture of the State illegally intruding into the private sphere is already long entrenched. It will not in any way start with the newly enacted Access to Information legislation. The State already has an arsenal of legislation and case law expressly or indirectly allowing citizen surveillance. The Access to Information law is not one of those.

Protection for Whistleblowers

The third criticism has argued that the Act lacks protection for whistleblowers, that is, persons who alert the public or law enforcement agencies about corruption and, irregularities regarding the access of information.[6] Although the Act lacks a specific clause protecting whistleblowers, there is a specific Act of general application which protects whistleblowers. The Public Interest Disclosure (Protection of Whistleblowers) Act No 4 of 2010. The Act applies to both public and private entities.[7] It offers protection against reprisals resulting from public interest disclosure or whistleblowing.[8]

4. EXISTING OPPORTUNITIES

Proactive disclosure is at the heart of the culture of access to information, transparency and accountability. Proactively making the information available ensures the public has the information it needs to make informed decisions. Although there is a lot to be done to have as many public institutions as possible proactively make information available, there are already several public entities proactively disclosing essential information. These, to varying degrees, proactively disclose essential information about their operations on their websites. Some of these are the National Assembly, the Judiciary, the Patents and Companies Registration Authority, the Ministry of Finance and National Planning; and the Electoral Commission of Zambia.

5. OPPORTUNITIES FOR REFORM

There is no law that is passed in a vacuum. The existing laws and context the law come into will have a bearing on their implementation and effectiveness. This section discusses some opportunities that may potentially enhance the effectiveness of the Access to Information Act.

- ### *Laws Prohibiting Sharing Information*

There are laws that restrict or prohibit the sharing of information. These include the State Security Act,[9] the Protected Places and Areas Act [10] and the Cyber Security and Cyber Crimes Act.[11] These place various forms of restrictions on the free flow of information. The State Security Act, for example, prohibits the communication of information by any person relating to protected places or information entrusted to that person in confidence or information obtained by virtue of a contract with the government.[12] The Protected Places and Areas Act restricts information sharing about some critical or vital infrastructure and facilities. The Cyber Security and Cyber Crimes Act criminalizes the publication of certain forms of information. It would be important to take stock of these and other laws and amend them to align them with the Access to Information Act. If that is not done, officers who operate under laws that impose restrictions on information are unlikely to comply with the new Act.

- ### *Non-Disclosure Clauses*

Many laws establishing institutions include a standard non-disclosure clause. Section 11 of the Electoral Commission Act 2016, for example, states:

(1) A person shall not, without the consent, in writing, given by or on behalf of the Commission, publish or disclose to an unauthorised person, otherwise than in the course of duties of that person, the contents of a document, communication or information whatsoever, which relates to or which has come to the knowledge of that person in the course of that person's duties under this Act.

(2) A person who contravenes subsection (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

(3) A person who, having any information which to the knowledge of that person has been published or disclosed in contravention of subsection (1), unlawfully publishes or communicates the information to another person, commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

There is need to review all the laws with non-disclosure clauses to harmonise them with the standards set in the Access to Information Act.

▪ *Oath of Secrecy*

All senior officers in government, quasi-government or public institutions take oath upon being sworn into office. The oath used for many of them is the official oath in the Seventh Schedule of the Official Oaths Act Chapter 5 of the Laws of Zambia, which reads:

> I....., having been appointed/elected/nominated……do swear/affirm that I will well and truly serve the Republic and the President of Zambia, that I will preserve, protect and defend the Constitution of Zambia as by law established; and that I will not directly or indirectly reveal or transmit any such information or matter as shall be brought under my consideration, or shall be made to me by reason of my office except as may be required in the discharge of my duties as such or with the authority of the President (emphasis authors').

The Official Oaths Act may need amending to align it to the Access to Information Act in view of the overriding requirement to make information public.

▪ *Rules Shielding the Judiciary*

While it has become commonplace to liberally criticize and display the work of the Executive and the Legislature, the Judiciary still has a ring of laws and practices limiting public scrutiny and free flow of information. Section 117 of the Penal Code Chapter 87 of the Laws of Zambia, for example, prohibits taking pictures from the courtroom or publishing such pictures. Additionally, Courts in Zambia still rigorously enforce outdated contempt of court rules that criminalise commenting on matters still active in court.[13] These and other rules that turn the judiciary into a cloistered entity must be reviewed and reformed to promote a culture of transparency and free flow of information.

6. CONCLUSION

The enactment of the Access to Information Act brings to closure the process of its lobbying for nearly three decades. Its provisions are generally consistent with international best practice. There are, however, laws and practices that are inconsistent with its provisions and spirit. There is need to reform these in order not to hamper the effectiveness of the new law.

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[1] *Cora Hoexter, Administrative Law in South Africa (Juta, 2007), 91*
[2] *Patrick Matibini, The Struggle for Media Law Reforms in Zambia (Misa Zambia, 2006)120*
[3] *Iain Currie and Johan De Waal, Sixth Edition, The Bill of Rights Handbook (Juta, 2016) 701*
[4] *Ibid*
[5] *Migail Akechi, Administrative Law (Strathmore University Press, 2016), 349*
[6] *Access to Information Coalition & Transparency International Zambia, 'Position Paper on the Draft ATI Bill' retrieved from https://tizambia.org.zm/2023/07/24/position-paper-on-the-draft-access-to-information-ati-bill/ (accessed 20 January 2024)*
[7] *Section 3 Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010*
[8] *See Part II of the Act*
[9] *Chapter 111 of the Laws of Zambia*
[10] *Chapter 125 of the Laws of Zambia*
[11] *No 2 of 2021*
[12] *Section 4*
[13] *See for example, the case of Anderson Kambela Mazoka v Levy Patrick Mwanawasa and the Electoral Commission of Zambia and the Attorney General (SCZ EP 1 of 2002) [2003] ZMSC 110 (15 May 2003)*

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