A RAPID ANALYSIS AND ASSESSMENT OF THE ACCESS TO INFORMATION BILL, 2016

MARCH 2016
# List of Abbreviations and Acronyms

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<th>Abbreviation</th>
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<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>IACHR</td>
<td>Inter-American Court of Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>Independent Information Commission</td>
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<td>LAB</td>
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<td>MISA-Malawi</td>
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<td>MPs</td>
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Executive Summary

The Malawi Government finally gazetted the long awaited Access to Information Bill, 2016 (the Bill) on 19th February 2016. MISA-Malawi sought a rapid analysis and assessment of the Bill in order to identify gaps or weaknesses, if any, with a view to further engage the Malawi Government to revisit any aspects of concern or lobby Members of Parliament not to pass it in its current form and instead refer it to an appropriate committee of the National Assembly for further scrutiny and consultation. The committee then produces a report with recommendations to the full House.

The analysis and assessment has revealed a number of gaps and weaknesses in the Bill. First, out of the seven principles of any modern access to information legislation as proposed in the Model Law on Access to Information in Africa, the Bill has taken on board five. It has left out two namely, that ‘information holders must accede to the authority of the oversight mechanism in all matters relating to information’ and that ‘any refusal to disclose information is subject to appeal’. These two principles have been violated because the Bill has totally removed the Independent Information Commission as an oversight body which was contained in the draft Bill which was passed on to the Malawi Government. This is a sad development. At a minimum, the Malawi Government should have left the function of the Independent Information Commission in the Human Rights Commission. Second, one of the objectives of any modern access to information legislation is to fight corruption and fraud in government. Sadly, in the case of the Bill, whistleblowers are not protected in any way and yet the Bill which was passed on to the Malawi Government by MISA-Malawi had a clause which was protecting whistleblowers. The message is clear here. The current government is not keen on using this proposed legislation to fight corruption and fraud in its system. Third, the Bill also has semantics or linguistic problems which have to be attended to as highlighted under part 3.0 of the report.

MISA-Malawi recommends that the Bill should not be passed by the National Assembly in its current state and signed into law by the President. Instead, the Bill must be referred to an appropriate committee or committees for further scrutiny and consultations. It is hoped that sense will prevail and that the Bill will make provision for either an Independent Information Commission or at a minimum, its role will be performed by the Human Rights Commission. The Human Rights Commission is willing to take that added responsibility. It is also hoped that whistleblowers will also be protected in the Bill, so that it assists in the fight against corruption and fraud in the government system.
1.0  INTRODUCTION

Media Institute for Southern Africa-Malawi Chapter (MISA-Malawi) requested a rapid analysis and assessment of the Access to Information Bill, 2016 (the Bill) gazetted on 19th February 2016 by the Malawi Government. The Bill is apparently already on the Order Paper for Business for the current sitting of the National Assembly which will be rising in the next two weeks or so. It must be stated at the outset that, time factor, is therefore one of the biggest limitations to this analysis and assessment as we had only seven (7) days to accomplish the task. The aim is to identify gaps or weaknesses, if any, that exist in the Bill. Depending on the outcome of the exercise, the findings will be used to engage the Malawi Government further to revisit some aspects of the Bill or indeed lobby members of Parliament (MPs) to amend it on the floor when it will be presented in the National Assembly for debate. The other option may be to encourage the National Assembly to refer the Bill to an appropriate committee\(^1\) for further scrutiny and consultation when it is introduced in the House and thereafter present a report with its recommendations to the full House. The last option may be to pass the Bill in its current form and then if there are any gaps and weaknesses, address them later through an amendment after having tested how it will have worked in practice for some time.

2.0  THE CONCEPTUAL AND ANALYTICAL FRAMEWORK

2.1  International Covenant on Civil and Political Rights

The right to access information held by public bodies or authorities is a fundamental human right recognised and protected by international law.\(^2\) Malawi is a state party to the International Covenant on Civil and Political Rights (ICCPR).\(^3\) In 2011, in General Comment No. 34 on article 19 of the ICCPR, the Human Rights Committee stated as follows:

Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.

