

AN ANALYSIS OF WEAKNESSES IN ACCESS TO INFORMATION LAWS IN  
SADC AND IN DEVELOPING COUNTRIES.

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Freedom of Expression Institute (FXI).

# CONTENTS

## *ACKNOWLEDGEMENTS*

I.	INTRODUCTION AND METHODOLOGY	4
II.	BACKGROUND	5
III.	SADC REGION	6
	- Zimbabwe	6
	- South Africa	10
	- Zambia	17
	- Mozambique	19
	- Malawi	22
	- Lesotho	26
IV.	POLICY PRONOUNCEMENTS, AGREEMENTS AND GOVERNMENT DECREES PROVIDING FOR ACCESS TO INFORMATION	28
V.	DEVELOPING COUNTRIES	29
	- India	29
	- Trinidad and Tobago	31
	- Jamaica	32
	- Mexico	33
VI.	CONCLUSIONS AND RECOMMENDATIONS	33
	BIBLIOGRAPHY	38

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## I. INTRODUCTION AND METHODOLOGY

This report examines the weaknesses in access to information legislation and policy frameworks providing for access to information to advance socio- economic rights in the Southern African Development and Economic Community (SADC) region and developing countries. The examination is undertaken primarily with a view to identifying specific provisions in access to information legislation that impede access to information for the advancement of socio- economic rights. Thereafter, the report will suggest recommendations aimed at the facilitation of social and economic justice in the use of access to information legislation.

With the dearth of access to information legislation in most SADC countries,<sup>1</sup> the right to access information finds resonance in policy pronouncements by the government/government decrees, and in memorandums of agreement between relevant state departments and civil society organizations- thus making it crucial to incorporate these creative methods of accessing information within this investigation. In SADC, the analysis will tend to emphasize weaknesses in accessing information as provided for under agreements and policy guidelines of the government and state departments within which requested information resides. South Africa and Zimbabwe are exceptions as they have access to information provided for under an Act of parliament.<sup>2</sup> SADC countries such as Lesotho, Malawi, Mozambique and Zambia currently have draft bills awaiting passage in parliament. In addition to analyzing existing regimes providing for access to information in these two countries- draft bills will also be examined as they provide the basis for future access to information laws.

A range of organizations were approached in the information-gathering phase of the research:

- MALAWI ECONOMIC JUSTICE NETWORK- MEJN
- ANTI- PRIVATISATION FORUM- APF South Africa
- CENTRE FOR ECONOMIC JUSTICE IN SOUTHERN AFRICA
- JUBILEE SOUTH AFRICA
- JUBILEE ANGOLA
- ECONOMIC JUSTICE COALITION- Mozambique
- ZAMBIA ASSOCIATION OF RESEARCH AND DEVELOPMENT- ZARD
- LESOTHO COUNCIL OF NGO'S- LCN
- NATIONAL SOCIETY FOR HUMAN RIGHTS- Namibia
- MEDIA INSTITUTE OF SOUTHERN AFRICA- Namibia
- ZIMBABWE COALITION ON DEBT AND DEVELOPMENT- ZIMCODD

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<sup>1</sup> See Memeza M Baseline Report on Access to Information in the SADC region, report commissioned by the Freedom of Expression Institute (2004).Duncan J in Active or Passive? The Right to Information in Southern African Constitutions, The OSISA Journal 4th ed. Issue 3, November 2004 at p.16 also makes the point that: 'In all the countries except Swaziland, the right of access to information is guaranteed under the broad contours of the right to freedom of expression and in certain instances the limitations on the right render it meaningless. Even more, many SADC countries do not recognise the right of access to information, in spite of the fact that – through the *SADC Protocol on Culture, Information and Sport* countries are expected to promote freedom of information.'

<sup>2</sup> The Promotion of Access to Information Act 2 of 2002 in South Africa and the Access to Information and Protection of Privacy Act 2002 (General Notice 116/2002). The Act was amended in June 2003 by the Access to Information and Protection of Privacy Amendment Act 2003, No. 5 of 2003.

- JUBILEE ZAMBIA
- South African History Archives (SAHA)

In accordance with the research's focus on the relationship between access to information and the advancement of socio- economic rights, civil society organizations that were approached varied from human rights and social and economic justice seeking organizations to social movements advocating for social and economic rights through popular struggles.

An approach to information gathering utilized a range of sources:

- Literature review
- Publications and websites
- Telephone and face to face interviews
- E- mailed requests for information to respondents

## **II. BACKGROUND**

South Africa and Zimbabwe are the only two countries in SADC to have enacted access to information legislation.<sup>3</sup> Most SADC countries are party to international treaties that guarantee the right to receive and impart information.<sup>4</sup> Domestic constitutions, with the exception of Swaziland also provide for the right to access information within a cluster of rights under the rubric of the right to freedom of expression.<sup>5</sup> Where a constitution does not guarantee the right to freedom of information, the concept of the right to access publicly held information is given recognition by a government decree or a policy pronouncement. Despite these wide ranging commitments both at domestic and international level, most SADC countries have yet to enact access to information legislation. It is also worth- mentioning, without downplaying these gaps, the significant developments that have taken place in the past two years. In 2004 Malawi and Zambia had a draft bill ready for passage before parliament. The bills are currently under consideration. This year also saw draft bills emerging from Mozambique and Lesotho. The process of presenting these bills before parliament is currently underway. A new era of government transparency seems to be flowing in SADC. In the words of Banisar (2004:3):

“Openness is starting to emerge in Africa. South Africa enacted a wide reaching law in 2001 and many countries in southern and central Africa, mostly members of the Commonwealth are following its lead.”

Mavuto Bamusi of the Malawi Economic Justice Network (MEJN) concedes that the Malawi draft bill on access to information is modeled on exactly the same lines as South Africa's access to information legislation but cautions against a heavy reliance on a piece of legislation that has its own flaws.<sup>6</sup> George Dor of the Southern Africa Centre for Economic

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<sup>3</sup> Beyond SADC- other countries to have enacted access to information legislation in Africa to date include Ghana, Kenya, Nigeria and Uganda.

<sup>4</sup> The International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration on Human Rights (UDHR) and the African Charter on Human and People's Rights (ACHPR).

<sup>5</sup> In other words, the right to freedom of information is treated as an incident of the right freedom of expression.

<sup>6</sup> Interview with Mavuto Bamusi: Deputy National Coordinator of MEJN, 15.06.05

Justice (SACEJ) also alludes to an over- reliance on a legislative scheme by other Africa countries, particularly SADC region countries that has practical and demonstrable limitations at home:

“There is a need to critically evaluate South Africa’s access to information legislation (the Promotion of Access to Information Act of 2002) because it is presented as the model access to information legislation in the region. For example- there are lessons to be learnt from the Ibrahim Harvey case and other failed attempts to obtain information in state hands.”<sup>7</sup>

The tendency towards adopting access to information legislation modeled along the lines of South Africa’s Promotion of Access to Information Act<sup>8</sup> is informed largely by the perceived civil and political rights achievements of South Africa.<sup>9</sup> As will be apparent later in the report, the experiences of most civil society organizations indicate that the debate on civil and political rights is not about to be over and in fact there is a dialectical relationship between the lack of delivery of socio- economic rights and challenges in accessing information in state hands.

It is against this background that the paucity of examining draft bills in SADC countries cannot be over- emphasized. In addition to an examination of weakness in access to information laws in Zimbabwe and South Africa- an analysis of current draft bills in Malawi, Lesotho, Mozambique and Zambia will be undertaken. The challenges in relying on government decrees, policy pronouncement and memorandums of agreement will also be explored. An examination of these developments at SADC will also take into account experiences of developing countries such as Mexico, India, Trinidad and Tobago and Jamaica.

### **III. Southern African Development Community (SADC) REGION**

#### **- ZIMBABWE**

It is difficult to explore weaknesses in Zimbabwe’s Access to Information and Protection of Privacy Act<sup>10</sup> (AIPPA). Some have contended that the Act does not give effect to the right of access to information and therefore cannot be classified as access to information legislation. A misnomer about this Act that bears mention is that whilst its title refers to freedom of information and access to information, its provisions provide for the opposite. The main thrust of the Act is to give the government extensive powers to control the media by requiring

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<sup>7</sup> Interview with George Dor: Southern Africa Centre for Economic Justice (SACEJ), 17.06.05

<sup>8</sup> 2 of 2002

<sup>9</sup> In a Conference on The Constitutional Right of Access to Information held on 4 September 2000 at St. George’s Hotel, Rietvlei Dam Pretoria, Dr Michael Lange Konrad Adenauer Foundation- reflecting on the contributions of participants remarked that: South Africa is considered by many observers to be a legally consolidated democracy in which development towards a constitutional, pluralistic state, ruled by the new law of the land, appears to be irreversible.

<sup>10</sup> Access to Information and Protection of Privacy Act (AIPPA), 15th March 2002 (General Notice 116/2002). Amended in June 2003 by the Access to Information and protection of Privacy Amendment Act, 2003, No. 5 of 2003

<http://www.kubatana.net/html/archive/legisl/030611aippaamd.asp?sector=LEGISL>

the registration of journalists and prohibiting the abuse of free expression.<sup>11</sup> It has been widely viewed as an instrument designed to give the government more powers for media censorship.<sup>12</sup> As a result, its value as a piece of legislation enabling access to information has been largely diminished. ZIMCODD- Organizer and Information Officer<sup>13</sup> with the Zimbabwe Coalition on Debt and Development (ZIMCODD) attributes the dissonance in the purpose of the Act and its implementation to the political climate that exists in Zimbabwe. The growth of an independent and assertive media in Zimbabwe in the early 1990's is considered as one of the factors that led the government to introduce sweeping restrictions on the media in the form of AIPPA.<sup>14</sup>

On paper, the Access to Information and Privacy Act (AIPPA) also creates a right of access by any citizen or resident (but not an unregistered media agency or foreign government) to records held by a public body that are generally similar to other freedom of information laws around the world. There has only been one reported instance of the access to information provision being successfully used in Zimbabwe and it has been by the opposition party.<sup>15</sup>

The Zimbabwean experience demonstrates that the mere existence of an Act does not always mean that access is possible. Access to information as provided for under AIPPA is by name only. It is therefore a mammoth challenge to review weaknesses in Zimbabwe's access to information law, as it remains unused and is not an access to information piece of legislation as such.

