

The Jesuit Centre for Theological Reflection (JCTR)

ACCESS TO INFORMATION LAW IN ZAMBIA: FOR WHO AND FOR WHAT?

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Foreword

For a long time in Zambia, the idea of Access to Information (ATI) or Freedom of Information (FOI) has been associated with journalists. The thinking is that journalists are the individuals who need information for their work. This is despite the fact that to access information is a right, provided for in international law, which must be enjoyed by everyone. However, due to this misconception, the fight for the ATI law has been left to journalists.

As an organisation whose work includes the promotion of human rights, the Jesuit Centre for Theological Reflection (JCTR), has been leading the campaign to ensure Zambia has a law that provides for access to information. Its work has been done in the context of an Access to Information Coalition which comprises of Civil Society Organizations (CSOs) such as MISA-Zambia, Press Freedom Committee of the Post, and Dialogue for Development. Others include Common Cause Zambia, Operational Young Vote, Southern Africa Centre for the Constructive Resolution of Disputes, Transparency International Zambia, and Action Aid Zambia.

Beginning in 2011, the CSO ATI Coalition has been sensitizing the public with the aim of helping them appreciate the gravity of accessing information. Beyond this, the Coalition has also been engaging government to enact the ATI law.

This booklet is therefore aimed at enhancing public education about this law. JCTR anticipates that with full information available on the meaning and significance of the ATI law, individual citizens, the Church, other Civil Society Organisations, interest groups and tertiary institutions will take up the challenge to join the campaign so that Zambia can have an explicit legal framework through which information can be accessed.

The JCTR therefore welcomes comments and suggestions from readers concerning the contents of this booklet.

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Introduction

Since the coming of the Patriotic Front (PF) party into power, there has been great public expectation about the enactment of the Access to Information law. This public expectation arose from the fact that it was one of the party's campaign promises while in opposition. After winning the September 2011 general elections, which ushered the party into government, the PF continued with this promise. In 2012, the PF-led government established a Taskforce on ATI with a remit to draft the Bill. This increased hope among the public that the government would deliver on that score. In June 2012, the government produced a draft ATI Bill, which raised more public expectation that the law would finally be enacted by the end of that year. Disappointingly, it has now been seven years of PF rule and there have been no further significant signs of commitment to this particular campaign promise. This booklet therefore serves as an educational tool on the right to access information. It is also aimed at reminding different stakeholders of their duty to demand the ATI law. The booklet furthermore takes stock of efforts made in this regard, challenges experienced and the steps different stakeholders need to take, which include government and the general citizenry.

What is Access to Information?

Access to information (ATI) is the concept that information held by public or state institutions or private institutions conducting business that has implications for the public should be accessible to the public. It is also referred to as Freedom of Information (FOI) or the Right to Know (RTK). The basis for this accessibility is that all information kept in public institutions belongs to the public. Therefore, the public should be allowed to access such information.



The ATI Coalition Picketing Parliament on the ATI Law in May 2016

Access to information is also a human right and therefore it is an entitlement. Article 19 of the Universal Declaration of Human Rights 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 media and regardless of frontiers.”

Since access to information is a right, the State is obligated as a duty-bearer to facilitate this right through legal mechanisms. A piece of legislation that provides for a right to access information is referred to as an Access to Information law or Freedom of Information law.



Access to Information is everyone's Right

While the public has the right to access information, the type of information they should have access to, is only that which is of public interest. This type of information is kept in both public and private institutions. A private institution can be, for example, a contractor or supplier who has a business contract with the government and is being paid from public resources. In this case, the public is entitled to access information about this private entity. However, information such as an individual's health records cannot be demanded using the ATI law because that is a personal matter and not in public interest. Therefore, in accessing information, there are exemptions and these exemptions will be determined by the legislation in a particular context. In many countries for example, information that relates to national security has restrictions. In Zambia this type of information, although in public interest, is protected by the State Security Act. Thus, such information can only be accessed through prescribed legal procedure.

Purpose of Access to Information

Access to information encourages effective participation by citizens in political, social and economic process. For example, when citizens are well informed about governance processes in their country and information is available on how they should participate in such processes, there is a possibility that they will take interest at least in some aspects of civic participation. But where information is lacking, effective public participation in important process cannot be guaranteed.



An Informed Community is a participative citizenry.