As at now, more than 105 states in all regions of the world have access to information legislation. The right is important for a number of reasons. It allows for democratic participation, fight against corruption, hold government to account, builds trust in

\(^{1}\) It may either be the Legal Affairs or the Media and Communications Committee.
\(^{2}\) See for instance article 19 of the Universal Declaration of Human Rights (UDHR) and article 19(2) of the International Covenant on Civil and Political Rights.
\(^{3}\) Malawi ratified it on 22nd December 1993.
government by preventing false rumours from spreading through the dissemination of correct and true information and fostering of sound development.4

2.2 **Model Law on Access to Information for Africa**

The right to access information is also recognised and protected by the African Charter on Human and Peoples’ Rights (ACHPR) through article 95, to which Malawi is also a state party.6 The African Commission on Human and Peoples’ Rights formulated the Model Law on Access to Information for Africa (the Model Law) as a guide for the development, adoption or review of access to information legislation by African States. Even though the Model Law is not a legally binding document, and each State Party is allowed to adapt it to suit its Constitution and the structure of its legal system, there is an appeal that “efforts must be made to ensure that in the process of adopting or reviewing national legislation on access to information, the principles and objectives of the Model Law are observed to the utmost”.7 The general principles and objectives of the Model Law will be reproduced here. There are seven principles in total. The principles are internationally recognised and they form the bedrock of any modern legislation on the right of access to information.

The first principle is that “every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively”.

The second principle is that “every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively”.

The third principle is that “this Act and any other law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure. Non-disclosure is permitted only in exceptionally justifiable circumstances as set out in this Act”.

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5 It provides as follows:
1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.
6 Malawi ratified it on 17th November 1989.
The fourth principle is that “information holders must accede to the authority of the oversight mechanism in all matters relating to access to information”.

The fifth principle is that “any refusal to disclose information is subject to appeal”.

The sixth principle is that “public bodies and relevant private bodies must proactively publish information”.

The seventh and last principle is that “no one is subject to any sanction for releasing information under this Act in good faith”.

We will now turn to the objectives of the Model Law. It has four of them. Just as we have done with the principles, we will also reproduce the objectives here in full.

The first one is “to give effect to the right of access to information held by a public body or relevant private body and any information held by a private body that may assist in the exercise or protection of any right”.

Second, to “establish voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to accurate information of information holders as swiftly, inexpensively and effortlessly as is reasonably possible”.

Third, to “ensure that in keeping with the duty to promote access to information, information holders create, keep, organise and maintain information in a form and manner that facilitates the right of access to information”.

Fourth, to “promote transparency, accountability, good governance and development by educating people about their rights under the legislation”.

2.3 **The Malawi Constitution**

The Malawi Constitution\(^8\) has two provisions on access to information under the Bill of Rights in Chapter IV. These are sections 36 and 37.

Section 36 provides as follows:

> The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to information.

\(^8\) Act No. 20 of 1994.
Section 37 provides as follows:

Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights.

Section 37 seems to assume or take it for granted that every person who will be making a request to access information will be able to link it to the exercise of a particular right. As Chirwa observes, this requirement seems to have been borrowed from the interim Constitution of South Africa. However, South Africa dropped this requirement in its final Constitution as it was deemed that it was going to render the right of access to information worthless. The term, ‘required’ is generally understood to mean ‘necessary’, ‘essential’ or ‘relevant’. A consensus has now emerged that to show that the information is essential or necessary to the exercise of one’s right would impose too onerous a burden on the right holder because it is not easy to all requesters to know what specific rights may be implicated by the information they have not yet seen. In *Claude Reyes et al v Chile* the Inter-American Court of Human Rights (IACHR) stated that:

> Article 13 of the Convention (guaranteeing freedom of expression) protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it... *The information should be provided without the need to prove direct interest or personal involvement in order to obtain it.* Emphasis supplied.

The other difficulty with linking the exercise of the right of access to information with the exercise of another right is that it is not clear which rights a requester can invoke. Is it rights contained in the Bill of Rights of the Malawi Constitution only? Would legal rights contained in legislation suffice? How about rights in international human rights instruments to which Malawi is a party and has ratified, would a requester invoke these as well? The levels of awareness of the rights by the people of Malawi are still not as impressive. It is because of these difficulties that a consensus has emerged that requesters should not prove direct interest or personal involvement or justification in order to have access to information.