Even more, according to ZIMCODD, AIPPA has never been seen as a tool that would advance socio- economic rights:

“The restrictions that apply in Zimbabwe are directed more towards the media, so that AIPPA was enacted with that in mind. As a result it is

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<sup>11</sup>ODAC Background Paper: *Public Accountability and Multilateral Governance: The State of the Art Challenges for the Region* at p.9. [www.opendemocracy.org.za/documents/Background\\_Paper.doc](http://www.opendemocracy.org.za/documents/Background_Paper.doc). In a report by Article 19 on The Access to Information and Protection of Privacy Act: Two Years On, the Act (AIPPA) is described as the leading weapon of the government and the ruling ZANU- PF in their ongoing campaign to stifle independent media reporting in Zimbabwe <http://a19.sylaba.pl/index.php?id=25051>

<sup>12</sup> Banisar D. *Freedom of Information Around the World Update 2002*, (Harvard University, 2002) [www.privacyinternational.org/issues/foic/](http://www.privacyinternational.org/issues/foic/)

<sup>13</sup> Interview with ZIMCODD, 13.06.05.

<sup>14</sup> For an overview of the constitutional and legislative framework enabling access to information in Zimbabwe- see Memeza M Baseline Report on Access to Information in the SADC region, report commissioned by the Freedom of Expression Institute (2004) at p.18. The report (at p.19) also explores the mutually reinforcing relationship between AIPPA and other similarly draconian pieces of legislation such as the Public Order and Security Act (POSA) which has been tightened to impose a jail sentence of up to two years for any journalist caught working without accreditation from the government-controlled media commission. A number of legislation in Zimbabwe in the mould of AIPPA such as the Broadcasting Services Act 3 of 2001 gives the government extensive control over any future private broadcasters should licenses be issued and POSA- which grants virtually unlimited discretionary powers to the executive to restrict the flow of official information contribute to the generally negative political culture necessary for access to information. Another such example is section 18 of the Zimbabwean Law and Order Maintenance Act (LOMA). This Act allows the President to prohibit certain publications in his absolute discretion with no possibility of judicial review.

<sup>15</sup> MDC Demands Forex Receipts From RBZ, Financial Gazette (Harare), June 13, 2002.

media organisations that are in the forefront of requesting and engaging with AIPPA as it directly affects them.”<sup>16</sup>

AIPPA therefore, because of its overriding objective to give the government extensive powers to control the media- is seen as irrelevant and therefore unused by organisations seeking access to information to advance socio- economic rights. ZIMCODD further states that:

“...because of its onerous provisions, the Act has rendered the right to access information an elite right. It sells information at a higher price because of its provisions requiring the payment of a fee by the requester. Its provision that the public authority upon whom information is sought must respond to a request in thirty days ends up defying the purpose for which the information is sought in the first place.”

AIPPA’s focus on media control has also meant that organisations seeking access to information to advance socio- economic rights have often missed the opportunity to test the legislation through making requests- and eventually challenge some its provisions in court.

MWENGO<sup>17</sup> is one organization that has attempted to access information in state hands, and has had to make a distinction between instances where the information is readily made available; where access is denied and where the government department concerned does not have the administrative wherewithal to make available information even where it can.

It is the last instance that MWENGO identifies as featuring prominently in attempts to access information. This instance- where a government department does not have the administrative capacity to make information available leads to mute refusals. In other words, the information is out there, and the official struggles to get hold of it and in the eyes of the requester this amounts to a refusal to furnish the requested information. MWENGO characterizes this as one of the problems that continues to vex even those public authorities that are willing to make available unclassified information.

In addition to mute refusals, there have been instances where there have been outright refusals to grant information. This has been particularly the case in the areas of macro-economic policy formulation.

According to MWENGO, in light of these challenges, there is therefore a need in the process of drafting access to information legislation to look critically at the readiness of bureaucracies in some SADC countries to roll out the demands attendant upon the enactment of a freedom of information legislative framework. For example, in some developing countries such as Jamaica,<sup>18</sup> the access to information legislation was phased in – in different stages: Jamaica’s access to information legislation provided for the establishment of the Access to Information Unit to oversee its implementation, train and guide the government

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<sup>16</sup> Interview with Simbiso Marimbe: Organiser and Information Officer, ZIMCODD, 13.06.05.

<sup>17</sup> MWENGO’s main objective is to strengthen the capacities of NGO’s in Eastern and Southern Africa to articulate and implement a development agenda rooted in African experience and analysis.

<sup>18</sup> Discussed in detail under section V of the report.



department responsible for supplying information (the Jamaica Archives and Records Department) and was also enjoined by legislation to work with non governmental organisations.

Zimbabwe's AIPPA on the other hand establishes under it- the Media and Information Commission (MIC) with oversight responsibilities and is also mandated to hear applications for appeals after refusals to grant information by a state department. ZIMCODD contends that the composition of the Commission is a serious cause of concern for civil society organisations:

“The MIC is comprised of ruling party apologists. Infact, the Ministry of Information has powers in terms of the Act to appoint the members of the Commission. Even more, the body's discretion and the significant powers it yields in deciding media accreditation and media workers' registration has also been a borne of contention.”<sup>19</sup>

It would seem that the perceived lack of independence of the Commission has also contributed to lack of requests for information. The attitude according to ZIMCODD is: *'why request in the first place when you won't get information and even an appeal process cannot avail you.'*

ZIMCODD further points that:

“Section 9(4) of AIPPA is also problematic. It refuses access to information if it is in the public interest to do so. The Act is not clear on what public interest means or would entail. As a result- a wide variety of circumstances may be described as being in the public interest in a bid to prevent access to information.”<sup>20</sup>

ZIMCODD goes on to state that:

“The provisions dealing with exceptions are not specific but broad. This section is invoked often to bar access to information.”<sup>21</sup>

On access to information related to debt and trade negotiations, ZIMCODD contends that- the Official Secrets Act<sup>22</sup> treats information on multilateral agreements and trade agreements as classified information. The Central Bank- when approached for information contends that what the state owes is classified information and the Zimbabwean government is bound by agreements with creditors not to divulge such information.

ZIMCODD states that:

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<sup>19</sup> Interview with ZIMCODD, 13.06.05.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> 16 of 1970. This Act prohibits the disclosure for any purpose prejudicial to the safety or interests of Zimbabwe of information which might be useful to an enemy: to make provision for the purpose of preventing persons from obtaining or disclosing official secrets in Zimbabwe; to prevent unauthorised persons from making sketches, plans or models of and to prevent trespass upon defense works; fortifications, military reserves and other prohibited places and to provide for matters incidental thereto.

“The figures that the Central bank is willing to provide are those of the World Bank and IMF- big institutions but they refuse to give information on small institutions and countries in general. The only source of information is the Blue Book- an annual report of the Ministry of Finance and the Central Bank providing information on state allocations. However beyond the Blue Book- civil society organisations advocating for social justice need information about expenditure. This information is also crucial for meaningful participation in budget processes.”<sup>23</sup>

Requests for information by ZIMCODD have however been on an informal basis and there hasn't been a concerted effort to seek information through AIPPA. ZIMCODD concedes this point and states that:

“AIPPA has not been explored. Its main aim was to crush the media. Even if there are certain positive aspects about it- its resolve to control the media has overshadowed its usefulness.”

With only a few instances where AIPPA has been used- lessons on the practical challenges in accessing information in Zimbabwe are hard to come by. However some general points can be made about some of the provisions of the Act, namely:

- The exceptions and exclusions to the right to information are so comprehensive as to effectively negate the right;
- The Act allocates broad regulatory powers to the MIC but this body is firmly under the control and whip of the Minister responsible for information;
- The problem of mute refusals must be dealt with through the inclusion of a provision providing for the an access to information body to oversee its implementation, train and guide the government department responsible for supplying information and also work closely with non governmental organizations in educating the public on the right to access information.

At a general level, the Act is undermined by a political culture that is averse to the right to access information and this is coupled by an extensive legal regime bolstered by Acts that proscribe access to information on debt and debt related matters.<sup>24</sup>

## - SOUTH AFRICA

The Constitution of the Republic of South Africa<sup>25</sup> guarantees the right of access to information in Section 16(1).<sup>26</sup> The general right in section 16(1)(b)<sup>27</sup> is augmented by an

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<sup>23</sup> Ibid

<sup>24</sup> For example the Official Secrets Act treats information on multilateral agreements and trade agreements as classified information.

<sup>25</sup> 108 of 1996.

<sup>26</sup> Section 16(1) states that: “Everyone has the right to freedom of expression, which includes:

explicit right of access to information in section 32 of the Constitution. There is a further Constitutional obligation that the state enacts enabling legislation to fully realize this right.<sup>28</sup>

Contemporaneous with section 32(2) of the Constitution, parliament enacted the Promotion of Access to Information Act<sup>29</sup> (PAIA) to give effect to the right of access to information. PAIA is therefore legislation with a particular constitutional status: it is legislation mandated by the Constitution to give effect to a Constitutional right.<sup>30</sup>

Through PAIA, South Africa is enjoying freedom of expression and access to information than it has done for many decades, even centuries. In a workshop on Media and Corruption- Kaitira Kandji of the Media Institute of Southern Africa (MISA) described PAIA as providing clear and detailed procedures for accessing a very broad range of both public and private information and also stated that:

“The exemption provisions are reasonable and subject to a public interest test and it provides a mechanism for oversight and monitoring which should ensure continued improvements and refinements as the Act begins to have an impact in South Africa.”<sup>31</sup>

Kandji further notes that despite the Act’s exemplary architecture it is not without problems:

“There have been problems in the implementation of the Act and its use has been limited. Surveys conducted by the Open Democracy Advice Centre in 2002 and 2003 found, *“on the whole, that PAIA has not been properly or consistently implemented, not only because of the newness of the Act, but because of low levels of awareness and information of the requirements set out in the Act. Where implementation has taken place it has been partial and inconsistent.”*<sup>32</sup>

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- a. freedom of the press and other media
  - b. freedom to receive or impart information or ideas.
  - c. freedom of artistic creativity; and
  - d. academic freedom and freedom of scientific research.

