A CASE FOR THE FREEDOM OF INFORMATION ACT

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I recommend that the directed research essay prepared under my supervision by

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Entitled:

A Case for the Freedom of Information Act

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the regulations governing directed research essays.

G. M. Kanja

Date
Dedication

To the lord for guiding me during this project and to my wife Mercy and son Mutande for being supportive and understanding.

I do appreciate the support you have given me and do recognise the fact that I may not have been there when you needed me most.

I feel heavily indebted
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I would like to state that your help to me was not in vein.

May the good Lord bless you all.
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FREEDOM OF INFORMATION ACT

CHAPTER ONE

INTRODUCTION

AIM OF THE ESSAY

The aim of this essay is to explore the frustrations that people in Zambia go through when they fail to access vital information that affects them. It has often been said that government should be accountable to the electorate and this can only be achieved if the country allows maximum access to information held by it. For instance, today the country is hearing shocking revelations of how the economy was plundered during the 10 years of former president Frederick Chiluba’s rule. While this plunder was going on, some quarters of society knew about it, but they had no access to information to prove this. As such nothing could be done to expose all what was going on.

However, the situation would have been different, if Zambia had in place a Freedom of Information Act. A Freedom of Information Act will give Zambians access to vital information that will allow them to offer checks and balances. As the situation stands today, it is not possible to keep an eye on the government because people know nothing and even if they knew something there is nothing in place that compels the government to make available such information to the public. The media has not been spared in this
fight for information. Some newspapers like The Post have been sued for publishing information which they knew was true. But because it was not possible to compel government to avail it certain information it was not possible for the newspaper to offer meaningful defence. A Freedom of Information Act will no doubt increase the democratic partition in the political process of the country. In this spirit, I will try to delve so much on the problems the media has encountered in their quest to inform the nation about the dealings of government.

Where as some people may argue that Article 20 of the Republican Constitution is enough and that there is no need of a Freedom of Information Act, it will be noted that such a reason may not stand. The state is able to sneak out of this requirement through other legislation vaguely put in the interest of the nation or national security. And this is what Article 20 of the Constitution says:\footnote{Constitution of the Republic of Zambia}:

20. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.
(2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision—

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
(c) that imposes restrictions upon public officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.²

A Freedom of Information Act will no doubt only go to guarantee Article 20 of the Republican Constitution. Some critics of the Freedom of Information Act have said it will be simply safer to rely on the Constitution alone and not to confine the right in law. Proffessor Etiene Mureinik³ a member of the South African task for on the introduction of the Acess to Information Act and head of the school of law at the University of Witswatersrand in Johannesburg says an enforcement mechanism is required to ensure that government will observe the constitutional right. As such a Freedom of Information Act would only extend the right contained in the constitution.

It should be pointed out that a Freedom of Information Act recognizes that there will be exempted categories of information. To such a category there will not be automatic access to information. However drafters will have to be very careful as to draft these exemptions as narrowly as possible. It will be better to leave litigation play an important role in the future after the bill has been passed into law to test the parameters of these exemptions.

² *ibid*, Constitution article 20
³ Professor Etiene Mureinik is a member of the South African task for on the introduction of the Access to Information Act and head of the school of law at the University of Witswatersrand in Johannesburg
SPIRIT BEHIND THE FREEDOM OF INFORMATION ACT

It is said that information is the oxygen of democracy\(^4\). By this, it is meant that if the public does not know what is happening in society, then the public cannot participate meaningfully and effectively in the affairs of the society. Therefore, access to information is an essential part of good governance. It has become common palance that bad governments tend to thrive on a culture of secrecy. Ironically, most governments prefer to conduct business in secret, away from the eyes of the public. To this extent, governments usually advance many reasons for maintaining such secrecy. Openness and democracy in a society based on equality and justice\(^5\) are key words that should be guide to having a Freedom of Information Act that will leave the test od time.

Usually these reasons include national security, public order and wider public interest. These are used vaguely so that they can cover a broad spectrum of information that the public may need. It is customary for government to treat official information as their own property, as opposed to something, which they hold and maintain on behalf of the people. There is therefore need through the enactment of the Freedom of Information Act, to break this culture of secrecy in government. The rationale advanced to support access to information and therefore imposition on government of a statutory obligation to make information available is two fold\(^6\). First, it is argued that government must be open so as to be accountable and exposed to the judgment and evaluation of the citizens. Secondly,

\(^4\) See parliamentary Speech by Sakwiba Sikota who is UPND Member of Parliament for Livingstone Constituency when he was moving the private member’s motion on the Freedom of Information Bill (NAB 14) (ZIMA) in 2002

\(^5\) From the poem by Robert Browing: How do I love thee? Let me count the ways ... 

\(^6\) See speech by Sakwiba Sikota, supra note 4
with the provision of adequate information, it is expected that it will lead the public to participate more effectively, albeit, indirectly, in the process of policy making. The significance of access to public or official information is that it enhances, the freedom of expression. It goes without saying that freedom of expression is in turn an indispensable element in the efficacious working of government.

To this end, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person. It is also said that freedom of speech is no doubt the very foundation of every democratic society for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the process of responsible government is possible. However, the ability to criticize government and participate effectively in government, is dependent upon the provision of adequate information about the workings of government and its decision making process. The public interest in freedom of discussion comes from the requirement that members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions that affect them.