### 2.4 National Access to Information Policy, 2014

The National Access to Information Policy, 2014 has three objectives. These are: (a) to facilitate provision of public information by Government and other institutions; (b) to ensure

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9 Chirwa, n4 above, 366.
10 Case Number Series C. No. 51, 19th September 2006.
statutory and regulatory compliance of the relevant sections of the Constitution; and (c) to provide a framework for developing the Access to Information Legislation. There is no doubt that a policy is not a legally binding document. However, at a minimum, the Malawi Government is obliged to follow its own policy or policies when developing legislation.

3.0 ANALYSING AND ASSESSING THE BILL

In this part, we examine the extent to which the Bill has complied with the framework in 2.0 above. The first principle in the Model Law was that every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.

It is our finding that this principle is clearly reflected in the Bill. Section 5(1) could not have been put any better when it provides that:

A person shall have the right to access information, in so far as that information is required for the exercise of his rights, which is in the custody of, or under the control of a public body or a relevant private body to which this Act applies, in an expeditious and inexpensive manner.

Our reading of the above section is that it does not limit in any way as to the time when the information was generated or created. It is basically open-ended and therefore a requester can make a request for information dating back to any time. This is in line with General Comment No. 34 referred to above, which propounded that a requester must be given access to information regardless of the date of production. The Bill however takes cognisance of the fact that information being requested may not be available or may not be found or may not exist. In that case, the Bill imposes an obligation on the information holder to notify the requester, and give a statement of the details of all steps taken to find the information, or determine whether the information actually exists and if it does or is later found determine whether to grant access, notify the applicant of the decision in writing, fees payable if any or indeed grant the applicant access to information.11

Furthermore, section 18(2) of the Bill dealing with Fees is to the effect that the fees payable by an applicant under this Act shall be limited to reasonable, standard charges for document duplication, translation or transcription, where necessary. This provision buttresses the inexpensive manner of accessing information.

The second principle in the Model Law is that ‘every person has the right to access information of private bodies that may assist in the exercise or protection of any right

11 See section 20 of the Bill.
expeditiously and inexpensively’. Section 2 of the Bill defines ‘private body’ to mean a person or organisation, not being a public body, who or which carries out any business in relation to public interest, or to rights and freedoms of people. Again, section 5(2) states as follows:

A private body shall on request, make available information in its custody or control, which it holds on a person who submits a request for that information pursuant to this Act.

Section 37 of the Malawi Constitution appears to limit the application of the right of access to information held by the State or any of its organs at any level of Government. Section 5(2) of the Bill is therefore an expansion of the right of access to information under section 37 of the Malawi Constitution by including private bodies holding personal information of the requester. This is in line with the dictates of the Model Law. Interestingly, section 5(1) of the Bill included the phrase, *inexpensive manner*. Does this mean the private body can afford to charge expensive fees? The answer should clearly be an emphatic no. The import of section 18(2) referred to above is that even private bodies are obliged to charge reasonable, standard fees for document duplication, translation or transcription, where necessary. The catchphrase is, ‘fees payable by an applicant under this Act’.

The third principle is that ‘this Act and any other law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure. Non-disclosure is permitted only in exceptionally justifiable circumstances as set out in this Act’. Similarly, this principle has been complied with fully in the Bill by sections 9 and 10 which require information holders to disclose certain information on their own relating to various matters such as manuals, policies, procedures, rules, the names, designations and other particulars of information officers, particulars of its organisation, functions and duties.

The second limb of the above principle would also appear to have been addressed. Non-disclosure is permitted only in exceptionally justifiable circumstances set out in the Bill. Part V deals with *information exempt from disclosure*. From the issue of demonstrable harm, protection of personal information, protection of information that preserves national security or defence, crime prevention or investigation of criminal or other unlawful acts commercial and confidential information, protection of life, health and safety of a person, protection of

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12 Section 32(b) of the Bill.
13 Section 23 of the Bill.
14 Section 24 of the Bill.
15 Section 29 of the Bill.
16 Section 25 of the Bill.
information on Malawi’s international relations,\textsuperscript{17} protection of legally privileged information,\textsuperscript{18} protection of information on ongoing academic or professional examinations and recruitment processes,\textsuperscript{19} manifestly malicious, frivolous or vexatious requests\textsuperscript{20} and third parties to be notified of disclosure of exempted information of public interest,\textsuperscript{21} all these have been lifted from the Model Law. The Bill however has a curious provision. Section 3(2) provides that it shall not apply to the following information—

(a) Cabinet records and those of its committees;
(b) court records prior to conclusion of a matter; and
(c) information excluded from publication under the Official Secrets Act; and
(d) personal information.