<sup>27</sup> “Freedom to receive or impart information or ideas.”

<sup>28</sup> For a detailed exposition of the South Africa’s constitutional and legislative framework providing for access to information- see Memeza M Baseline Report on Access to Information in the SADC region, report commissioned by the Freedom of Expression Institute (2004) at p.34.

<sup>29</sup> 2 of 2000. The Promotion of Access to Information Act, Act 2 of 2000. For a detailed analysis of the Act, see Currie and Klaaren, The Promotion of Access to Information Act Commentary (Siber Ink 2002). <http://www.gov.za/gazette/acts/2000/a2-00.pdf>.

<sup>30</sup> Currie I and Klaaren J, The Promotion of Access to Information Commentary, Siber Ink Publishers 2002 at p.12.

<sup>31</sup> Kaitira Kandji: Programme Manager- MISA in a paper presented at a workshop: Media and Corruption: Raising the Bar, May 29 –June 3, Park Plaza Hotel, Sandton, South Africa.

<sup>32</sup> Allison Tilley and Victoria Mayer, Access to Information Law and the Challenge of Effective Implementation, in The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice (ODAC 2002).

George Dor of the Southern Africa Centre for Economic Justice (SACEJ) also makes the point that:

“PAIA has positive elements but these positive attributes are overshadowed by the teething problems of implementation. Where people have tried to access information they have faced delays and found it to be expensive. Government and business have often found delaying tactics for meeting request for access to information.”<sup>33</sup>

Another major weakness in South Africa’s access to information legislation according to Dale McKinley at least from a practical point of view is that the remedies- the final remedy in particular for non-compliance lies in a process that ordinary South Africans cannot afford i.e. the courts.<sup>34</sup>

The weaknesses in South Africa’s access to information legislation can broadly be characterized in following ways:

- The lack of a cheap, accessible, quick and effective mechanism for resolving disputes under the Act.
- Record keeping and voluntary disclosure of information
- Time limits
- Relief from fees
- Scope of exemption from PAIA
- Circumstances under which public interest dictates that request should be refused.

I now turn to deal with these weaknesses in the Act and the ways in which they manifest practically.

Most civil society organizations cited the lack of a cheap and effective way of resolving information requests without having to go to court. According to Dale McKinley:

“Access to court is a privilege for most South Africans. The legislation and the way in which it is drafted masks socio- economic issues. The inability of ordinary South African to have easy and quick access means that only blue- chip or well funded civil society organisations are capable of realizing this right. There are therefore huge institutional and practical difficulties for the poor in accessing information.”

Trevor Ngwane of the Soweto Electricity Crisis Committee adds that:

“It is easy for Researchers and Academics to tolerate the protracted and onerous methods of accessing information. They have all the time and

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<sup>33</sup> Interview with George Dor, 17.06.05.

<sup>34</sup> Interview with Dale Mckinley, Publicity and Information Officer of the Anti Privatisation Forum, 20.06.05.

they are sometimes paid to do this. But for an ordinary South African this is not the case.”<sup>35</sup>

Rolf Sorenson of the South Africa History Archives (SAHA) contends that what is needed is a forum to be created under the Act to assess requests and later refusals of a request by a public or private body before resort to court action.<sup>36</sup> In a report commissioned by the Human Rights Commission in 2002 with respect to its role under PAIA, SAHA expressed the view that any such dispute- resolution mechanism should provide for the making of binding orders and not merely recommendations for the resolution of disputes. The Open Democracy Advice Centre was also commissioned in 2002 to research aspects of this issue by the Human Rights Commission and came to a similar conclusion.<sup>37</sup>

In addition to setting this body up under PAIA, Sorensen argues that such a body should be responsible for other functions such as promotion, publicity, education, advice, assistance, monitoring and reporting to Parliament. PAIA currently assigns responsibility for these functions to the South African Human Rights Commission (SAHRC) and the responsibility for resolution of disputes over substantive issues to the courts and those over mal-administration to the Public Protector.<sup>38</sup> However Sorensen argues that the SAHRC’s role as provided for under section 8 of the Human Rights Commission Act of 1994 does not allow it to undertake dispute resolution under PAIA because PAIA establishes a legislative scheme for enforcing the Act conferring specific powers of this type to the SAHRC. There is therefore a need for a new forum for dispute resolution under PAIA alternatively the SAHRC’s role should also be extended to give or it must be given powers to make binding orders.

The courts have also been criticized as providing an expensive mechanism for seeking recourse under PAIA. Sorensen argues that there is a need to consider assigning access to information cases to the Magistrates Court.<sup>39</sup> Another option would be to refer matters to the SAHRC or the Information and Privacy Commissioner for mediation. This would provide a cheap and quick dispute resolution mechanism. This is a matter that obviously has a great practical impact on social justice seeking organisations that are currently facing serious funding difficulties for which taking a matter to court is not an option. The expense that comes with taking a matter to court as the last form of recourse under the Act has had demonstrable and dire effects on the work of civil society organizations particularly those working to advance socio- economic rights, and according to Dor:

“Since 1998, the Southern Africa Centre for Economic Justice (SACEJ) has been demanding the correct figures of South Africa’s debt due to foreign countries and institutions. Recently demands for information have been made to the Minister of Finance about the ABSA – Barclays

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<sup>35</sup> Interview with Trevor Ngwane: Chairperson of the Soweto Electricity Crisis Committee, 21.06.05.

<sup>36</sup> Sorensen R The Impact of South Africa’s Promotion of Access to Information Act After Three and A Half Years: A Perspective, ESARBICA Journal 22, 2003 at p.51.

<sup>37</sup> ODAC Research Paper: The Promotion of Access to Information Act, Commissioned Research on the Feasibility of the Establishment of an Information Commissioner, The Open Democracy Advice Centre, Cape Town.

<sup>38</sup> Sorensen R The Impact of South Africa’s Promotion of Access to Information Act After Three and A Half Years: A Perspective, ESARBICA Journal 22, 2003 at p.53

<sup>39</sup> Ibid at p.55.

deal. The South African Minister of Finance claims that we don't have a debt problem and that we no longer have an Apartheid debt. Research of the available data shows this not to be the case. The ministry has refused access to its data and Jubilee South Africa in its campaign 'OPEN THE BOOKS' has been met with outright refusal. Seeking recourse through PAIA hasn't been an option because of the expensive and lengthy processes including court battles in the end."<sup>40</sup>

McKinley also points out that as a result of these institutional and practical blockages access to information risks becoming a right exercisable by blue chip non-governmental organisations and the urban elite.<sup>41</sup>

Another weakness in PAIA is the vexed issue of record keeping and the voluntary disclosure of information. The maintenance of an up to date archival and proper recording system of information ensures that the problem of mute refusals is obviated. This will also deal with the perception that public officials are not interested in providing information. Where information is out there and the requester knows this, and the official struggles to get hold of it- in the eyes of the requester this not only amounts to a refusal to furnish the requested information but also creates a perception in the public mind that public officials are not committed to a culture of openness and accountability.

It is against this background that a provision must be created as indicated above that augments the powers of the SAHRC or alternatively the creation of new forum not only to oversee the implementation of PAIA but also trains and guides the government department in discharging their duties under PAIA.

The issues of fees- even though section 22 of PAIA provides for the making of regulations exempting appropriate categories of requesters of information from payment of fees. Despite the fact that the Act has only been in operation for just over three years, such regulations have not yet been made. Currently it is only individuals requesting information personally that are exempted. The fee stands at thirty-five rands.

In addition to providing relief to fees for requests made personally, Sorenson contends that the Act should also require that the time spent on severing disclosable information from that subject to exemption under PAIA and on routine declassification of governmental information be specifically recorded. The latter should be expressly excluded from fees calculated and imposed for preparation of records subject to release.<sup>42</sup>

Under PAIA, any person can demand records from government bodies without showing a reason. State bodies currently have thirty- days to respond.<sup>43</sup> The period is reduced from sixty-days before March 2003 and ninety- days before March 2002. The Act includes a unique provision that allows individuals and government bodies to access records held by private bodies when it is necessary to enforce the right of the public. Private bodies must respond in

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<sup>40</sup> Interview with George Dor, 17.06.05.

<sup>41</sup> Interview with Dale McKinley, 20.06.05.

<sup>42</sup> Sorenson R The Impact of South Africa's Promotion of Access to Information Act After Three and A Half Years: A Perspective, ESARBICA Journal 22, 2003 at p.57.

<sup>43</sup> Section 35 of the Promotion of Access to Information Act.

thirty- days. In certain circumstances, provision for a longer period to deal with requests could be desirable, provided that the person requesting the information authorizes any extension.

According to Sorenson, SAHA's experience, almost entirely with public bodies, has been that the requirement that a requester under PAIA be responded to within thirty- days is very rarely met in practice. Statistics kept by SAHA record average times taken to respond to a request by each body to which a request has been made. Statistics for 2003 indicate that the average response time was just under 150 days for public bodies, although interestingly it just over thirty days for private bodies.<sup>44</sup>

Sections 27 and 58 of PAIA currently provide for 'deemed refusal' of a request for information on the expiry of the time within which a response must be made. In order to improve speedy processing of requests for information, a provision could be included replacing deemed refusal with deemed acceptance of such a request. In other words- once the request has been accepted, it has to be processed speedily and secondly the expiry of the time for responding must not be relevant. For Ngwane, certain information may be useful if granted within a short space of time in order to deal with pressing issues of water and electricity provision. If the information is provided later it might not be useful anymore.<sup>45</sup> It is for this reason that a provision compelling timeous disclosure of information that it is in the public interest and that can be readily made available to requesters should be incorporated into PAIA.

