Access to Information and Protection of Privacy Act

Fact Sheet Two:
Access to information and freedom of expression

Introduction:

Sections 5-29 of the Access to Information and Protection of Privacy Act [Chapter 10:27] (AIPPA) provide mechanisms for accessing information held by public bodies.

However, as the analysis below will show, the provisions are actually concerned with restricting journalists from accessing information, with the end result that the so-called access to information is more illusory than real.

The principle of freedom of expression:

Freedom of expression is one of the most precious of all the freedoms human beings can enjoy and is an indispensable condition for a free and democratic society. Freedom of expression (which also involves the freedom to receive information) is critical for any democratic polity in four critical ways:

(a) it helps an individual to obtain self-fulfilment.
(b) it assists in the discovery of truth, and in promoting political and social participation.
(c) it strengthens the capacity of an individual to participate in decision-making.
(d) it provides a mechanism by which it will be possible to establish a reasonable balance between stability and social change. Generally, respect for freedom of expression (as well as the right of access to information held by public bodies and companies) will lead to greater public transparency and accountability, good governance and democracy.

Freedom of expression is universally recognised as a core value of society. The United Nations’ Universal Declaration of Human Rights (UDHR) (Article 19) states that:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.*
The African Charter on Human and Peoples’ Rights (ACHPR) (Article 9) also declares: *Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his/her opinions within the law.*

Zimbabwe is a signatory to the Windhoek Declaration (Article 9) which states: *African states should be encouraged to provide constitutional guarantees of freedom of the press and freedom of association.*

Thus, the standard measure for press freedom in any country is the extent to which its media laws comply with these conventions.

Section 20(1) of the Constitution of Zimbabwe states that: *Except with his/her own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his/her freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*

Although there is no explicit provision on freedom of the press in the Zimbabwean Constitution, this provision on freedom of expression is held by many to extend to freedom of the press. The logic is that unless citizens have access to a free media that provides platforms for their expression, freedom of expression becomes meaningless.

It is thus argued: “It is the mass media that makes the exercise of freedom of expression a reality”. The concept of a free press is premised on the notion that the ultimate objective of a free media is to provide citizens with the information they will need in order to participate in the running of their own country.

However, both the Zimbabwean Constitution and international covenants acknowledge that freedom of expression is not an absolute and unlimited right, and that it may be subject to restrictions in certain specific instances.

In terms of section 20(2) (a) of the Zimbabwe Constitution, restrictions on the right to freedom of expression may only be “in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health”. There are also restrictions aimed at protecting the reputations and private lives of persons (section 20(2) (b)).

In the exercise of freedom of expression, the media communicate various ideas, opinions and information to the public. Inevitably some of the information that the media disseminate lies in direct conflict with other interests in society. The media may either deliberately, or through negligence, violate other people’s constituted rights, hence the restrictions above. Any other restrictions imposed, however, must not be reasonably justifiable in a democratic society (see section 20(4) (b) of the Zimbabwean Constitution).

**The principle of access to information:**

Access to information is an important element of freedom of expression. The people’s right to know is also often defined as the right of the people to have access to information held by government and other public entities. This access is vital in two major ways.
First, in order for the people to exercise their full rights as citizens, they must have access to the information, advice, and analysis that will enable them to know what their personal rights are and allow them to pursue them effectively. Secondly, they must have access to the broadest possible range of information, interpretation, and debate on areas that involve public political choices, and they must be able to use the media in order to register criticism and propose alternative courses of action.

Access to information legislation is generally based on the principle that public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Normally, public bodies should be under obligation to publish key information that it is in the public interest. Any restriction should be clearly outlined and strictly and narrowly defined to avoid undue denial of information. Another rationale for access to information is accountability and transparency, both of which are the very essence of a democratic constitutional order. Accountability presupposes a high degree of openness.

Access to information enables people to know what decisions the government is taking on their behalf and the reasons behind those decisions. If a government is allowed to work in secrecy, it may abuse the power entrusted to it - corruption and vice thrive in secrecy.

**Access to information as provided by AIPPA**

A mere glance at sections 5-29 of AIPPA reveals that the very title of the Act is a misnomer as it gives one the impression that the Act is meant to ensure that individuals have the right to access information held by government and other public bodies. In fact, AIPPA has more provisions and restrictions limiting people’s rights to access public information than guarantees for the same.

Most of the provisions discussed below are in clear violation of the Constitution of Zimbabwe, especially section 20(1) which guarantees all individuals the right to receive and impart information. This means that these provisions are invalid, since, according to section 3 of the Constitution of the country, “if any other law is inconsistent with [the] Constitution that other law shall, to the extent of the inconsistency, be void”.

For example, the Act stipulates that it is only the head of a public body that may answer requests for information. According to the Second Schedule of the Act, a “head” is defined as high-level government official such as the permanent secretary, the director-general, the general manager, Registrar-General and the Executive Mayor.