A Freedom of Information Act will:

A) Provide access to information on all levels of government.

B) Provide access to information held by private bodies which wield public power.

C) Empower civil servants to disclose maladministration and corruption without fear of reprisal.
D) Ensure that political information about individuals held by the government is accurate.

E) Oblige government bodies to announce when they are holding meetings as well as the agenda, so that they may observe or demand minutes of such meetings.
CHAPTER TWO
THE DIFFICULTIES FACED BY THE PUBLIC AND MEDIA IN ZAMBIA IN ACCESSING VITAL INFORMATION

Where as Article 20 of the Republican constitution tries to guarantee the freedom of information by stating that: ‘Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence', very little in essence is worthy saying the citizens have enjoyed this freedom of information.

A Mozambican journalist, Leite de Vasconcelos during a Regional workshop on Freedom of Expression and Information in a Democratic Society, observed, “Freedom without the means to exercise it does not go beyond the bill of rights. It is like an unborn child: you know he is there, you can picture him, feel his movements and dream his future, but you know that if he does not come out after nine months he dies.” This is the urgency the Freedom of Information Bill has. The political leaders seem to have found any law that would compel them to maximum disclosure of information undesirable.

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7 Constitution article 20
8 Leite de Vasconcelos, is a Mozambican journalist who addressed a regional workshop on Freedom of Expression and Information in a Democratic Society held in Lusaka from May 30 to June 1, 1995
In most countries of the world, it is not only journalists who mainly use the Freedom of Information legislation. The main users are academics, researchers, nongovernmental organization and so on. Today in Zambia, there is a crusade against corruption. It is however important to look at where the campaign is coming from. This fight can be traced to two separate statements that were made by Lusaka Central Member of Parliament Dipak Patel and former Finance minister and now Munali Constituency Member of Parliament, Edith Nawakwi. The two during campaign meetings against the third term debate that had engulfed the country in 2000 made statements to the fact that then President Frederick Chiluba was a thief. The Post newspaper carried this story as lead of their Sunday edition with a headline CHILUBA IS A THIEF. In reaction to that the police arrested Mr Patel, Ms Nawakwi, the reporter who wrote the story, Mr Bivan Saluseki and the newspaper’s managing editor Fred M’membe and charged them with defamation of the president. While the two politician and the two journalists were convinced that Mr Chiluba was a thief the had no tangible evidence which they could say tied Chiluba to any shoddy dealings. This was all because the government could not be compelled to disclose any information that was vital to the citizens of this country. If the citizens of this country were able to access information that revealed the plunder of the country’s economy, they would have made informed decisions. This court case however assisted by the fact that Mr Chiluba later own had to handover power to President Levy Mwanawasa. The case also took a new twist with the magistrate court ordering the Zambia National Commercial Bank (ZANACO) to present accounts of the Zambia Security Intelligence Service (ZSIS) to court. Subsequently these accounts revealed so much in the way the funds of the country were being channeled into what has come to
been known as the Zamtroop account. These accounts have revealed so much that there a
number of people who are now facing criminal charges linked to theft of public funds.
The interesting part of the information that has come out is that a number of Zambians
started a long time to suspect that some people were living beyond their earnings or
means. However because most of the people who were suspected to be plundering this
economy were in the position of power they saw it convenient to make sure that nobody
has access to this information. The striking aspect is that had the public been able to
access this information, they would have risen up an put to an end the vices. That plunder
was able to go on undetected because the public had no evidence to base their accusations
on.

Even Members of Parliament have toe spared by this luck of information. During one
parliamentary debate, Mr Patel presented a document to parliament that purported to
disclose maladministration of the Chiluba government. However, Mr Patel was stopped
from presenting that document with the Speaker of the National Assembly Amusaa
Mwanamwabwa saying that was illegally obtained information. Mr Patel was actually
rebuked and threatened with arrest by the Speaker of the National Assembly. The
reaction of the Speaker of the National Assembly who is actually supposed to make sure
that the freedom of information of the member of parliament is protected came out the
opposite. He said that was illegally obtained information despite that fact that it was
exposing the government’s bad dealings. The interesting thing is that if a member of
parliament by virtue of his position in society should have access to certain vital
information that affects his constituents can be intimidated to such extent. What more for
a common citizen. The reaction of the Speaker of the National Assembly only goes to prove that where there is no law that compels public officers to give out information as demanded by the public, no information will be given to the citizens.

To show how important public information is, close allies of former President Frederick Chiluba, like Fackson Shamenda called for the quick investigation and arresting of all those suspected to have plundered public resources. Shamenda was commenting on President Levy Mwanawasa’s corruption and theft revelations. The interesting thing is that people like Shamenda should have had access to certain information for them to effectively represent the workers. However, because there was no means on how he was going to compel the government to release certain information, Shamenda had to wait until the end of Chiluba’s rule. In the sprit of checks and balances such a long wait is not good for a poor country like Zambia.