Furthermore, access to information promotes a culture of transparency and accountability. In a democracy, these two aspects are key to realising good governance. Unaccountable and opaque public institutions cannot earn trust from the public. Transparency, for instance, about how decisions that affect the public are reached and accountability about how public resources are accrued and used become critical for the public. In Zambia it is important, for example, that information about public funds meant for development projects in each Constituency is made available. There is a developmental fund called the Constituency Development Fund (CDF), which by law is supposed to be disbursed annually to every constituency. Ordinarily, the public should be informed regularly where the money is being used, how people in such areas should contribute to developmental ideas and how projects are being implemented. Transparency and accountability may not only apply to public institutions but also to private institutions that conduct business with the government. Transparency is demanded from public leaders both in the government and private sector.

In addition, the right to access information enables beneficiaries to obtain what is due to them. As citizens' participation in governance increases with access to information, citizens begin to make demands that direct public resources towards intended goals.

Access to information also helps to curb corruption. With access to information, there is a likelihood that any public officer with the intention to solicit a bribe or abuse their office in any way will be scared that members of the public will obtain such information and call them to account. Thus, national resources can be used for the development of the country and for the benefit of every citizen.

Principles of Access to Information Law

Maximum disclosure: Bodies covered by an ATI Act have an obligation to disclose information whenever the public requests for it. Even where there is no request, these public bodies are required by law to proactively publish and make available documents of relevance to the public. This, in practical terms, means that public institutions make available information about their mandate, project reports, their future plans and anything else of relevance to the public.

Minimum Exceptions: This principle demands that exemptions to the principle of maximum disclosure should be kept to an absolute minimum and should be narrowly drawn. This principle is aimed at protecting and promoting public interest. Exceptions are normally put to a test to determine whether such information poses any risk if disclosed.

Simple, clear and quick access procedures: The law demands that the public should obtain information with ease. Obtaining information should also be inexpensive and prompt. Thus, there should be no difficulty in obtaining information whenever needed by the public. In some cases, members of the public may not pay to access information but in others, it might be necessary to pay. For example, if one is requesting for a document that requires photocopying, they should pay for such a service.

Effective enforcement: The law should provide for independent appeal mechanisms and penalties. Any refusal to disclose information is accompanied by substantive written reasons and includes the processes of appeal.

Access to Information law origins

Sweden was the first country in the world to enact a piece of legislation that provides for access to information. The legislation was enacted in the 18th Century (1766). Since then, countries around the world have discerned the necessity for this piece of legislation and over 100 countries have enacted

such laws. Eleven of these countries are in Africa. These are Angola, Ethiopia, Guinea Conakry, Liberia, Nigeria, Niger, Rwanda, South Africa, Uganda, Tunisia and Zimbabwe.

ATI law in Zambia

Zambia has been working towards the enactment of the ATI law for almost two decades now. Attempts to do so have been made since the country reverted to multi-partism in 1991. At the time, journalists who felt that in the spirit of multi-partism it would be good also to enhance transparency by enacting such a law, spearheaded the demand for ATI. But the United National Independence Party (UNIP) government led by Kenneth Kaunda was uncomfortable with such a law. The Frederick Chiluba-led Movement for Multiparty Democracy (MMD) as an opposition party then capitalized on the demand and used it as one of their campaign promises. But after coming into power in historical elections, the new government began to equally drag their feet and later went quiet on the demand. In 2001, the government published the FOI bill for stakeholder input, but it was never enacted into law. Sensing that the government was not really interested in media legal reforms, the Zambia Independent Media Association (ZIMA), now called Media Institute of Southern Africa (MISA) Zambia Chapter, teamed up with other stakeholders and spearheaded the reforms. Stakeholders included the Press Association of Zambia, Zambia Union of Journalists, Zambia Association of Media Women, and the Society of Senior Zambia Journalists. This team of stakeholders implored various strategies of advocacy that put pressure on government and eventually made it succumb to their demands for their rights.