Records excluded from PAIA are those listed under section 12. The exclusions relate to judicial functions. The scope of exemptions also extends to undertakings of confidentiality. McKinley argues that the so- called third party information exemptions are often invoked in an attempt to conceal the nature of contractual undertakings between the state organs such as municipalities and service providers. This is one area where the effects of the privatization of basic services are felt.<sup>46</sup> For Ngwane, the Ibrahim Harvey request for information is a case in point. In this case information regarding a contract Johannesburg Water- a service utility overseeing the provision of water and sanitation in the Johannesburg area had entered with a service provider to undertake water and sanitation services in the Johannesburg area. Access to information was refused on the basis of the agreement that both parties had entered that certain information on the contract should be confidential. Information was denied on the basis of the third party agreement exemption. It should not be enough to exempt access to information that both parties agreed to make the information confidential. This section in the Act should be revisited as it sometimes refuses information whose public interest considerations outweigh privity of contract and confidentiality of certain terms between the two contracting parties. Litigation to resolve the tension between these competing interests is not an option for certain civil society organizations and poor South Africans as pointed out above.

Sections 46 and 70 of PAIA provide for circumstances under which information will be released in the public interest. However, the circumstances under which information from

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<sup>44</sup> Sorensen R The Impact of South Africa's Promotion of Access to Information Act After Three and A Half Years: A Perspective, ESARBICA Journal 22, 2003 at p.58.

<sup>45</sup> Interview with Trevor Ngwane: Chairperson of the Soweto Electricity Crisis Committee, 21.06.05.

<sup>46</sup> Interview with Dale Mckinley, 20.06.05.

public and private bodies can be released in the public interest are currently so narrow as to raise doubt that these provision do give effect to the constitutional right to access to information. Removing the need for the information sought to reveal evidence of a breach of the law or a serious and imminent threat to public safety or the environment should broaden the public interest override. Release of information under sections 46 or 70 should be permitted whenever the public interest in disclosure outweighs the harm caused by the non-disclosure of the information.

Overall, the weaknesses in PAIA can be summarized as follows:

- Like Zimbabwe's AIPPA, South Africa's access to information legislation runs the risk of retaining exceptions (sections 12, 29, 37(1)(a) and 65) and exclusions to the right to information that are so comprehensive and inequitable as to effectively negate the right to access information;
- The problem of mute refusals must be dealt with through the inclusion of a provision providing for the an access to information body to oversee the implementation of the Act, train and guide the government department responsible for supplying information and also work closely with non governmental organizations in educating the public on the right to access information;
- To deal with the problem of the lack of cheap and effective ways of resolving information requests without having to go to court. A forum must be created under the Act to assess requests and refusals of a request by a public or private body before resort to court action;
- In order to deal with problems of record keeping and the voluntary disclosure of information, the new forum to be created under the Act should not only oversee the implementation of the Act but must also train and guide government bodies in discharging their duties under PAIA. Alternatively the SAHRC's role must be broadened to include these challenges;
- There should be a general exemption on fees. It should be the state's duty to provide access to information and therefore the state should make it less onerous to access information;
- The public interest override should not be narrow but should be broadened so that the constitutional right to access to information is not defeated;
- Time limits for responding to information should be reviewed;
- The artificialness of the distinction between private and public bodies in the Act should be acknowledged in the Act. Some private bodies/ companies cannot be treated as private entities due to the huge impact they have in the macro- economic direction and management of economies of developing countries.



## - ZAMBIA

A Freedom of Information Bill was drafted in 2001 by both the Zambian government and the Zambian MISA chapter. The government's draft provides for the opening up of all records held by public officers, and gives the Bill precedence over subsequent laws restricting access to certain information.

The Bill aims to provide for the right of access to information; set out the scope of public information under the control of public authorities, which is to be made available to the public in order to facilitate more effective participation in good governance; promote transparency and accountability of public officers. Section 4 (1) of the bill provides for the opening up of all records held by public officers covered under the proposed Act, even if such records were restricted before the commencement of the Act.

Section 4 (2) provides that any laws enacted after the commencement of the access to information Act, with provisions restricting rights and obligations provided under the Act, would have no effect unless the restrictions are provided for under the proposed access to information Act. This section is critical as it ensures that the proposed access to information legislation is not trumped by state secret laws, data protection etc. which have the effect of limiting the right to access information. Even more some access to information laws in countries such as Zimbabwe have built-in limitations within them and in the Constitution subjecting the exercise of the right to some pieces of legislation negating the right itself.

Like the proposed access to information legislation in Zambia, South Africa is also exceptional, as it does not limit the right of access to information in the interest of national security and the honor and integrity of the head of state.

Whilst the Zambian draft bill is a watershed for access to information in Zambia- there are several provisions that deserve scrutiny. Among them are parts of Section 8, which allows public officials to claim exemption on the grounds that information sought is "reasonably expected to cause substantial harm to the legitimate interests of Zambia in areas of foreign policy, defense, security, public safety and monetary policy". This could allow blanket denials of requests for information.

Another provision worth- mentioning is section 21, which gives the president powers to single-handedly appoint a "Commissioner for Public Information", whose job would be to administer the proposed Act. The "Commissioner for Public Information" would receive applications for disclosure of information and hear appeals for denial of information by public authorities. Zimbabwe's AIPPA also has a similar provision conferring broad regulatory powers on the Media Information Commission (MIC). In Zimbabwe this body is firmly under the control and whip of the Minister responsible for information. This has generated a sense of distrust in the institution and consequently fewer requests for information have been made under AIPPA. There is clearly a need for a broadly representative and legitimate commission that would include members of Parliament from various political parties and also draws on the experience of civil society organisations. In this way citizens would be able to have confidence in the laws of the country enabling access to information and bring request without prejudging the legislative framework within which access to information takes place.

Another contentious provision of the draft bill is the thirty-day waiting period after filing a request for information. The thirty-day period is problematic in the South African context. According to Sorenson, SAHA's experience, almost entirely with public bodies, has been that the requirement that a requester under PAIA be responded to within thirty- days is very rarely met in practice. Statistics kept by SAHA record average times taken to respond to a request by each body to which a request has been made. Statistics for 2003 indicate that the average response time was just less than 150 days for public bodies, although interestingly it was just over thirty days for private bodies.<sup>47</sup> Ngwane of the APF also argues that the difficulty with these time limits is even more nuanced where the information is sought for socio- economic relief now and the granting of the information at a later stage would defeat the purpose for which the request is made in the first place. It is for this reason that Zambia, in light of these difficulties experienced in South Africa should advocate for a provision compelling timeous disclosure of information that it is in the public interest and that can be readily made available to requesters should be incorporated into PAIA.<sup>48</sup>

Section 5 of the draft Bill also deserves mention. It allows members of the public access to documents held by public authorities. MISA Zambia has argued that this section should also extend to meetings of public authorities, and not just documents held by them, as currently proposed.

Whilst the Bill captures some of the key tenets of access to information legislation- it has been awaiting presentation to parliament for quite some time now.<sup>49</sup> On the other hand these delays might present opportunities for civil organisations and in particular those engaged in the advancement of socio- economic rights to debate its implications for their work.

The weaknesses that emerge from the bill can be summarized as follows:

- Time limits for responding to information should be reviewed
- The provision in section 8 which allows public officials to claim exemption on the grounds that information sought is "reasonably expected to cause substantial harm to the legitimate interests of Zambia in areas of foreign policy, defense, security, public safety and monetary policy"- has the potential of allowing blanket denials of requests for information. What is "reasonably required" or "reasonably expected to cause substantial harm to the legitimate interests of Zambia" has not been defined by the constitution, and the courts have not had occasion to interpret the meaning an application of this phrase. And since the provision itself is overbroad- it could block the flow of a wide range of unrelated information that could not possibly relate to the legitimate interest of Zambia.
- Section 21 gives the president powers to single-handedly appoint a "Commissioner for Public Information", whose job would be to administer the proposed Act. The undesirability of having such a provision has already been explored in the context

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<sup>47</sup> Sorensen R The Impact of South Africa's Promotion of Access to Information Act After Three and A Half Years: A Perspective, ESARBICA Journal 22, 2003 at p.58.

<sup>48</sup> Interview with Trevor Ngwane: Chairperson of the Soweto Electricity Crisis Committee, 21.06.05.

<sup>49</sup> According to MISA- Zambia, government has still not indicated when the bill will be presented to parliament <http://www.ifex.org/en/content/view/full/12917>.

of Zimbabwe. Zimbabwe's MIC has effectively eroded public trust in their access to information regime. Its composition and control by ruling party apologists has generated a sense of distrust in the institution and consequently fewer requests for information have been under AIPPA. As stated above, there is a need for a broadly representative and legitimate commission that would include members of Parliament from various political parties and also draws on the experience of civil society organisations.

- MISA Zambia's suggestions that section 5- allowing access to documents held by public authorities should also extend to include public participation in meetings of public authorities is worthy of inclusion and consideration by other SADC countries currently debating their proposed draft bills.

#### - MOZAMBIQUE

The constitution of Mozambique came into force in 1990 and specifically protects the right to information as an aspect of freedom of expression. Article 74 of the constitution states:

“All citizens have the right to freedom of expression and to freedom of the press as well as the right to information; Freedom of expression, which includes the right to disseminate one's own opinion by all legal means, and the right to information shall not be limited by censorship; freedom of the press shall include, in particular, the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications; The exercise of the rights and freedoms referred to in this article shall be regulated by law.”