Another instance is the death of Zambia Intelligence Security Service senior officer David Musaka. Musaka is believed to have been killed in a police cell in Chama. In quoting a relative of the late Musaka, The Post newspaper reported that his family believed he had been hanged\(^9\). Another Post edition\(^10\) followed up the story with a comment from the Director of Public Prosecutions, Gregory Phiri, now High Court judge\(^11\). The DPP noted that the family was entitled under the law to know the cause of

\(^9\) The Post newspaper, issue number 289, June, 9 1995, on page 5 story entitled Intelligence officer Dies mysteriously in prison

\(^10\) Ibid, issue 291, June 16, 1995 at page 2, story entitled Security officer’s family have right to know cause of death

\(^11\) Judge Gregory Phiri was the Director of Public Prosecutions at that time, but now is a High Court Judge in Lusaka
Musaka’s death. The DPP noted that sudden death in a police cell, like that in prison should have been investigated. The family tried all avenues to know the real cause of the death of their relative, but to no avail. A Freedom of Information Act can be used to compel officers with the relevant information to disclose it to the family.

THE MERIDIEN BANK SAGA

Another issue that the public was entitled to information was the Meridien Bank saga where hundreds of depositors lost their savings when the bank went under. While rumour went round that the bank was headed for collapse, the government pumped in billions of tax payers’ money while, some politicians went and borrowed the same money meant to save the bank since they knew it could not be saved. When it went under people lost their jobs. But if the public could access such information from the Bank of Zambia, the government could have acted in the best interest of the public and not the politicians. An economic analyst K.M. Lamaswala was quoted by the The Post newspaper as saying “there are many depositors in Meridien BIOA Bank who would not have put new deposits into the bank or would have withdrawn their existing deposits, but for the assurances given by the minister that the bank was being propped up.” What the Mr Lamaswala was trying to say is that, if the people had access to the right information about the bank, they would have not kept their money in a sinking boat. They would have acted immediately after getting information about the bank. But because they had no access to the right information, only those in authority, who had access to the information about the bank were able to save their savings. While it may be accepted that there is a

12 Supra, The Post, issue 295 at page 11, story entitled Tips on Meridien Bank Fiasco
law that requires that the bank makes available certain information of the bank to the public, the public was not availed the right information that was going to assist them in making decisions.

For instance a synopsis of the causes of bank failures in Zambia indicates that the Bank of Zambia had known the activities of the banks and that they were not sustainable\textsuperscript{13}. For instance the synopsis states that Banks such as Meridien BIAO and Capital Bank collapsed partly because they grew too fast. As such they simultaneously opened several branches (even in the impoverished rural areas) and introduced some grandiose socio-financial schemes. These schemes literary dished out hefty interests to clients, and in some cases up to 50 per cent. And yet the national economy was too small and too weak to support such a prethora of banks and lavish schemes. The Bank of Zambia knew about this, before the two banks collapsed. It is also stated that some bank owners sat on the boards of several other banks and as such they were forced to use one bank to sustain another in time of trouble. Again the bank of Zambia knew all about this. It has also been suggested that the ineptitude of managers at the Central Bank led to the collapse of these banks. There are charges that the BOZ was not effectively supervising and monitoring commercial banks. Indeed its failure to supervise and enforce regulations resulted in Capital Bank overshooting the overdraft ceiling by more than K40million.

With all this going on and the rumours growing by the day the Bank of Zambia continued to give an impression to the public that all was well at Meridien Bank. The then BOZ governor Jacques Bussieres was quoted as having dismissed charges that Meridien Bank

\textsuperscript{13} Bank Collapses: The Zambian Experience
was facing liquidity problems\textsuperscript{14}. Bussieres was reacting to claims by one of the opposition parties which said some high ranking officials had arranged for the bank to take over the role of collecting customs revenue to save it from closure. With all this going on, the media tried to obtain information about what was going on in some of these banks. The final nail into the bank was when it was reported by the Times of Zambia with a headline MERIDIEN CLIENTS PULL OUT EN MASSE\textsuperscript{15}. Panic gripped clients of Meridien Bank BIAO in Ndola and Lusaka rushed to close their accounts as speculations mounted of an impending closure. And a day later, the bank appealed to its clients to remain calm as the bank’s operations were intact\textsuperscript{16}. The chairman of the bank Mr John Kapotwe in a statement said the bank had more than US$1 billion of deposits in 20 African banks. Two days later there was another announcement in the papers with a headline: STATE BAILS OUT MERIDIEN BANK\textsuperscript{17} which stated that then Finance Minister Ronald Penza had told Parliament that government had decided to provide liquidity to ensure calm was restored. During the Meridien saga the Times of Zambia came up with a screaming headline of “Meridien Shocker!”\textsuperscript{18}. This news indeed shocked the nation. But people had some suspicion of the malpractices at some of these banks but could not compel the BOZ to give out some of this information to the public.

\textsuperscript{14} Story in the Evening edition of the Times of Zambia of August 8, 1991
\textsuperscript{15} ibid, February 15, 1995
\textsuperscript{16} ibid, February 16, 1995
\textsuperscript{17} Ibid, February 18, 1995
\textsuperscript{18} A Times of Zambia story of July 12w, 1995 read in its introduction that a report into the collapse of the Mediridien BIAO Bank has revealed that about K90m was fraudulelnty withdrawn from the bank and has been recommended that directors at the bank be brought to book.
From what happened in the banking sector, it is clear that had the citizens been given the right information they would not have invested their in a bank that was not operating according to the law. The citizens would have made informed decisions.