Media Legal Reforms have continued to be demanded by various stakeholders

In November 2002, the Freedom of Information Bill was drafted and later tabled before Parliament, together with the Zambia National Broadcasting Corporation Amendment Bill and the Independent Broadcasting Authority Act. While the other two Bills were passed, the FOI Bill only went as far as the first reading before the government withdrew it. The Freedom of Information Bill 2002 was sponsored by two opposition Members of Parliament, namely Livingstone constituency's Sakwiba Sikota of the United Party for National Development and Petauke Central's Ronald Banda of the Heritage Party. The Bill had provided for the establishment of the Public Information Commission to ensure, among other things, the purposes of the Act were carried out. The Bill further provided for the right of access to information and compelled public bodies to avail public information whenever it was requested for. Article 10 provided as follows:

“(1) Subject to this Act –

- (a) every person shall have the right of access to information which is under the control of a public authority;
- (b) every public authority shall make available to the general public or, on request, to any person information which is under its control;
- (c) every public authority shall make available to the general public or, on request, to any person access to public meetings or to places where information may be obtained;
- (d) every private body shall make available, on request, information which it holds on the person requesting for the information, if reasonable evidence is shown regarding the purpose of the request.”

The Bill did not compel any member of the public seeking information to provide reasoning for their request.

Article 10 (2) stated: “A person who requests for information in pursuance of the right in subsection (1) need not give any reason or justification for that person's interest in the information being requested for.”

The FOI Bill 2002 received overwhelming support from legislators, including a majority from the ruling party. But sensing embarrassment arising from its imminent success, the then information minister Newstead Zimba asked movers of the Bill to stop, claiming that the government had similar intentions, so there was no need of having private members' Bills. The government further claimed that it needed to consult widely, both locally and internationally. ZIMA did not mind who presented the Bill—the focus was instead on the content—so they agreed. The MMD administration therefore consulted for the next nine years, until they were voted out of power in 2011.

Then came the Patriotic Front (PF) government in 2011. Having promised the public that they would enact the ATI law in their “famous” ‘90 days’ slogan, they began the process by establishing a Taskforce on Access to Information in 2012. This was composed of members from government ministries such as Information and Broadcasting Services, Ministry of Justice, Civil Society Organisations, the private sector, and the Church. The remit for the Taskforce was to draft the law and sensitize the public in all provinces so that when such a law was enacted, it would be used effectively. After the release of the 2012 draft Bill, there was increased public anticipation regarding the administration’s seriousness on enactment. To the contrary, this story under PF ultimately ended with a copy of the 2012 ATI draft Bill.

A Recap of Excuses and Pronouncements under PF

- i) Launch postponed because the Minister of Information has travelled to the Copperbelt for a funeral.*

After the Bill was drafted, the Taskforce was scheduled to travel to all provinces for public sensitisation on the topic. The Bill was scheduled to launch on 21st June of the same year. However, the launch did not take place as the public was informed that the then minister of Information and Broadcasting Services, the late Kennedy Sakeni had travelled to the Copperbelt for a funeral instead.

- ii) Need for consultation with the Attorney General*

The launch was rescheduled to 26th June, but it was yet again cancelled because the government claimed they needed further consultation with the office of the Attorney General.

- iii) Vice President announces the Bill will be tabled in Parliament in February 2013*

The second cancellation of the launch was followed by a long silence on the status of the Bill after which then Vice President, Dr. Guy Scott announced it would be tabled before the House in February 2013. Dr. Scott made this announcement when he officiated the 2012 Lucy Sichone and Bright Mwape Award organized by the Press Freedom Committee of the Post.

- iv) Sakeni’s sickness and subsequent death*

When the Civil Society Coalition made a follow-up on the status of the ATI Bill around July/August 2013, they were informed that the Bill could not be considered at Cabinet level due to the sickness and subsequent death of the then Minister of Information and Broadcasting Services, Kennedy Sakeni.

v) *Harmonisation of the Bill with existing laws*

After all these excuses, there was another that the Bill was not in tandem with existing laws. It therefore was decided that the document needed to be harmonized with existing laws that it could possibly conflict with. The question that remained in the public mind was why the issue had not been considered at the time of drafting since experts had handled the document. Thereafter, there have still been one-off pronouncements by different political leaders regarding the ATI Bill, including by Justice Minister Given Lubinda. He was quoted in the media as saying that the government was still keen on delivering the Access to Information law. According to media reports, Lubinda said that the government was working on systems to be put in place to support the proposed legislation. He is reported to have further said that some of the systems the government wanted to strengthen included archiving.

Other pronouncements came from Chishimba Kambwili who also served in the same portfolio under President Edgar Lungu. He too promised to take the Bill to the National Assembly for enactment, but never did before he was relieved of his duties in November, 2016.