A draft “Law on Access to Sources of Information” has been drafted by civil society, led by the Mozambique chapter of MISA in 2004.

The draft is visibly skeletal and is not drawn out, as is typical with most legislation. The draft Bill's lack of detail may be indicative of the consultative processes that are still required to give more flesh to the draft Bill.

As a starting point, the preamble of the legislation does not say anything about the purpose and the context of the proposed legislation. It also unnecessarily makes mention of the protection of the freedom of the press. Instead the preamble to any Act should set out in a clear and succinct manner the purpose and parameters of the Act.

Chapter 1 deals with general provisions. As with the preamble, the general provisions section is relied upon to aid interpretation. This section should evince a clear commitment to the purpose and object of the Act. On the contrary it is vague and appears to have been drafted in haste. Thus the draft Bill as it stands, contains no clear and affirmative statement of the right to access information. Article 5 of the draft Bill at least imposes an obligation on certain bodies to provide information, but there is no mention of a concomitant right vested in all people. The provisions of Chapter 1 also suffer from the fact that, in setting up, parameters of the law, the drafters have used terminology that centres on access to official sources of information. Although the term ‘official sources’ is defined in Article 2 to include private

sources- ‘whenever the public good is at stake.’ The wording of the section is vague and this does not bode well for the public. It is important that the language in the legislation is clear and accessible for the public. The dense language in the draft Bill seems to be a recurring throughout.

The draft Bill also does not have provisions for pro- active disclosure. South Africa and Zimbabwe’s access to information legislation provide for general information to be provided to the public from time to time. This provision is also contemplated in the Zambian draft Bill. Similarly, section 7(1) of the Trinidad and Tobago Freedom of Information Act 1999 and section 4 of the Indian Freedom of Information Act 2000<sup>50</sup> which are discussed in details hereunder provide good examples of the wording of such pro- active disclosure provisions.

The draft Bill is silent on a number of provisions that would ordinarily obtain in access to information legislation. For instance, section 4 (2) of the Zambian draft Bill provides that any laws enacted after the commencement of the access to information Act, with provisions restricting rights and obligations provided under the Act, would have no effect unless the restrictions are provided for under the proposed access to information Act. This section is critical as it ensures that the proposed access to information legislation is not trumped by state secret laws, data protection etc. which have the effect of limiting the right to access information. An opportunity exists for civil society organisations in Mozambique to advocate and lobby for an additional article or section explicitly providing that the proposed access to information legislation will override inconsistent legislation.

The draft Bill is also silent on penalties available to discipline officials and government bodies failing to comply with requests for access to information. Lobbying and advocacy in this regard is also recommended.

The content and extent of the exercise of the right to information is not clear under the draft Bill. Accordingly, the draft Bill should include a clear and uncomplicated procedure that ensures quick responses at no cost. Applications should be simple and must be capable of comprehension by the ordinary citizen. In line with some of the comments made by social justice organisations in South Africa,<sup>51</sup> all private and public bodies under the proposed legislation should be required to establish open, accessible internal systems for ensuring the public right to receive. South Africa’s PAIA is a classical example of an elaborate access to information legislation regime that is rendered ineffective by the lack of a maintenance of an up to date archival and proper recording system. The maintenance of an up to date archival and proper recording system of information ensures that the problem of mute refusals is obviated. It also deals with the perception that public officials are not interested in providing information. These are critical considerations to bear in mind when filling the gaps under Chapter 2 of the draft Bill. For example Articles 6, 7 and 9 read together set out the process for applying for and receiving information. In accordance with Article 7, a petitioner is only required to specify the information they wish to receive. It is not clear whether the request must be in writing or made orally, nor whether written request should be hand delivered, posted or can be sent electronically. It is also not clear to who the requests should be sent to. Although Article 6 appears to suggest that the head of the relevant body will be the recipient of the requests- a trend in most Acts (including South Africa and Zimbabwe) is to

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<sup>50</sup> Discussed under section V of the report.

<sup>51</sup> See p.10 of the report above.

specifically designate that each relevant body must appoint an Information Officer who will be responsible for receiving and dealing with information requests from the public.

The draft Bill also fails to address a number of additional issues commonly covered under the procedural sections of right to information legislation, including- requiring officials to assist requesters with formulating their requests. For example sections 18(3) of South Africa's PAIA provides that:

- “(a) An individual who because of illiteracy or a disability is unable to make a request for access to a record of a public body in accordance with subsection (1), may make that request orally.
- (b) The information Officer of that body must reduce that oral request to writing in the prescribed form and provide a copy thereof to the requester.”

In addition to section 18(3), section 19(1) of PAIA also enjoins the Information officer to render such reasonable assistance, free of charge as is necessary to enable the requester to make the request in the prescribed form.

The Mozambique draft Bill should include a section that is more or less couched along the lines of section 18(3) and 19(1) of PAIA directing the Information Officer to assist the requester to comply with the formalities required under the Act for a request for documentation or any information. This provision is critical particularly for SADC region countries where level of illiteracy still remain very high.

Unlike South Africa, Zimbabwe and the draft bill of Zambia, a positive aspect of the Mozambique draft bill is that it requires requests to be responded to within 10 day.<sup>52</sup> It provides for fewer days for the public authority to respond than South Africa, Zimbabwe and the draft bill of Zambia.

Article 8(2) of the draft Bill states that where there is no reply or a request is met by a refusal, the requester may present a complaint to the Ombudsman. Article 8(6) further provides that Appeals against the decision of the Ombudsman may be directed to the Administrative Tribunal. Whilst it may be necessary to specify that the courts have jurisdiction to adjudicate disputes under the Bill, consideration should be given to including an additional article stating that recourse to the courts should be the last option after the exhaustion of administrative and internal remedies provided for under the Bill. This is a matter, which has great practical implications in a very poor country like Mozambique where access to justice could be a reality for only a small urban elite.

Finally, civil society organisations should lobby and advocate for the inclusion of a provision mandating a body to promote the proposed legislation. Such a provision should require that the government ensure that programmes are undertaken to educate the public and officials responsible for administering the proposed legislation.

Overall, whilst the draft Bill contains useful provisions, it is still requires considerable work in the following areas:

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<sup>52</sup> Article 19 of the draft Bill. South Africa and Zambia require 30 days whilst Zimbabwe requires 15 days.

- The use of clear and accessible language is critical for public participation;
- The context, purpose and object of the proposed legislation must be clear and unambiguous;
- Provisions for pro- active disclosures should be included;
- Inclusion of a provision providing that the proposed access to information legislation will override inconsistent legislation;
- Inclusion of penalties for officials and public and private bodies which fail to comply with requests for access to information;
- Inclusion of a clear and uncomplicated procedure that ensures quick and effective responses to request for information at no cost;
- All private and public bodies should be required by the proposed legislation to create open, accessible internal systems for ensuring the public right to receive;
- There must be clarity on who the requests should be sent to and in what form;
- The draft Bill should require officials to assist requesters with formulating their requests;
- A cheap and effective way of resolving refusals and disputes should be provided for under the proposed legislation.

The challenge is on civil society organisations to engage at an early stage for an access to information legislation that takes into account their organizational needs and of poor communities they represent. Whilst there are several pieces of legislation in Mozambique establishing access to information<sup>53</sup> in other areas such as media- there is a definite need nonetheless for an elaborate access to information legislation.

#### - MALAWI

The 1994 Constitution of Malawi includes separate guarantees for freedom of opinion, freedom of expression, freedom of the press and the right of access to information in Articles 34 to 37 respectively. The right of access to information provides that, “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 rights.”

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<sup>53</sup> The Press Law of 1991 contains provisions aimed at ensuring that the rights set out in Article 74 of the constitution are realized. Article 3 of the Press Law defines the right to information as "the faculty of each citizen to inform him/herself and be informed about relevant facts and opinions, at the national and international level, as well as the right of every citizen to disseminate information, opinions and ideas through the press". In terms of the Press Law, all legislation should be published and there is a government printing service. National Statistics should also be published.

The National Media Institute of Southern Africa- Malawi (NAMISA) drafted the Access to Information Bill in Malawi. The Bill is comprehensive and substantially conforms with best practice in the area of access to information legislation. For example, the object of the Bill is clear. It is to:

- “(a) to provide for the right to access information;
- (b) define the scope of information that the public has a right to access;
- (c) establish the Public Information Commission and define its functions;
- (d) promote transparency and accountability of public officers; and
- (e) provide for matters connected with or incidental to foregoing.”

In its arrangement of clauses, the Bill assumes a similar architecture as that of South Africa’s Promotion of Access to Information Act. It therefore stands in sharp contrast with Mozambique’s skeletal draft Bill and is more elaborate than Zambia’s Freedom of Information Bill.<sup>54</sup>

Under Part 3, the Bill directs public authorities to provide information. Couched along the same lines as South Africa’s PAIA, the problems of poor record keeping and record management systems often dictate the extent to which this obligation can be met. This obligation often means that public authorities have to maintain and implement appropriate archival standards for the creation and retention of records which ensure that documents subject to the proposed legislation exist and are readily retrievable. This is an issue that is increasingly being recognized in South Africa as crucial to the effectiveness of PAIA. This often entails the resourcing and financing of public authorities to deal with this challenge. This challenge was also mooted by Mavuto Bamusi of the Malawi Economic Justice Network (MEJN) that:

“The first challenge in terms of accessing information is that information must be there in the first place and then most importantly public officials must know where to find it.”<sup>55</sup>

MEJN also raised serious concerns around the time limits within which information must be made available to the requester.<sup>56</sup> Section 28(1) of the Bill provides that:

“Where access to a record is requested, the head of the public authority or any other authorized person to which the request is made, shall subject to section twelve and other provisions of this Act, within fifteen (15) days after the request is received-

- (a) give written notice to the person who made the request as to whether the record exists and if it does whether access to the record or part of it will be given; and

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<sup>54</sup> For instance its provisions under Part IV dealing with the Independent Public Information Commission and the obligations it puts on the state and private bodies to provide information are elaborate and commendable.