**HISTORICAL BACKGROUND OF THE PROTECTION OF FREEDOM OF THE PRESS UNDER THE CONSTITUTION**

**THE 1964 INDEPENDENCE CONSTITUTION**

Under the 1964 Independence Constitution\(^{19}\), it was provided that except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression to hold opinions without interference, freedom to receive ideas and information without interference, (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence. Article 22 (1) of the Independence Constitution went on to provide that nothing in or done under the authority of any law shall be held to be inconsistent with or contravention of the article to the extent that the law in question makes provision:

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons

\(^{19}\) Article 22 of the Constitution
concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions, in the interests of persons receiving instructions therein, or regulating the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or

(c) that imposes restrictions upon public officers; and except so far as that provision or as the case may be the thing done under the authority, therefore, is shown not to be reasonably justifiable in a democratic society. It is evident from the preceding provisions that the independence constitution generally protected the right to receive ideas and information, as well as to communicate ideas and information. Press freedom as a right was not specifically provided for or indeed protected under the independence Constitution.

THE CHONA CONSTITUTIONAL REVIEW COMMISSION

The National Commission on the establishment of a One-Party Participatory Democracy in Zambia\(^20\) or popularly referred to as the "Chona Commission", did not consider the freedom of expression or indeed freedom of press when it examined protection of fundamental rights and freedoms of the individual. Thus, Article 22 of the independence constitution, was re-enacted without any changes whatsoever in the 1973, One Party State constitution.

\(^{20}\) Established pursuant to Statutory Instrument Number 46 of 1972 and submitted its report on October 15, 1972
THE MVUNGA CONSTITUTIONAL REVIEW COMMISSION

It was acknowledged by many journalists, as well as ordinary citizens who addressed the Mvungu Constitutional Review Commission\textsuperscript{21}, that the constitution provided by implication, for the freedom of the press. However the outcry was that it was inadequate and they urged that there be specific provisions which would not only protect journalists be means of the existing legal defence of absolute privilege, qualified privilege and fair comment, but other protective provisions such as would leave them free to debate without any limitation, public issues and to report on officials without fear of reprisals or legal suits.

The Mvungu Commission made the following findings and recommendations\textsuperscript{22}:

(a) \textit{concern was expressed particularly by journalists, that the present law concerning the press is not adequate, because it does not elaborate on the freedom that the press should enjoy.}

(b) \textit{that there was a desire amongst journalists to strengthen or widen the scope of legal defences available to them, newspaper proprietors, printers and news vendors so that the press may be free to publish information or criticize

\textsuperscript{21} The Commission was gazetted under Statutory Instrument Number 135 of 1990, dates October 8, 1990
\textsuperscript{22} \textit{ibid}, Mvungu Commission
public officials, for the public good, without fear of constant threats or legal suits.

(c) there was agitation for the establishment of non-governmental news media so as to enhance the independence of the press; and

(d) some petitioners who submitted on this subject betrayed some degree of misunderstanding of the law of defamation.

RECOMMENDATIONS

The Mvungu Commission made the following recommendations:

(a) the fundamental right of "freedom of expression", as contained in Article 22(1) of the Constitution be extended to include a specific reference to freedom of the press.

(b) the existing law in relation to defences available to the press and journalists is adequate; and
(c) apart from government news media, political parties, individuals and organisations be free to establish their own newspapers and other propaganda machinery subject to legislative regulation.

The government accepted the recommendation of the Mvunga Commission that the fundamental right of "Freedom of Expression) as contained in Article 22 (1) of the Constitution be extended to include a specific reference to freedom of the press. As a result, the Constitution of Zambias—, in Article 50(2) was amended to include the following clause:- "(2) Subject to the provisions of this Constitution no law shall make any provision which derogates from freedom of the press".

By prohibiting the legislature from passing laws that may derogate from the freedom of the press, the constitution underscores the indispensable role the press plays in the realization of freedom of expression.s2 Without a free press, freedom of expression will just be an illusion.

THE MWAKATWE CONSTITUTIONAL REVIEW COMMISSION

Most petitioners to the Mwanakatwe Constitutional Review Commission23 were anxious that there be generous constitutional safeguards for preserving a free press. A free press, the commission report observed, was necessary for a democracy; as a medium of exchange of ideas and the realization of the tenets of accountability and transparency. In

23 The Mwanakatwe Constitutional Review Commission was appointed by President Frederich Chiluba and some of the recommendation were made into law in 1996 after much controversy. Most of the Recommendations were rejected by Cabinet
addition, many petitioners were unhappy at the veil of secrecy that surrounded the workings of government, as well as legal prohibitions created by the State Security Act. In this respect, it was noted that government was a natural custodian of public documents. Yet, administrative measures, as well as statutory prohibitions may effectively deny citizens access to vital information. The commission accepted the views that the right of access to information, alongside the right of the free press will enhance democracy. Furthermore, many petitioners felt strongly about present arrangements under which journalists were compelled by a tribunal to divulge their sources of information. Other petitioners called for constitutional safeguards for persons engaged in teaching and research. The commission noted that the intolerance of African governments has witnessed the persecution of intellectuals for their ideas and mode of disseminating those ideas.