The implication here is that a head of a police station cannot comment or give out information to the press on matters relating to his/her area of jurisdiction, as only the Police Commissioner is mandated to do this. The actual effect of this provision is to restrict public officials from giving information to the media, and this curtails citizens’ rights to access to information, as most ‘ordinary’ citizens simply do not have the means to access high-level government officials such as the Commissioner of Police.
Section 7 of AIPPA sets a fee that has to be paid for one to access information from a public body. This means that those individuals who do not have the necessary amounts cannot access the required data, making public information a commodity that can be sold to the highest bidder. This again contravenes Section 20(1) of the country’s Constitution that clearly stipulates that everyone has the freedom to receive and impart information without hindrance or interference.

It can be argued that the levy charged for one to access government information is a hindrance or barrier to one's access to information.

Further, heads of public bodies are actually allowed by law to decline or delay applicants’ access to data. According to section 8 of AIPPA, heads of public bodies are allowed up to 30 days to respond to an application to access information.

The section does not take into account the possibility of urgent requests for access to information, especially that which is made by a journalist covering a story. This provision actually renders invalid section 20 of the Zimbabwean Constitution and the whole point of AIPPA itself. Read together with sections 11 and 12, heads of public bodies have about 70 days to respond to a request for access to public records or information, without any guarantee that access would be granted.

Surely, within 70 days new situations would have arisen and in cases of fraud or corruption in public enterprises, the concerned parties would have had enough time to cover their tracks. It is often said that these days, censorship is not about telling what the media should or should not publish: it is often enough to delay the news so that it is no longer relevant. Thus, these rather lax response periods are in fact a hindrance to the exercise of the right to freedom of expression, making them patently unconstitutional and, as a result, null and void.

AIPPA further stipulates 10 categories of information that cannot, under any circumstances, be made available to journalists. These include:

1. deliberations of Cabinet, which includes advice, policy considerations, recommendations to Cabinet and draft legislation prepared for submission to Cabinet (section 14(1)).
2. deliberations of local government meetings held in camera (section 14(4)).
3. information subject to client-attorney privilege (section 16).
4. information whose disclosure will be harmful to the law enforcement process and national security (section 17).
5. information relating to inter-governmental relations or negotiations (section 18).
6. information relating to the financial or economic interests of a public body or the State (section 19).
7. private individual research information, and information relating to the conservation of heritage sites (sections 20 and 21).
(8) information relating to personal or public safety (section 22).
(9) information relating to the business interests of a third party (section 24).
(10) information relating to personal privacy.

What is particularly problematic about these restrictions is that they provide for blanket bans on any category of information related to the above. Section 20(2) does not permit a blanket restriction of information. It operates on the principle of openness and that each restriction must be specific and would be considered separately. Blanket restrictions hinder the exercise of the right to freedom of expression.

Section 14(3) is particularly obnoxious in that it states that government has a right to hold on to any information on cabinet deliberations, draft legislation, or local government officials' meetings for a period of up to 25 years! This means that government is effectively insulated from public scrutiny for up to 25 years and thus is not accountable to the very people that voted them into power.

There is no reason why the public should not have access to draft legislation being discussed by government because such legislation will obviously affect everyone, and thus everyone has a right to input into the proposed law before it is approved!

Clearly this section violates section 20 of the Constitution of Zimbabwe, which gives citizens the right to receive information. Deliberations of Cabinet and other public bodies are currently protected from disclosure by the Official Secrets Act, the Broadcasting Services Act, and the various restrictions on the right to freedom of expression stated in section 20(2) of the Constitution of Zimbabwe which allows government the right to refuse to disclose certain matters, relating to matters potentially prejudicial to the defence, public safety, public order, and economic interests of the State, public health, or public morality.

The blanket ban on information relating to inter-governmental relations (section 18) is also unconstitutional as it allows the government to ‘hide’ information on the rather flimsy excuse that it might harm inter-governmental relations. The public has a right to know relations their government enters into with other governments in order to participate in decision-making processes on an informed basis. These relations are negotiated for and on behalf of the people. Citizens, therefore, have a right to demand for that information.

Clearly, AIPPA was promulgated to protect government from public scrutiny as the above restrictions are too absolute, and are not made subject to the greater good of public interest. Further, the application for access to specific data is deliberately laborious, time consuming, potentially expensive and subject to the discretion and whims of individual government officials.

It is recommended that these sections be amended to provide for reasonable and strict time limits for the processing of requests for information and a
requirement that any refusal be accompanied by written reasons that are consistent with Section 20(1) of the Constitution of Zimbabwe.

Any refusal to disclose information should also be subject to appeal before an independent body, and not the MIC (as AIPPA states), since the body is firmly under government control and therefore lacks sufficient independence to undertake this important and politically sensitive task.

In addition, the Act should be reformed to add a requirement that all public bodies must establish open, accessible internal systems – including designated persons (like spokespersons/information/communication officers) – for ensuring that someone is always available to provide information should the public request it.

Further, fees levied against those applying for information should be struck off – the only justifiable fee that anyone seeking information should pay is the cost of reproducing such information.

Any refusal to disclose information should be subject to appeal to an independent body. Unfortunately, the MIC, to which such appeals should be lodged, is politically compromised and therefore incapable of playing the role of an independent adjudicator in the case of appeals.

Ends.