Current status of the Bill

As of 2015 when some members of the ATI Coalition visited the Ministry of Justice, they were informed that the Bill had been refined and handed over to the Ministry of Information and Broadcasting Services. When the ATI team later in 2016 engaged the Permanent Secretary at the Ministry of Information and Broadcasting Services, they were told that the Bill was there, but that it was awaiting cabinet approval. Further, the Minister then was supposed to issue a Cabinet Memorandum to trigger the process of scrutinizing and subsequently approving the Bill before it could be tabled in Parliament. Since then, there has only been infrequent but unconvincing statements about the government's commitment to enacting the ATI law. This song has been sung by every other government official to date, but in reality there has never been any action of substance.

Real issues behind the inaction

Lack of political will: With the list of excuses and pronouncements since 2011, the public would like to believe in the government's good will. But given the length of time that this process has taken, seven years to be precise, citizens are also bound to be skeptical as they have been subjected to endless explanations with regard to the lack of action on this matter. The

issue about harmonization is in fact a serious one because by this argument, government seems to imply that the drafters they engaged in 2012 were blind to the possible existence of other laws that stand in conflict with the ATI Bill. At one point, the public was informed that the draft Bill was with the Ministry of Justice. Another time, the public was informed that the Bill was a responsibility of the Ministry of Information and Broadcasting Services. Naturally, one would expect that the Ministry of Justice would from the start consider ascertaining whether or not the Bill was in conflict with existing laws. Surely, by the time the Bill was announced to the public, it would have been thoroughly scrutinized by various legal experts. The truth is that there has been a lot of rhetoric surrounding the enactment of the ATI Bill. Simply put, there is no political will to enact this law.

Fear of the Unknown: There is a Civil Society Coalition on ATI that has been active in educating the public on the concept of access to information. This Coalition has also led a campaign for the enactment of the ATI law. The Coalition has had a number of engagements on this subject with politicians, including Members of Parliament. It is clear from the discussions that a significant number of them lack understanding of the ATI law. In fact, some of them imagine that the law is aimed at journalists entering their bedrooms so that there is no privacy. And it has caused a lot of panic and great fear among most of them. This outright ignorance from some lawmakers is a huge source of worry. But the question is: why should one be so fearful when the information to be accessed is public in nature? The fear expressed is not just from those in the PF government but politicians in general. And this is not merely about the PF government, as the MMD were equally fearful of this law. If there are fears relate to state secrets and the risk of security, provisions exist in the draft Bill to ensure the country is not at any security risk. There are exemptions in the 2012 draft Bill for this purpose. One thing is certain: the unfounded fear is a weapon to close the eyes to the possibility of enacting an ATI law in Zambia so that opportunities for accountability and transparency by public institutions and political leaders are limited.

In May 2015, both Kambwili and President Lungu told the nation that they would think twice about enacting the ATI Bill because of what they termed irresponsible reporting from journalists. Their reaction emanated from an expose by *The Post* newspaper about a US\$192 million loan that the government had contracted from China for the improvement of security systems in the country.

The following was Mr Kambwili's reaction: *"I'm directing the Inspector General of Police with immediate effect to take keen interest in the leakage of this document and bring the culprits to book. Even if government sat and discussed this loan, there is absolutely no way that it can be brought to the general public because the issues that are contained therein are issues of very high security..."*

Now government has even started thinking that maybe this is even the reason why successive governments did not enact the Freedom of Information Bill because of irresponsible reporting like this. And I want to appeal to ZAMEC (Zambian Media Council) which is supposed to regulate the print media that we agreed as government to allow the media houses to regulate themselves through ZAMEC, but we are disappointed because it appears ZAMEC is now toothless. They are letting The Post newspaper go away with it, despite the fact that they know that The Post newspaper is behaving without ethics in some articles. There is no ethical standards in their reporting and I want to say that as government, we may be forced to regulate the media if ZAMEC does not do anything about it. So my appeal to The Post newspaper is to be responsible, otherwise we will be forced to regulate the media. ZAMEC must start doing its job. If ZAMEC does not do its job, I'm afraid we may think twice about the Access to Information Bill."