RECOMMENDATIONS AND GOVERNMENT REACTION

The Mwanakatwe Commission made the following recommendations and the government reacted as follows:

(a) every person should have the right to freedom of the press and other media; and the freedom of artistic activity; This recommendatzon was not accepted by government because the right is covered by Article 20(2) of the current Constitution.
(b) all press material and other communication intended for publication should not be subjected to any form of censorship or official interference and all public media should enjoy institutional independence and protection from outside influence to enable it accommodate different opinions and ensure the free flow of information and ideas necessary in a democratic and open society; This recommendation was not accepted by government because of the reasons at (a) above.

(c) all media financed by or under the control of the government should be organized and regulated in a manner which should ensure impartiality and the expression of diversity of opinions; This recommendation was not accepted because of the reasons at (a) above.

(d) journalists should not be compelled to divulge their sources of information; This recommendation was not accepted because it was alleged that this right is already protected Article 23(b) of the present Constitution.

(e) the registration or licensing of any media should not be unreasonably withheld, withdrawn or refused; This recommendation was accepted.
(f) there should be no censorship in Zambia and no person should be hindered in the enjoyment of the freedom of expression which includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media; This recommendation was no! accepted because of the reasons advanced at (a) above.

(g) the National Assembly should pass no law abrogating the freedom of the press;

This recommendation was accepted subject to the other provisions in the Constitution providing circumstances under which parliament may pass legislation prescribing derogations.

(h) Noting the crucial role informed opinion played in fostering good governance, the commission recommended that the right of access to information be a justiciable right. The implication of this right is to make:

(i) all official documents public unless such documents have been classified secret; and

(ii) the right available to every person whose right or freedom is affected
by the right of access to information held by the state. These recommendations were not accepted because their wholesome application would compromise state security and disrupt the smooth operations of government departments. Appropriate legislation should be passed to prescribe declassification of certain documents and the release of any information.

(i) persons who are involved in the production of ideas and the dissemination of ideas should be given protection; and

(j) no person should be hindered in the enjoyment of his academic and intellectual freedom, including the freedom to undertake research in any area, the freedom to impart ideas and the right to have property rights in the results of such research. These recommendations on academic and Intellectual Freedoms were rejected because it was argued appropriate statutes such as the University of Zambia Act of 1992, the National Council for Scientific Researchers.
CHAPTER THREE
AN OVERVIEW OF THE FAILED BILLS

The Zambia Independent Media Association (ZIMA) and the Press Association Zambia (PAZA) agreed to work together to campaign for the introduction of freedom of information legislation. The objective of the campaign was to lay down as a legal principle the right to be informed about the administrative documents as a necessary corollary to the guarantee of freedom of expression and to prescribe rules for the exercise of this right.

The two organization organized a number of workshops where they engaged lawyers such as University of Zambia lecturer Dr Alfred Chanda and Patrick Matibini. At the end of these workshops the two organizations came up with a policy document which was drafted under the Media Law Review Committee which recommended:

a) The creation of an Independent Broadcasting Authority (IBA)

b) The repeal of the Zambia National Broadcasting Corporation (ZNBC) Act

c) The promulgation of a new Broadcasting Act and,

It was said that the IBA would be responsible for issuing broadcasting licenses and regulating broadcasting, while the Freedom of Information Act would guarantee the unhindered flow of information from the government to the media. However as the media groups soldiered their way to have their proposed private members’ bills presented to parliament, posturing in the House already suggested that partisan interests would determine the way legislators voted on the proposed media reforms, with the ruling party members backing President Levy Mwanawasa in insisting on the maintenance of a vibrant state media.

As expected the proposed Bills that were promoted by UPND vice-president and Livingstone member of parliament\textsuperscript{24} and R.JN. Banda Member of Parliament for Petauke Constituency\textsuperscript{25} were thrown out after government insisted on presenting their own. After the two organization failed to have the Bills passed, the government presented their own. However the Freedom of Information Bill was passed after members of the opposition hinted they would oppose it. As the situation stands now, the government has just promised to carryout some research on the Freedom of Information Bill. According to the objectives of the Bill it was to:

\begin{itemize}
  \item[A)] Establish the Public Information Commission and defines its function;
  \item[B)] Provide for the right of access to information;
\end{itemize}

\textsuperscript{24} Sakwiba Sikota, supra note 4 and 6
\textsuperscript{25} R.JN. Banda Member of Parliament for Petauke Constituency
C) Set out the scope of public information under the control of public authorities
to be made available to the public in order to facilitate more effective
participation in the good governance of Zambia;

D) Promote transparency and accountability of public officers; and

E) Provide for matters connected with or incidental to the foregoing.

In the preamble the failed Bill read:\(^{26}\) An Act to establish the Public Information
Commission and define its functions; to provide for the rights of access to information; to
set out the scope of public information under the control of public authorities to be made
available to the public in order to facilitate more effective participation in the good
governance of Zambia; to promote transparency and accountability of public officers; and
to provide for matters connected with or incidental to the foregoing.