<sup>55</sup> Interview with Mavuto Bamusi, Deputy Coordinator: Malawi Economic Justice Network, 14.06.05.

<sup>56</sup> The issue of short time limits within which information may be granted was also raised as a serious concern by Trevor Ngwane of the APF- see pp. 9 and 12 of the report above.

- (b) if access is to be given, promptly give the person who made the request access to the record or a part of it in the form of a copy or an opportunity to examine the record.”

South Africa’s PAIA and Zimbabwe’s AIPPA provide thirty days for responding, whilst Mozambique’s draft Bill on Access to Official Sources of Information provides for ten days. Zambia’s Freedom of Information provides for thirty days. By any standard, the fifteen days provided under the Access to Information Bill in Malawi is quite reasonable for the kind of work that organisations such as MEJN do. According to Bamusi:

“The reality of our advocacy work dictates that we get information on budget expenditure and municipal local finances as soon as possible so that we can be able to participate effectively and critique some of the decisions the public authorities make.”<sup>57</sup>

Another problem that Bamusi cites is the distinction that the Bill makes between the categories of information it may consider.

Section 7 of the Bill provides for exemptions on information that is private and confidential and information that involves the private interests of a third party.

It is precisely the latter category of information that Bamusi contends is critical for the advancement of economic justice in Malawi:

“We make request for information on the details of multilateral agreements and what is owed to the government of Malawi by foreign countries and multinational institutions and we are often told that such information cannot be disclosed because of the confidentiality agreements entered into between the state and the third party concerned.”

The common thread that seems to be cutting through most pieces of legislation and Bills is that they have exemptions on the basis of information that is of interest to private third parties.<sup>58</sup> These exclusions to the right to information are so inequitable as to effectively negate the right to access information. They embody the most blatantly unjust provisions for the effective realization of socio- economic rights.

Part IV of the Bill provides for the creation of the Public Information Commission. Its functions are set out in section 20 and they broadly include oversight responsibilities over the implementation of the Act. In light of the low levels of education in Malawi and the predominantly rural character of most of the main country’s centres. The opportunity should therefore be seized by civil society organisations to lobby for the expansion of the powers of the Commission to- in addition to overseeing the proposed Act’s implementation- also educate the public on the use of the proposed legislation, train and guide the government department responsible for supplying information.

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<sup>57</sup> Interview with Mavuto Bamusi, Deputy Coordinator: Malawi Economic Justice Network, 14.06.05.

<sup>58</sup> Zimbabwe’s AIPPA, South Africa’s access to information legislation retains exemptions (sections 12, 29, 37(1)(a) and 65) where the private interests of a third party are involved.



The Bill's stance on the importance of the having an independent Commission must be commended. Section 20(3) provides that:

“The Commission shall be independent in the performance of its functions and shall not be subject to any direction or political interference, by any person.”

This is a welcome development in light of the wide- spread use of public organs to entrench the interests of ruling parties. As pointed out above<sup>59</sup> the importance of an independent Commission creates trust in the country's access to information regime and consequently results in many requests – and the Act is also tested.

Bamusi also points to the unwillingness and suspicion in which some public officials view requests:

“Some information is public and is out there but officials threat request with great suspicion. There seems to be a psychology that views requests negatively by officials even where the information is available and is sought in the right way.”<sup>60</sup>

A Commission with an expanded role to train and educate public officials on the proposed legislation will hopefully obviate some of these challenges.

Section 31 of the Bill proposes a fee payable upon the lodgment of a request for information. The Act does not stipulate the amount. The importance of providing relief from fees cannot be over- emphasized. It is a matter with huge ramifications for poor people struggling to make ends meet. The charging of fees tends to deepen the suspicion that the sate is not prepared to make information available instead they seek to prevent such provision even after having enacted access to information legislation.

Malawi's access to information Bill has weaknesses which come closer to those of South Africa's PAIA. This as has been indicated above is due largely to the similarities not only in the arrangement of clauses in the legislations but in the architecture and the content of the provisions provided under the two pieces of legislation. The weaknesses Malawi's access to information Bill relate to the following issues:

- The exceptions in section 7 undermine the brilliant access to information regime that the Bill seeks to enforce;
- The Commission's powers should be broadened to include other functions such as promotion, publicity, education, advice and assistance of those seeking to access information;
- Record keeping and the voluntary disclosure of information should be facilitated through the creation and maintenance of effective record systems- this would prevent mute refusals;

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<sup>59</sup> Under the section dealing with Zimbabwe in the report at p.6.

<sup>60</sup> Interview with Mavuto Bamusi, Deputy Coordinator: Malawi Economic Justice Network, 14.06.05.

- There should be a general exemption on fees. It should be the state's duty to provide access to information and therefore the state should make it less onerous to access information;
- Time limits for responding to information should be reviewed.

The Malawi draft Bill is represents a positive step to advance access to information in Malawi. It approximates South Africa's PAIA in architecture. It is extremely progressive in nature and it addresses most of the key issues and elements of public authorities and information, a right to access some information held by private bodies,<sup>61</sup> good procedures for accessing information<sup>62</sup>, a right to appeal any refusals to disclose information and a system of sanctions for internal contravention of the law.<sup>63</sup> There are however some omissions and weaknesses as pointed above. In main, the draft Bill's lack of protection of good faith disclosures pursuant to the law itself, some exceptions are not made conditional upon showing harm to the protected interest and the obligation actively to publish information deserve closer and immediate attention.

The Malawian government is currently considering the enactment of access to information legislation. Civil society organisations have taken a leading role in raising public consciousness and campaigning for freedom of information legislation.<sup>64</sup> Submissions have been made to the Malawi Law Commission on implementing the right to freedom of information in the Malawi Constitution. The Commission decided, as a preliminary matter, to recommend an amendment of Section 37 of the Malawi Constitution to remove the words "subject to any act of parliament" and thus strengthen the content of the constitutional right. While the Law Commissioner has expressed the hope that Malawi will move towards the South African trend in this regard, there has been no movement at the official level and according to Bamusi "freedom of information no longer appears to be on the government's agenda."<sup>65</sup>

## - LESOTHO

The Lesotho Law Reform Commission drafted the Access and Receipt of Information Bill in 2000. The aim of the draft Bill is to give effect to the constitutional right of freedom of expression by ensuring access to information and by enabling people to use such information for the exercise or protection of their rights. In October 2000, a draft bill was introduced that could allow for access to government information or the information of public bodies that carry out their functions

According to Thandiwe Solwandle of the Lesotho Council of Non-Governmental Organisations, the Media Institute of Lesotho (MILES) is at the forefront of advocating for the passage of access to information legislation:

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<sup>61</sup> Under Part II and III of the draft Bill dealing with 'the right of access to information' and 'the obligation to provide information.'

<sup>62</sup> Under Part V of the draft Bill- sections 27- 32.

<sup>63</sup> Under Part VI of the draft Bill- sections 33- 38.

<sup>64</sup> Interview with Collins Maglasi, Director of the MALAWI Economic Justice Network, 04.01.2005.

<sup>65</sup> Ibid.

“They recently requested the government to "table the Access and Receipt of Information Bill in Parliament," arguing that the work of media practitioners, as an integral part of our society, would be made easier and more effective, more importantly the peoples' constitutional right to freedom of expression through access to information would be put into effect.”<sup>66</sup>

She goes on further to state that:

“In relation to the weaknesses of the Lesotho Bill, it depends on the types of information you are requesting. The Bill still makes it difficult to get information from public authorities. Its provisions that dispute resolution must be resolved in court will result in many people not getting recourse under the Act. There are also high levels of illiteracy in Lesotho and there is a need for funding to NGO's to educate and assist the public in utilizing the piece of legislation once it is passed.”

Other more pressing challenges are that:

“Lesotho is a predominantly rural country and organisations assisting people in using the legislation find it hard to reach the communities. If the communities are found, the communities have other more immediate socio- economic demands and do not have time to lodge requests for information. So organisations should undertake requests on behalf of communities.”

Further:

“The mindset of public officials should be changed so that they are willing to entertain requests for information.”

Other pieces of legislation running parallel to the proposed legislation are the Printing and Publishing Act. The Printing and Publishing Act is the main law governing the print media. Section 10 makes it an offense to import, print, publish, sell or distribute information that is “a clear and present danger to public safety, public order, public morality or fundamental human rights and freedoms.”

It is worth- mentioning that the Bill should provide for a section that trumps other legislation such as the one stated above that have the tendency of negating the right to access information.

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<sup>66</sup> Interview with Thandiwe Solwandle: Information Officer of the Lesotho Council of Non- Governmental Organisations, 13.06.05.