It is generally agreed that Cabinet records and those of its committees are information which is privileged from disclosure.\textsuperscript{22} The question however is, should they remain so, forever? For instance, why should a person not have access to Cabinet records of 1964 when Malawi had just received her independence from Britain? What harm would that kind of information cause to Malawi now if it was disclosed to some person who may require it to exercise the right to education in terms of research to understand say, the true reasons for the Cabinet crisis of 1964? One must quickly mention that section 22(2) has given powers to the Minister to declassify information as exempt from disclosure. While this power has been given to the Minister, the challenge is that section 3(2)(a) is very clear that the Act does not apply to information relating to Cabinet records and those of its committees, which means, it can never be declassified. Should this remain so?

The other curious one relates to court records prior to the conclusion of a matter. It appears that this provision has been borrowed from Uganda.\textsuperscript{23} Why should the would-be Act not apply to court records prior to the conclusion of a case say in a purely criminal or commercial case for example? Does the public not have the right to know and the media the right to report and publish freely within Malawi including on on-going cases? Are court records not

\textsuperscript{17} Section 28 of the Bill.
\textsuperscript{18} Section 26 of the Bill.
\textsuperscript{19} Section 27 of the Bill.
\textsuperscript{20} Section 30 of the Bill.
\textsuperscript{21} Section 31 of the Bill.
\textsuperscript{22} See for instance section 34(1) and (6) of the Freedom of Information Act 1982 of Australia which provides that Cabinet documents and those of a committee of the Cabinet are exempt documents. Uganda also has a similar provision in section 2(2)(a) of the Access to Information Act, 2005.
\textsuperscript{23} Section 2(2)(b) of the Access to Information Act, 2005.
public documents. Why does the law require that proceedings should be heard in open court then where references are made to documents filed by the parties? One would understand if the court record related to a child, for instance. Even in that case, it is not necessary to deal with that matter in the Bill because such issues are either addressed in polices or indeed child-related legislation or rules or practices of the court. Even in cases where parties do not want the public to attend hearings, there are specific provisions that are invoked for the proceedings to be heard in camera. It is contended that the Malawi Government has gone a little overboard here. The courts have enough tools to deal with the matter of access to court records in the interest of justice or propriety. Unlike the Cabinet records, at least here, there is an assumption that after the conclusion of the case, the court records may be accessible to every person. However, even that, may not be true in all types of cases. Again, cases dealing with children come to mind here. In law reporting for example, in concluded cases involving adults certain personal information concerning the parties may not be accessed by members of the public.

The Bill also excludes from disclosure information under the Official Secrets Act. This is an old piece of legislation, dating back to 1913. It is however an important piece of legislation mostly dealing with security or defence of the country. In our view, cross-referencing of this Act in the Bill as has been done in section 3(2)(c) will not hamper access to information held by public bodies not dealing with issues of security or defence of the country and public order. It is a drafting requirement that legislation dealing with similar matters must be cross-referenced. Cross-referencing does not make any legislation superior to the other. Even in developed countries, their access to information legislation specifically excludes from disclosure information under secrecy legislation.

The fourth principle is that “information holders must accede to the authority of the oversight mechanism in all matters relating to access to information”. The oversight mechanism envisaged in Part V of the Model Law is that of an independent and impartial commissioners for the purposes of promotion, monitoring, and protection of the right of access to information. In the original Bill which was submitted to the Malawi Government, it provided for an Independent Information Commission (IIC) under Part VI. In the Bill which the Cabinet