According the Bill that was presented to parliament by the private members, the Freedom
of Information bill would ensure that all individual requests for information from public
bodies are met, unless the public shows that the information within the scope of the
limited exceptions\(^{27}\). In this regard a refusal to disclose information is justified unless the
public authority can show the information is governed by professional confidentiality or
privilege or relates to records of proceedings before a court or tribunal. As such, non
disclosure of information must be justified on a case by case basis. According to the
private motion mover restrictions who aim is to protect government from embarrassment

\(^{26}\) Freedom of Information Bill (NAB 14) ZIMA
\(^{27}\) ibid, Freedom of Information Bill (NAB 14) ZIMA
or the exposure of wrong doing can never be justified. This bill covered all levels of government such:

A) Government ministries and departments and persons in the public service;

B) Local authorities and persons in the service of local authorities;

C) Institutions and organizations whether established by or under an Act of Parliament or otherwise in which the government holds a majority of shares or exercises financial or administrative and persons in the service of those institutions and organizations;

D) Commissions established by or under the constitution or any Act of Parliament, except the commissions and persons in the service of commissions;

E) Quasi-governmental organizations and persons in the service of the quasi-organisations;

F) Public corporations and persons in their service;

G) Court in relation to administrative matters and persons in their service;

H) Tribunals in relation to administrative matters and ns in t service;

I) Private bodies carrying out public functions and persons in their service;

J) Religious and sporting organizations in receipt of public funds and persons in the service of those religious and sporting organization; and

K) Organisations contacted by government to do work for government and persons in the service of those organization.

However the Zambian government thwarted attempts by the Zambia Independent Media Association (ZIMA) and six opposition members to table three bills to ensure greater
freedom of the press, deciding to introduce its own media freedom bills instead. The campaign had hoped to introduce three bills - the Freedom of Information Act (FOIA), Independent Broadcasting Act (IBA) and the Zambia National Broadcasting Corporation Act (ZNBCA) to address difficulties faced by the media in Zambia, where media freedom is not enshrined in the constitution. The speaker of parliament, Amussa Mwanamwambwa said that the bills could not be allowed to go through because they would require the government to spend money on creating the new institutions proposed in them and approval was first needed for this from the finance ministry\textsuperscript{28}.

However, the government, through the ministry of legal affairs and the ministry of information and broadcasting, had decided to table its own similar bills, which incorporate some of the elements contained in the ZIMA-driven bills. With the FOIA bill, ZIMA and opposition lawmakers wanted the government to lift the veil of secrecy on the army, air force and police on the grounds that they were funded by taxpayers and therefore taxpayers had a right to information on them. The government however disagreed and said information pertaining to security organs was "top secret" and should remain so.

As such on November 28, 2002, the Ministers of Information and Broadcasting Services Newstead Zimba at that time, presented for second reading, the Freedom of Information

\textsuperscript{28} The words of the Speaker of the National Assembly when he rejected the Freedom of Information Bill (NAB 14) ZIMA: "I therefore will not allow the bills to be tabled in their form [without government consent]. The law is clear on such matters," Mwanamwambwa said.
Bill number 22 of 2002. The minister pointed out then, that the Bill sought to accomplish the following:\(^{29}\):

A) *To establish the Public Information Commission and to define its functions;*

B) *To provide for the right of access to information;*

C) *To set out the scope of public information under the control of public authorities to be made available to the public in order to facilitate more effective participation in the good governance in Zambia;*

D) *To promote transparency and accountability of public officers; and*

E) *To provide matters connected with the foregoing.\(^{20}\)*

Mr. Zimba in introducing the Bill for the second reading\(^ {30}\), pointed out that the right of access to information facilitates more effective participation in the good governance of any country, as it promotes transparency and accountability of public officers. The minister went on to say that freedom of information is derived from the old concept of the right to know enacted by the Seventeenth century British Libertarian and fiery advocates of press freedom, John Milton (1608 to 16740). He said that concept was exported to America, where several intellectual and progressives embraced it. The minister indicated that among the strong statements in support of the right to know is that: the backbone of the representative government, is the direct participation in the affairs of government by the people. As such he said the Constitution of the Republic of Zambia, which is the supreme law of the land approves:

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\(^{29}\) Statement by Hon Newstead Zimba (at that time) when he presented the Freedom of Information Bill

\(^{30}\) *Ibid, Zimba*
A) The recognition of the equal worth of men and women in their rights to participate and freely determine and build a political, economic and social system of their own free choice.

B) That all power resides in the people who shall exercise their sovereignty through the democratic institutions of the state in accordance with the constitution; and

C) That except with his own consent, a person shall not be hindered in the enjoyment of his freedom to hold opinions, to receive ideas and information, to impart and communicate ideas.

The minister said that freedom of information contributes to economic and social development by enabling people to participate effectively in the process of government and make informed choices in matters affecting their welfare, while at the same time enabling officials to benefit from public inputs which facilitate their decision making or improves the quality of public officials or matters of public interest. The minister advised the House that government views information as a national resource, which should be used for public purposes, subject to the limitations and expectations contained in the appropriate legislation. The minister confirmed that government sits on enormous amount of information, which could be made public to benefit public debates and understanding. He said much of it, is however kept confidential until politicians and senior civil servants decide that bits be released when it is convenient for them. The minister, however, cautioned the House that terrorists and other insurgent incidents, have come to threaten the security institutions which deal with information of sensitive and delicate nature, least
the security of the country is compromised. He then called for the provision of limited
exemptions\textsuperscript{31}.