#### IV. POLICY PRONOUNCEMENTS, AGREEMENTS AND GOVERNMENT DECREES AS THE BASIS FOR ACCESS TO INFORMATION

In certain countries where there is no access to information legislation civil society organisations rely heavily on policy pronouncements and memoranda of agreement between themselves and the relevant public authority. In other instances cabinet directives or decrees are issued pronouncing government's commitment to providing information. Accordingly these innovative methods of accessing information are critical where no legislation exists. In Namibia, "the government issued a cabinet directive that effectively pronounced government's commitment to provide information."<sup>67</sup> Cabinet pronouncements- as the name suggests are merely pronouncements and the government cannot be compelled to provide information where it does not want to. In addition to cabinet pronouncements all legislation in Namibia is published but not all ministerial regulations. Ministers publish public information leaflets when the need arises and if the budget allows, examples are leaflets on Namibian national symbols, government posters, code of conduct for labor inspectors, and all policy documents. The Office of the Government Gazette and the Department of Justice publish legislation and regulations. Parliament publishes draft bills and notices pertaining to the work of the National Assembly and the National Council. National statistics are also published. Government publications are available to the general public at the National Library of Namibia, the library of the University of Namibia and at some regional offices of the Ministry Information and Broadcasting. MISA also contends that members of the public easily access information from municipalities and town councils. However in other instances information has not been forthcoming. A to Dorkas Philemon of the National Society for Human Rights in Namibia:

"Municipal Local Councils do not provide information on expenditure. As a result of the privatization of water and basic services the cutting of water services and other supplies has become a common feature in certain municipalities. ADAQHI is one of the organizations in Namibia that campaigns against the privatization of water and basic services and has been using legal aid to compel municipal authorities to provide information on their spending but to no avail."<sup>68</sup>

Notwithstanding difficulties in accessing information and the above mentioned practical problems- Martin and Fieldman (1998) notes that there is generally a willingness to move towards access to information legislation in Namibia.<sup>69</sup>

In Malawi, the need for an access to information legislation is quite pressing despite the sporadic conclusion of agreements between civil society organisations and public authorities providing for access to information. According to Bamusi, MEJN requested information from the Ministry of Finance on budget formulation. MEJN's request was not considered despite an undertaking and agreement by the Ministry to provide such information when requested.

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<sup>67</sup> Interview with Kaitira Kandji: Programme Manager, MISA- Namibia, 20.06.05.

<sup>68</sup> Interview with Dorkas Philemon: Public Relations Officer of the National Society for Human Rights in Namibia, 13.06.05.

<sup>69</sup> Access to Information in Developing Countries by Robert Martin and Estelle Feldman (April 1998) , Working Paper at p.4. [www.transparency.org/working\\_papers/martin-feldman/7-legislation.html](http://www.transparency.org/working_papers/martin-feldman/7-legislation.html)

MEJN has had to approach the IMF and the World Bank for such information and the response has been mixed.<sup>70</sup>

It is also worth- noting that the agreements are often a product of popular struggles and intensive campaigning. In the case of Malawi- after intensive campaigning, the government finally entered into a memorandum of agreement with MEJN to access information in state hands. As a result of the agreement concluded in 2002, MEJN is now able to access information from the various parliamentary committees and in particular the Budget and Finance Committee. According to Bamusi: “the response is not uniform. Sometimes we get the information sometimes we don’t.”<sup>71</sup>

MEJN has also had to look at some legislation providing opportunities for accessing information in the absence of a thorough- going access to information legislation. The Public Finances and Management Procurement Act provides such opportunities. Despite its efficacy, the Act does not provide for mechanisms for compelling disclosure where there is refusal. It is against this background that access to information legislation remains crucial.

The experiences of organisations utilizing creative methods of accessing information point to a need for the enactment of access to information legislation. The responses to request are not uniform and may take various forms and this might confound campaigns for the enactment of a comprehensive access to information legislation. It is against this background that efforts for the enactment of access to information legislation must be focused and concerted even though other creative methods are utilized in the meantime.

## **V. DEVELOPING COUNTRIES**

In this section of the report, an examination of the access to information legislation regimes of developing countries is undertaken. India, Mexico, Trinidad and Tobago and Jamaica are explored to ascertain if any lessons could be derived from their respective Acts. The developing countries under review have some of the best access to information legislation in the world and it has been difficult to discern weaknesses in their access to information regimes. A common weakness is the period provided for the consideration of requests- the period varies from twenty to thirty days. The difficulties attendant upon such lengthy periods have already been alluded to in earlier sections of the report. Mexico – perhaps because of its recent emergence from a repressive and dictatorial regime is conspicuous for its wide-ranging exceptions and exclusions, which effectively diminish the right to information.

Other developing countries have been left out due to the fact that they are Spanish or Portuguese speaking countries and therefore presented difficulties in the information-gathering phase of the research.

### **- India**

Many of the states in India have enacted Right to Information Acts since 1997 due to pressure from activists fighting corruption. These include Goa, Tamil Nadu, Madhya Pradesh, Karnataka, Maharashtra, New Delhi and Rajasthan. However the national

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<sup>70</sup> Interview with Mavuto Bamusi, Deputy Coordinator: Malawi Economic Justice Network, 14.06.05.

<sup>71</sup> Ibid.

legislation, once passed, takes precedence over state governments' legislation. Thus the Freedom of Information Act <sup>72</sup> takes precedence over all legislation passed in the Indian states.

The Department of Personnel and Training is in charge of implementing the Act. The Department is also tasked with the responsibility of educating and training the public officials on the Freedom of Information Act.

Under the Act, all Indians shall have the right to ask for information from public authorities. The public authority must respond in thirty days to a request for information. The public authority must respond in 48 hours if it concerns dangers to the life or liberty of a person. The Act does not apply to intelligence and security agencies. There are mandatory exemptions for information that would harm national security, public safety and order or international relations; information that would harm centre state relations; cabinet papers; advice in policy making prior to decision; trade or commercial secrets; or would result in a breach of parliamentary privileges or a court order. Most of the information cannot be exempted if it relates to an event that is over 25 years old. There also discretionary exemptions if the request is too vague or a large request; information that is about to be published; has already been published; or would be an unwarranted invasion of privacy.<sup>73</sup>

Appeals are to the public authority. A second appeal is to the central government. The lower courts cannot hear appeals but appeals can be made to the High Court and the Supreme Court.

Public authorities must appoint public information officers. They must also publish information on their duties, all relevant facts concerning important decisions and policies, give reasons for its decision to those affected by them, and publish facts about any project before initiating any project.

The Act is exemplary to other developing countries and SADC countries in particular in its commitment to supporting maximum disclosure of information. Section 4 of the Act provides for proactive disclosure of information by organisations and public authorities that have the duty to provide information under the Act. Further, section 10 of the Act prohibits partial disclosure of information. This ensures that bodies do not deny disclosure if it is all possible to sever exempt information from a document and release the remainder.

The Act also provides for a model regime for disciplining officials failing to comply with the terms of the legislation.<sup>74</sup> The Act imposes a penalty of rupees two hundred fifty for each day's delay in furnishing the information after giving such Public Information officer a reasonable opportunity of being heard.

Finally the Act explicitly provides that the Freedom of Information Act will override inconsistent legislation.<sup>75</sup> In other words, pieces of legislation such as the Official Secrets

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<sup>72</sup> 5 of 2002

<sup>73</sup> <http://www.manupatra.com/downloads/acts/the%20freedom%20of%20information%20act%202002.htm>

<sup>74</sup> Section 12 of the Act.

<sup>75</sup> Section 14 of the Act.

Act<sup>76</sup>, which prohibit the unauthorized collection or disclosure of information and are frequently used against the media, will be subject to the Freedom of Information Act.<sup>77</sup> Similarly the Public Records Act<sup>78</sup> will also be subject to the Act.<sup>79</sup>

#### - **Trinidad and Tobago**

The Freedom of Information Act<sup>80</sup> was approved in 1999 and went into effect in February 2001. In terms of the Act - any person may request official documents in any form from public authorities, including public corporations and private bodies that are exercising state power. A response to an information request should be made within 30 days. There are exemptions for Cabinet documents less than 10 years old, defense, security, international relations, internal working documents, law enforcement, privilege, personal privacy, trade secrets, confidence and documents protected by another law. There is a public interest test that allows documents to be released if there is reasonable evidence of a significant abuse or neglect of authority, injustice to an individual, and danger to the health of an individual or the unauthorized use of public funds.

The Act does not apply to the President and the judicial functions of the courts. The President may also issue a decree exempting agencies from coverage under the Act.

Those denied can appeal to the Ombudsman who may issue a recommendation, which is not binding on the agency concerned.<sup>81</sup>

The Act also requires public authorities to publish information relating to the functions of the authority, rules, manuals and other documents on making decisions. The Freedom of Information Unit of the Ministry of Public Administration and Information oversees the implementation of the Act.

The positive aspects of the Act to be gleaned by developing countries and SADC countries in general are the following:

Trinidad and Tobago's Freedom of Information Act provides the most comprehensive provisions on pro- active disclosure. Section 7(1) of the Act provides for the publication of certain information in the Gazette and in daily newspapers circulating in Trinidad and Tobago; and on the website and that the copies must be kept for inspection at all government offices.

The Act also sets out an elaborate scheme on how reply procedure should operate in practice, in particular addressing requests for information given in different forms , that is, tapes, disks, films, or other material.

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<sup>76</sup> 19 of 1923.

<sup>77</sup> <http://www.vakilno1.com/bareacts/officialsecretsact/officialsecretsact.htm>

<sup>78</sup> 69 of 1993. It sets a thirty-year rule for access to archives.

<sup>79</sup> [http://nationalarchives.nic.in/public\\_record93.html](http://nationalarchives.nic.in/public_record93.html)

<sup>80</sup> 26 of 1999.

<sup>81</sup> <http://www.ombudsman.gov.t/>

Section 40(1) of the Act provides a brilliant example of a provision placing a responsibility on a specific body for monitoring the Act and reporting to parliament on its efficacy.

Finally a notable weakness in the Act is (as with South Africa's PAIA) its protection of officials and the relevant bodies from liability under the Act for their actions.<sup>82</sup> Officials making decisions regarding the disclosure of information should appreciate the gravity of the tasks they are faced and the implications of their work for many poor people. Thus criminal sanctions and/ or penalties should be imposed on officials and public bodies for duties or conduct carried out in bad faith in the execution of their duties.

#### - **Jamaica**

The Access to Information Act was adopted in 2002 and implemented on October 1, 2003- resulting in the abolition of the Official Secrets Act.<sup>83</sup> The Access to Information Act creates a general right of access by any person to official documents held by public authorities. Authorities must respond in 30 days but can delay access if required by law, to allow the person who received the document at a reasonable time to present it to the body or person it was prepared for or the premature release prior to an occurrence of an event would be contrary to the public interest.<sup>84</sup>

The Governor General, security and intelligence services, the judicial function of courts, and bodies as decreed by the Minister of Information are excluded from the scope of the Act.