24 See the definition of a “public document” in section 2 of the Authentication of Documents Act, Cap.4:06 of the Laws of Malawi.
25 Section 60 of the Courts Act, Cap. 3:02 of the Laws of Malawi.
26 As above.
27 Cap. 14:01 of the Laws of Malawi.
28 See for instance section 38(1)(a) and (b) of the Australian Freedom of Information Act, 1982.
rejected on 17th November 2015, the Independent Information Commission was replaced by the Human Rights Commission (HRC). HRC was a better alternative because it met many of the criteria recommended in the Model Law on such issues as independence,30 holding office for a stipulated term,31 and being accountable to the National Assembly32 to mention but a few. The removal of the IIC and or the HRC is a cause for concern. In the words of HRC, ‘it grossly undermines the spirit and substance of the intended law. A robust and effective legal regime on access to information, depends to a large extent on the role of such a Commission to administer the relevant law, as well as play a regulatory and oversight function relating to access to information. This principle has been breached as the entire oversight mechanism has been removed from the draft legislation. This means that the appeal by the Special Rapporteur referred to part 2.0 above has been entirely thrown out of the window. In addition, the Malawi Government has also neglected and breached its own National Access to Information Policy (NAIP), 2014 which envisaged the establishment of an IIC without it being amended. If the Malawi Government cannot follow international best practices and its own policy on a matter, who will?

The fifth principle is that “any refusal to disclose information is subject to appeal”. This principle in the Model Law is based on the assumption that the requester will already have sought a review of the decision by the information holder to the head of the information holder known as internal review. In section 21(2) of the Bill, it actually provides that any refusal by an information holder to disclose information requested by an applicant under this Act shall be subject to review.

In the original Bill which was submitted to the Malawi Government, one of the functions of the Independent Information Commission was to sit as appellate body against the decision of the head of the information holder. In short, any refusal to disclose information under the Bill will not be subject to appeal, as there is no body created or established to hear such appeals. Once an internal review mechanism has been exhausted, the only other remedy available to a requester will be to apply to Court for review of a decision of an information holder.33 The Bill defines ‘Court’ to mean the High Court of Malawi. The disadvantages of using the High Court system in Malawi are well documented.34 Courts take too long to resolve matters, you require legal practitioners to represent you in the High Court who are

31 Section 5(1), n27 above.
32 Section 37, n27 above.
33 This is in terms of section 38(1) of the Bill.
deemed to be expensive by the greater majority of the Malawian population, the rules of the court and practice are very complicated for ordinary litigants, the court environment is not friendly et cetera. On the other hand, the IIC or the HRC would have been easily accessible to requesters, it would also dispense quicker justice at a low cost. The Legal Aid Bureau (LAB) which is supposed to assist indigent persons in Malawi to access justice is not sufficiently funded and it also has few lawyers. This may mean that once the head of the information holder has upheld the decision to refuse to disclose information by the information holder, to most people, that may be the end of the matter. In an appropriate case, where a requester has resources to pursue the matter in Court and the Court determines that information was wrongfully denied, then the officer or institution responsible shall be liable to a fine of two hundred and fifty thousand Kwacha (K250,000). Persons who are granted access to information and use it for unlawful purpose, or reasons other than those for which a request for information was made, without the authority of an information holder; or in such a manner so as to be detrimental to the interests of public officers, information holders or the public interest, commits an offence, and shall on conviction be liable to a fine of two million kwacha (K2,000,000) and imprisonment for two years. The disparity between the fines in sections 40 and 41 is so huge even though it is appreciated that the offence in section 41 may affect many people than in section 40. Actually, the Malawi Government is sending a wrong message here, which is that it can wrongfully deny people information and that arrangements will be made to pay a smaller fine after all. There is an urgent need to rationalise these fines somewhat.

The sixth principle is that “public bodies and relevant private bodies must proactively publish information”. This principle is somewhat similar to the third one. In our view, Part III of the Bill also covers proactive publishing of information. Section 6(2) of the Bill also imposes a similar obligation to every information officer.

The seventh principle espoused by the Model Law is that “no one is subject to any sanction for releasing information under this Act in good faith”.

The principle is reflected in article 87 of the Model Law. In the original Bill that was submitted to the Malawian Government by MISA-Malawi, this principle was reflected in section 16. This principle too is generally recognised in the Bill.