**OBSERVATIONS ON THE FREEDOM OF INFORMATION BILL (NAB 14)
(ZIMA) AND THE FREEDOM OF INFORMATION BILL (NAB 22) (GRZ)**

In fact a comparison between the two bills: Freedom of Information Bill (NAB 14) ZIMA and Freedom of Information (NAB 22) (GRZ) suggests that there are minor points of difference in which either the ZIMA or the GRZ version is better. Some of the major issues worth looking at are:

6(4)(a)\textsuperscript{32} The GRZ bill would allow public servants to be appointed to the Public InformationCommission. What this means is that there will be a conflict of interest, and to undue pressure on such me. This in turn could lead to the commission being swamped w public servants.

10(2)\textsuperscript{33} of the GRZ bill puts a requirement of a reason for making an inquiry (although the bill does not expressly state that.) This implies that there are reasons which will cause the authority to reject the request. This requirement does not go in line with the right of access to information as outlined in the provisions of 10 (1) (a) and (b).

\textsuperscript{31} *Supra*, Zimba

\textsuperscript{32} *Supra*, 6 (4)(a) Freedom of Information (NAB 22) (GRZ)

\textsuperscript{33} *Supra*, 10(2) Freedom of Information (NAB 22) (GRZ)
Section 17 states that employees may disclose information. "Notwithstanding the provisions of this Act ..." This protects whistleblowers notwithstanding schedule 1 section 9 which prohibits disclosure. However schedule 1 section 9 (3) extends the offence to a person who having information obtained in contravention of subsection (1) "unlawfully publishes or communicates any such information to another person". Information obtained from a whistleblower is obtained in contravention of subsection (1). While the whistleblower in such circumstances protected by section 17, a media worker who publishes information obtained from a whistleblower may still fall victim of schedule 1 section 9 (3).

23 (4) ZIMA or 22 (4) GRZ: In view of a number of compromises made between the two bills, two new subsections have been made in order to ensure that the new Act does not make access to information more difficult than previously. 23 (4) (ZIMA) or 22 (4) (GRZ) states: "Notwithstanding any other provisions of this Act, where there is an existing relationship between any public authority and any member of the public, including the media, in respect of the release of information, that relationship shall continue at the mutual agreement of both parties."

Section 23 (5) (ZIMA) or 22 (5) (GRZ) also state: "Notwithstanding any exemption that may be granted in conformity with the provisions of this Bill (Act) in accordance with the third schedule attached hereto, may at its own discretion, and either on request or on its own initiative, release to any member of the public any information whose release it believes is not harmful to the interests of the state."
According to correspondence between the Press Association of Zambia (PAZA), Zambia Independent Media Association (ZIMA), Zambia Media Women’s Association (ZAMWA) and Society of Senior Zambian Journalists (SSZJ) and the then Minister of Information and Broadcasting Services, Newstead Zimba, the media associations noted:\(^\text{34}\):

"Following several meetings with stakeholders including the Attorney General and several radion and television discussions on the three media now before Parliament, we strongly feel that the following should be seriously noted regardless of who is going to present the bills before the House.

**Freedom of Information Bill**

\(^\text{A. Section 6(4)(c) of the government bill}\(^\text{35}\) would allow public servants to be appointed to the Public Information Commission. We feel that this is not in order as it could lead to conflict of interest, and to undue pressure on such members because they are government workers. In the worst case it could lead to the commission being swamped with public servants}

\(^\text{B. Section 7 (1) (c) is present in the private members bill}\(^\text{36}\) but has been omitted from the government bill. We feel that section should be incorporated into the government bill. A person should have the right to

\(^\text{34}\) Letter from the Press Association of Zambia (PAZA), Zambia Independent Media Association (ZIMA), Zambia Media Women’s Association (ZAMWA) and Society of Senior Zambian Journalists (SSZJ) addressed to then Minister of Information and Broadcasting Services, Newstead Zimba on November 7, 2002.

\(^\text{35}\) Freedom of Information, *Supra*, note

\(^\text{36}\) *Supra*, Freedom of Information Bill (NAB 14) ZIMA
ensure amendment of outdated or inaccurate information held on him or her by a public authority.

C. Section 10(2) of the government bill\(^{37}\) requiring reasons for an enquiry implies that there are some reasons which will cause the authority to reject the request. This is not consistent with the rights of access to information outlined in the provisions of 10 (1)(a) and (b) of the government bill. This needs to be removed.

D. Section 20(7) of the government bill pertaining to the right to institute proceedings in a court to compel routine publication of lists of holdings should rest with the Commission, to avoid personal legal expenses\(^{38}\).

E. Section 22(1) of the government bill relating to the purpose of requiring information on the requester, apart from the name and address, is not understood and this requirement should be dropped\(^{39}\).

F. Section 22(4) of the government bill or 23(4) of the private members bill.

Two new subsections are highly recommended in order to ensure that the new Act does not make access to information more difficult than previously. The legislation should be in effect give legal support for those who are unable to obtain the required information through more informal channels. The two subsections are as follows:

Section 22(4) of the government bill or 23 (4) of the private members bill\(^{40}\).