Documents are exempt from disclosure if they would prejudice security, defense, or international relations; contain information from foreign government communicated in confidence; a submission to the Cabinet or a Cabinet decision or record of any deliberation of Cabinet; and a range of other documents from trade secrets to information relating to the personal affairs of any person alive or dead.

Appeals are heard internally by the Permanent Secretary or principle officer of the Ministry or the Minister for Documents subject to a certificate and then to an Appeal Tribunal.

Unlike The Freedom of Information Act of Trinidad and Tobago, Jamaican Act provides for penalties and prosecution for acts done illegally to prevent the disclosure of information. Such acts can be punished by the imposition of fine and imprisonment.

The most important feature of the Act for SADC countries is that it was phased into effect - the Access to Information Unit<sup>85</sup> was established under the Act to oversee its implementation, to train and guide the agency responsible for supplying information (the Jamaica Archives and Records Department) and to working with NGO's. This is one of critical factors that the report emphasis for inclusion in the proposed access to information legislation in SADC countries.

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<sup>82</sup> Section 89 of PAIA and section 38 of the Trinidad and Tobago Freedom of Information Act 1999.

<sup>83</sup> 1911.

<sup>84</sup> <http://www.jis.gov.jm/AIU/ATI%20ACT.pdf>

<sup>85</sup> A colloraly of the Media Information Commission in Zimbabwe or the South African Human Rights Commission.



## - Mexico

Article 6 of the 1997 Constitution says in part that: “the right to information is guaranteed by the state.”

The Federal Transparency and Access to Public Government Information Law<sup>86</sup> was unanimously approved by parliament in April 2002 and signed by the President in June 2002.<sup>87</sup> The law allows all persons to demand information from government departments, autonomous constitutional bodies and other government bodies. Agencies must respond to requests within 20 working days. The law further creates five categories of classified information. For these categories, information can be withheld if their release will harm the public interest. These include information on national security, public security or national defense; international relations; financial and economic stability; life, security or health of any person at risk; and verification of the observance of law, prosecution of crimes, collection of taxes, immigration or strategies in pending processes.

There are an additional six categories of exempted information. These are information protected by another law, commercial secrets, prior investigations, and judicial or administrative files prior to ruling liability proceedings before a ruling, deliberative processes prior to a final decision.

Information can only be classified for twelve years or less if the reasons for non-disclosure no longer exist. Information relating to the investigation of grave violations of fundamental rights or crimes against humanity may not be classified. All departments must produce a regular index of all classified files. Even before the enactment of the transparency law, the President ordered a declassification of the files relating to human rights abuses.

Every government body is required to publish the information in electronic form. State agencies are also required to set up information committees to review classification and non-disclosure of information.

The National Commission on Access to Public Information provides oversight of the law.<sup>88</sup> It can carry out investigations, order government bodies to relate information, and apply sanctions. Individuals and agencies can appeal decisions to federal courts. It has set up an electronic system for requests on the internet for executive agencies.<sup>89</sup>

A notable weakness in Mexico’s access to information legislation is its wide- ranging exceptions and exclusions which effectively diminish the right to information.

## VI. CONCLUSIONS AND RECOMMENDATIONS

Most Freedom of Information laws in developing countries discussed above are broadly similar. In part, this is because a few countries’ laws, mostly those adopted early on, have

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<sup>86</sup> 2002.

<sup>87</sup> <http://info4.juridicas.unam.mx/ijure/fed/9/default.htm>

<sup>88</sup> <http://www.ifai.or.mx/>

<sup>89</sup> <http://www.informacionpublica.gob.mx/>

been used as models. Whilst in SADC, South Africa's Access to Information Act has been the most influential- in developing countries it remains a model access to information law particularly in countries based on a common law tradition.

The most basic feature of most Freedom of Information laws is the ability of individuals to ask for materials held by public authorities and other government bodies. This is variously defined as records, documents or information. The definitions vary and in many poor countries' laws will have to adapt to gaps in access as computers replace paper filing systems.

Generally the Acts in developing countries discussed here and South Africa and Zimbabwe apply to nearly all government bodies. Depending on the type of government, this includes local and regional bodies. In most countries, the courts, legislatures and the security and intelligence services are exempt from coverage.

There is a trend towards extending Freedom of Information laws in countries to include non-governmental bodies such as companies and non-governmental organisations that receive public money to do public projects. This is frequently used to cover hospitals but could have broad effects and as more basic government functions are outsourced to private entities.<sup>90</sup> In South Africa the law allows individuals and government bodies to obtain information from private entities if it is necessary to enforce people's rights.

There are also a number of common exemptions that are found in nearly all the access of information laws discussed here. These include the protection of national security and international relations, personal privacy, commercial confidentiality, law enforcement and public order information received in confidence and internal discussions. Most laws require that harm must be shown before the information can be withheld or at least some of the provisions. The test for harm generally varies depending on the type of information that is to be protected. Privacy, protecting internal decision-making, national security tends to get the highest level of protection. Similarly documents that are submitted to the cabinet for decisions and records of Cabinet meetings are excluded.

A common feature in the access to information laws of developing countries and South and Zimbabwe is that they also include public interest that requires that withholding of information must be balanced against disclosure in the public interest. This allows for information to be released even if harm is shown if the public benefit in knowing the information outweighs the harm that may be caused from disclosure. This is often used for the release of information that would reveal wrongdoing or corruption or to prevent harm to individuals or the environment but in some countries it applies to all exemptions for any public reason.

There are also various mechanisms for appeals and enforcing access to information. These include administrative reviews, court reviews and enforcement or oversight by independent bodies. The effectiveness of these different methods varies greatly. In general, jurisdictions that have created an outside monitor such as an ombudsman or information commissioners are more open.

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<sup>90</sup> On the artificial distinction created by access to information legislation when dealing with private and public bodies- See McKinley interview above.

The first level of appeal in the countries with an access to information law discussed above is an internal review. This typically involves asking a higher-level entity in the body that the request was made to review the withholding of information. Practically it has mixed results. It can be an expensive and quick way to review decisions. However the experience in many countries is that the internal system tends to uphold the denials and results in more delays than enhanced access.

In developing countries, once the internal appeals have been completed, the next stage is to an external body. An Ombudsman – an independent officer appointed by parliament can be asked to review the decision as part of their general power reviewing the administration of the government. Ombudsmen generally do not have the power to issue binding decisions but in most countries; their opinions are considered to be quite influential and typically are followed.

Zimbabwe and South Africa have created Commissions in form of the Media Information Commission and the South African Human Rights Commission. In countries such as Zimbabwe, the independence of such a body is still a matter that has serious implications for the legitimacy of Zimbabwe's access to information regime and public trust in the efficacy of the legislation. The Malawi draft Bill proposes an ideal independent body for overseeing the implementation of the proposed Act. However all the countries in SADC under review lack an independent body that has powers and functions to oversee and train and guide public authorities and also assist the public in requesting information. Jamaica offers the best example of how such bodies should function.

Some general observations can also be made from the above examination:

- The enactment of access to information laws is the only beginning. For it to be of any use, it must be implemented;
- Governments must change their internal cultures;
- Civil society must test access to information legislation by demanding information;
- The mere existence of an Act does not always mean that access is possible. In some countries freedom of information laws are that in name only. The Zimbabwean Protection of Privacy and Access to Information Act sets strict regulations on journalists and its access provisions are all but unused. In fact the Act is designed to restrict access to information and not promote it;
- In some SADC countries draft Bills have remained that for a long time , that is, Malawi and Zambia;
- Independent oversight bodies are weakened by lack of funds, which prevent timely appeals- South Africa, is one such example;
- Excessive fees are sometimes charged to prevent requests. More so in poor SADC countries where the fee of thirty rands per request could mean a whole days meal for a family;

- Information about intelligence services is frequently withheld for national security groups in an overly broad manner that has little to do with protecting the state;

Specific legislative amendment would necessitate a close examination of the following:

- To review the exemptions and (sections 12, 29, 37(1)(a) and 65 of PAIA) and exclusions to the right to information that are so comprehensive and inequitable as to effectively negate the right to access information;
- The problem of mute refusals must be dealt with through the inclusion of a provision providing for an access to information body to oversee its implementation, train and guide the government department responsible for supplying information and also work closely with non governmental organizations in educating the public on the right to access information;
- To provide for the establishment of a forum to assess requests and later refusals of a request by a public or private body before resort to court action;
- There should be a general exemption on fees. It should be the state's duty to provide access to information and therefore the state should make it less onerous to access information;
- The public interest override should not be narrow but should be broadened so that the constitutional right to access to information is not defeated;
- Time limits for responding to information should be reviewed;
- The artificialness of the distinction between private and public bodies in the Act should be acknowledged in the Act. Some private bodies/ companies cannot be treated as private entities due to the huge impact they have in the macro- economic direction and management of economies of poor and developing countries;
- Time limits for responding to information should be reviewed;
- Access to documents held by public authorities should also extend to include public participation in meetings of public authorities.

What is also worth- noting is that in SADC countries where draft Bills have been prepared for passage in Parliament- this has been as a result of civil society organisations' efforts. In certain instances, civil society organisations have themselves drafted the Act so as to enable legislators to have an idea of the kind of legislation that is envisaged. One such example is Mozambique- where MISA Mozambique has drafted the Bill that is currently the basis for debates on the desirability of an access to information legislation in that country. Thus, civil society organisations have been crucial in campaigning around the enactment of access to information laws. In SADC countries awaiting passage of an Act, civil society has an even more important role of legitimizing the Acts. However

opportunities beckon now for civil society organisations particularly those advocating for the realization of socio- economic rights to lobby for certain changes in their draft Bills based on experiences of other SADC and developing countries that have already gone the road of implementing access to information legislation.

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