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35 Section 40 of the Bill.
36 Section 41 of the Bill.
37 It provides as follows:

(1) No person is criminally or civilly liable for the disclosure or authorisation of the disclosure in good faith of any information under this Act.
Section 4 (e) provides that one of the objects of the Act (when it becomes so) is to provide for the protection of persons who release information of public interest in good faith. We searched in vain for a substantive provision effecting this object in the Bill which principally is meant to protect whistleblowers. The question is why was it left out? Is it by mere inadvertence or design? As the Bill stands now, it means that whistleblowers are not protected. It is a sad development because, it would be difficult then to deal with issues of fraud, corruption, or other dishonest or criminal conduct in public bodies or relevant private bodies if persons who bring out such information in the public interest in good faith are not specifically protected by a substantive provision in the Bill. This development is also unfortunate because it contracts the general policy of the Malawi Government on access to information and its role in the fight against corruption as it appears in the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act which specifically protects whistleblowers.\(^3\) In this regard, the Bill has gone against the constitutional principles of accountability and transparency and the spirit of the much-talked about public sector reforms. It would be recommended that a public interest disclosure based on wrongdoing such as fraud, corruption, miscarriage of justice e.t.c. be included in the Bill in addition to section 31 as is the case in other jurisdictions such as Uganda.\(^4\) Section 31 of the Bill states that where an information holder has claimed an exemption to be of public interest, the information holder shall notify an affected third party in writing that the information shall be disclosed after the expiry of fifteen working days from receipt of the notice; and inform the third party of that party’s right to have the decision reviewed; the authority to which an application for review should be lodged; and the period within which the application for review may be lodged.

Coming to the objectives, the first one was to give effect to the right of access to information held by a public body or relevant private body and any information held by a private body that may assist in the exercise or protection of any right. This objective is similar to the first and second principles. The discussion on these two principles applies with equal force to this objective. The Bill reflects the first objective.

\(^3\) See for instance, sections 20, 21 and 22 of the Act.

\(^4\) Section 3(c) of the Access to Information Act of Uganda states that one of the purposes of that legislation is to protect persons disclosing evidence of contravention of the law, maladministration or corruption in Government bodies. This is followed by a substantive provision in section 34(a)(i) which is to the effect that, notwithstanding any other provision in that Part, an information officer shall grant a request for access to a record of the public body otherwise prohibited under that Part, if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with the law; the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.
The second objective was to establish voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to accurate information of information holders as swiftly, inexpensively and effortlessly as is reasonably possible. Section 4(c) states that one of the objects of the Bill is to provide for a framework to facilitate access to information held by information holders in compliance with any right protected by the Constitution and any other law. Part II of the Bill on Compliance with Access to Information Obligations deals exhaustively with voluntary and mandatory mechanisms, processes or procedures to give effect to the right of access to information and effective compliance and implementation of the Act. The discussion on fees or costs to be charged has also been already addressed elsewhere. In short, this objective is also reflected in the Bill.

The third objective was to ensure that in keeping with the duty to promote access to information, information holders create, keep, organise and maintain information in a form and manner that facilitates the right of access to information. Similarly, this objective is reflected in Part II of the Bill generally and section 7 in particular. Furthermore, section 9(3)(c) requires every public body to publish information relating to its processes and procedures for creating, keeping, organizing, maintaining, preserving and providing information, documents or records.

The fourth and last objective was to promote transparency, accountability, good governance and development by educating people about their rights under the legislation. Section 4(b) states that one of the objects of the Bill is to ensure that public bodies disclose information that they hold and provide information in line with the constitutional principles of public trust and good governance. Section 4(d) provides that another object is to promote routine and systematic information disclosure by information holders based on constitutional principles of accountability and transparency. We have already discussed these objectives when discussing the principles. However, section 4(f) states that another object of the Act is to facilitate civic education on the right to access information under this Act. Even though the Minister of Information and Civic Education was quoted as saying that he shall be responsible for raising awareness of the Act,40 no such power has been expressly given to the Minister under the Bill.

There are a few minor general observations to be made on the Bill. First, under section 8, it has two subsections, but only 2 is clearly indicated as such and not 1. Section 11(1) does not read well. It provides as follows:

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Every information holder shall, not later than three months after the end of a financial year, submit to the Minister a report on their level of compliance with the provisions of this Act, during that financial year in the form and manner as may be prescribed.

It is our contention that the words during that are not correct. They should be replaced with of the previous. Section 11(2) provides as follows:

The Minister shall, within three months after receiving the reports in subsection (1), submit an annual report to Parliament covering the general activities of information holder in implementing the provisions of this Act in the year to which the report relates.