Kambwili's fears were also expressed by his predecessors, starting with those in the UNIP and MMD administrations respectively. In fact in 2005, the then Luapula MMD Member of Parliament Dr. Peter Machungwa remarked at a workshop organised by MISA Zambia on ATI as follows: *"We know that some of you journalists want this law because you want to be following us in our bedrooms and write about what we do. You want to be invading our privacy and embarrass us."*

Belief that information is accessible: There is a firm belief by government officials that information is already accessible as some of it is on websites of different ministries and certain documents are accessible to the public. While this may be the case to some extent, there is still a huge challenge in accessing public information in Zambia without a legal framework. JCTR, for example, has had difficulties in obtaining information that relates to how tax monies are spent by respective authorities. Asking for such information is often equated to mistrusting the government, instead of supporting it. Officials do not see the demand for information by citizens as legitimate. Thus, there is merit in citizen's demands for an ATI law. Currently, it is hard to obtain certain information from government departments even when the information being sought is purely for academic purposes. Another significant challenge is that there are often no timeframes within which such information can be given. Access depends on whether or not a particular officer is willing to give the information being sought. When they decide not to give information, there is often no explanation for withholding such public information. Questions are also asked about how one is going to use the information. When a law is provided, this should not occur, as the public should enjoy this right within the provisions of the law.

The Role of Different Stakeholders in the Campaign for ATI Law

Government

Government needs to take stock of their real position on the ATI law and communicate it to the people. The public certainly has a right to know what the government's position is. In fact, it is in the government's own interest to show real commitment towards the completion of this important process and endeavor to present the Bill to Parliament as promised in their election campaigns. The public deserves to know the truth and the time is now. It is also important to keep in mind that processes such as those of ATI enactment cost the country resources. So, when important process for enactment begin, it is advisable that they are completed within a certain timeframe, as stopping at some stage and beginning again demands more resources. The government also needs to listen to what the public is demanding and bring this issue to its conclusion.

Civil Society Organisations

There is generally good will among Civil Society Organisations to ensure that the country has an ATI law. Commitment has been shown through the work of the CSO Coalition on ATI, which has been educating both the public and politicians on the importance of the ATI law. The Coalition has engaged several chiefdoms and their subjects in all 10 provinces. The people engaged in all provinces appreciate the essence of this law. However, in practical terms few organisations show real commitment to this process. What might be needed among CSOs is to put strategic thinking into this process so that the government is ultimately compelled to table the Bill before Parliament before the next general elections.

It might be important, for instance, for CSOs to be consistent in their engagement with the government to elicit the real reason for failure to enact the law. CSOs should also take a proactive approach in their advocacy and lobbying. Waiting to hear a government statement and simply reacting to it in the media is certainly not the best approach.

Broader civil society: (church, media, interest groups, student bodies, etc)

The concept of civil society goes beyond the traditional Civil Society Organizations. Often, civil society is reduced to CSOs and these are seen to be those who should advocate. With regard to the campaign on ATI, efforts made have largely come from few CSOs and some media houses such as MISA-Zambia and the Press Freedom Committee of The Post. There is, therefore,

need for the wider civil society to be more involved. For example, the Church could educate its flock on the ATI to generate interest for their participation in the campaign. The same should be said about student bodies, given that they have other students to engage for a buy-in. All these groups should see how important information is in their daily lives and join in lobbying the government to enact the law.

The Law Association of Zambia

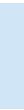
Where are the lawyers to give guidance when the government argues that the ATI Bill is in conflict with other laws? Where are the lawyers to assure the government that this law is not meant to endanger their security? The engagement of lawyers is crucial in that they can provide informed public debates based on their legal knowledge. For example, lawyers can enlighten the public on which laws are in conflict with the ATI Bill and how long experts can make them harmonious. Beyond this, they can also advise on the practicability of clauses in the law and those that may be ambiguous so that the law is adequate for its purpose. The Law Association of Zambia can also make its services available to CSOs advancing the cause.

Conclusion

To access information is both a human right and a social need. It is a necessity particularly in a democracy where every citizen has a role to play in the governance of the country. It promotes transparency and accountability; it helps in the fight against corruption and generally leads to open governments and to effective democratic participation by the public. Government has an obligation to make access to information possible as a duty-bearer, while the public is entitled to demand that their right is fulfilled. When there is no legal channel to do so, the challenge of enjoying this right is greatly increased. Thus, the duty-bearer and the rights-holders have a responsibility to play their part in ensuring the enjoyment of access to information. Concerted efforts from the wider civil society and the public that can ensure there is an ATI law in Zambia, just as there are in several African countries. Thus, the ATI Bill must become a reality in Zambia.

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Booklet

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