It is our contention that the word holder is not correct. It should be replaced with holders. Furthermore, in terms of section 49(1) of the Malawi Constitution, ‘Parliament’ consists of the National Assembly and the President as the Head of State. Was it the intention of the draftsperson that the Minister should report to both the National Assembly and the President or just National Assembly? This ambiguity needs to be resolved. Otherwise, the original Bill which was submitted to the Malawi Government by MISA-Malawi was very clear on that point that the IIC was going to make a full report to the National Assembly on the exercise and/or performance of its functions under the Act.41

The requirement on submission of annual reports on the levels of compliance with the provisions of the Act by information holders have been totally watered down in the Bill. For instance, there is now no sanction for failure by any information holder to which the Act applies, to submit its annual compliance report to the Minister. In the original Bill, such failure attracted a minimum penalty of K1,000,000 and any additional sanctions as may have been determined by the Independent Information Commission.42 Secondly, in the original Bill, the annual compliance report was also supposed to be simultaneously made available publicly, as information holders reported to the IIC and failure to do so was also actionable in the High Court.43 This was to ensure the highest levels of accountability and transparency by public bodies and relevant private bodies to the public. It is now very doubtful whether information holders will take their responsibilities under the Act seriously in the absence of such water-tight provisions which have been removed in the Bill.

The word appeal in section 34(7)(b) is not correct. The discussion has already shown that there is no appellate mechanism put in place in the Bill. The appropriate word is review. The same is also true of section 35(4) and (5)(b).

41 See Section 57(1) of the original Bill (on file with the author).
42 See Section 58(3) of the original Bill (on file with the author).
43 See Section 59 of the original Bill (on file with the author).
CONCLUSION AND RECOMMENDATIONS

The analysis and assessment has shown that out of the seven internationally recognised principles on access to information legislation, the Bill has incorporated five, and left out two. It is weak on the principle dealing with oversight mechanism which has been totally removed altogether from the Bill. The original Bill which was submitted to the Malawi Government by MISA-Malawi had an IIC. The draft Bill which was rejected by Cabinet on 17th November 2015 replaced the IIC with the HRC which was a better alternative than completely removing it altogether, the way it has been done. This is against international best practice on access to information legislation. It is also a breach of the NAIP, 2014 which envisaged an oversight mechanism in the name of an IIC. The removal of the oversight mechanism in the Bill has also created a gap in that there is no body to handle appeals following decisions on internal review by the head of an information holder. Similarly, this is against international best practice on access to information legislation. If the idea was to cut costs, at a minimum, HRC should have been left intact in the Bill to exercise the functions, powers and duties and oversight role of an IIC. In any case, HRC has been willing and is still willing to take on board this added responsibility. The objective of promoting awareness and civic education of the right to access information has also been affected by the removal of both IIC and HRC from the Bill. No section in the Bill has given that responsibility to the Minister as alleged. The section on disclosure of wrongdoing based on public interest which was in the original Bill has also been removed. This means that the Bill is so weak that it cannot be used as a tool in the fight against corruption and fraud and other unlawful activities occurring in public bodies and relevant private bodies which is one of the objectives of an access to information legislation. It is a lost opportunity. The Bill would have strengthened existing legal framework on the fight against corruption.

In an ideal situation, it would also have been better to remove the need for justification on the part of the requester for the access to information as it is also against international best practice now, notwithstanding that the Malawi Constitution is frozen, on that point, in time. The annual compliance requirements by information holders need to be water-tight as they were in the original bill as discussed in the preceding section.

It is recommended that the gaps and weaknesses identified in the Bill should be brought to the attention of the Malawi Government and the National Assembly so that if possible they can propose some amendments to the Bill before it is presented to the National Assembly or indeed while it is on the floor. The National Assembly has been able to do so on a number of Bills including the Legal Aid Act on the appointment of Director and Deputy Director. Alternatively, the National Assembly may consider referring the Bill to an appropriate
committee for further scrutiny and consultations. This is our recommendation. The Committee or Committees of the National Assembly should oversee that process. It is also recommended that some of the sections in the Bill need to be reworded as proposed in part 3.0 above.
Selected Bibliography


The Republic of Malawi Constitution.