Notwithstanding any other provisions of this Act, where there is an existing

\(^{37}\) Supra, Freedom of Information supra note 26

\(^{38}\) Supra, Freedom of Information, supra note 27

\(^{39}\) ibid
relationship between any public authority and any member of the public, including the media, in respect of the release of information, that relationship shall continue at the mutual agreement of both parties.

Section 22 (5) of the government bill or 23 (5) of the private members bill\(^\text{41}\): Notwithstanding any exemption that may be granted in conformity with the provisions of this Act, any public authority, including those that are exempted from the provisions of this Act in Accordance, and either on request or on its own initiative, release to any member of the public any information whose release it believes is not harmful to the interest of the state.

G. First Schedule

Section 2(3) of the government bill\(^\text{42}\) relating to the President’s power to remove a member of the Commission should be subject to the advice of the Appointments Committee. There should also be a right of appeal against the President’s decision, since this a high profile position and unjustified removal could seriously affect a member’s future career.

\(^{40}\) Supra, Section 22(4) Freedom of Information (NAB 22) (GRZ) and , Freedom of Information Bill (NAB 14) ZIMA

\(^{41}\) Supra, Section 22 (5) Freedom of Information (NAB 22) (GRZ) and 23 (5) , Freedom of Information Bill (NAB 14) ZIMA

\(^{42}\) Supra, Freedom of Information (NAB 22) (GRZ)
It would seem the GRZ Bill proposes some cumbersome bureaucratic procedures in order to release information. Clearly such a system would lead to less disclosure of information. This will be defeating the purpose of such legislation. Requests for information will become bogged down by bureaucrats unwilling to release it and using the red tape of the law to prevent it. To go ahead with the government bill would be just as good as not having a freedom of information Act. It also seems the media associations that are championing the bill are trying to strike a balance with the government. There is, however a danger with dealing with this kind of legislation piecemeal as it would be very difficult to make it airtight in future. The two bill are in fact prone to abuse by the government. As Sakwiba Sikota\textsuperscript{43} noted during the second reading debate, that we are living in a time when, the majority of the people in Zambia are urging for a toning down of the President’s powers and discretion. It therefore goes to show that the inclusion of First schedule is going to cause trouble and open the Act to abuse\textsuperscript{44}. As media lawyer Patrick Matibini states, the National Assembly therefore, should not be seen to be moving in the opposite direction of what the people of Zambia desire. The National Assembly should be responsive to the demand of the people\textsuperscript{45}.

\textsuperscript{43} Sakwiba Sikota, Supra, note 4
\textsuperscript{44} Freedom of Information (NAB 22) (GRZ), supra note 27
\textsuperscript{45} Patrick Matibiti is a Lecturer at the University of Zambia in the School of Law and media lawyer
CHAPTER FOUR

A GLANCE AT OTHER SIMILAR LEGISLATION

More than 50 countries now have guaranteed their citizens the right to know what their government is up to, and more than half of these freedom of information laws passed in the last decade (seven in the last year alone), according to a new global survey posted on the Web by the virtual network of access advocates, freedominfo.org\textsuperscript{46}. The new openness laws are making headlines around the world on subjects ranging from public safety to corruption to human rights. The global survey includes a sample of more than 40 such news stories from around the world based on records released through the access laws, including radiation contamination and refugee medical care in Australia, mercury poisoning and official entertainment expenses in Japan, secret police surveillance in Mexico, offshore company profits from a South Africa-Nigeria oil contract, and a long-delayed sewer in New Delhi that suddenly was finished when residents asked for the documents under a new access law.

In December 2002 the South African History Archive (SAHA) published comparative statistics on its use of the Promotion of Access to Information Act (PAIA) during the years 2001 and 2002. PAIA came into operation in March 2001, the legislative mechanism for giving expression to the constitution’s recognition of South African’s right of access to information held by both public and private bodies. The South

\textsuperscript{46} www. freedom.org
African experience is such that use of this Act has been extremely limited. However, SAHA's experience in 2001 was encouraging in that, of the 24 PAIA resquests submitted to four state agencies, 11 resulted in the release of materials, and only two were refused while 11 were pending at year end. However, average response times were not good with the South African National Defence Force (SANDF), to whom 10 requests had been directed, came in with an average of four months. The worst performer was the National Archives, with an average of eight months.

"It is apparent that a growing number of state agencies are adopting negative strategies in dealing with PAIA requests. Incompetence, including several cases of Saha requests being lost by the agencies dealing with them, partially explains the poor response times. But there is growing evidence of some agencies simply ignoring both requests and internal appeals on the assumption that most requesters will give up and will not have the resources required to apply to the High Court for relief. In this context, capacity and determination to use the court becomes of crucial importance. The single SAHA High Court action finalized by year end with the SANDF releasing certain military intelligence file lists with various categories of information masked. Included in these categories was information on countries and firms having dealings with the apartheid military during the international arms embargo of the 1980s. SAHA's internal appeal against these masking was unsuccessful and consequently papers were filed in the High Court. The SANDF quickly offered SAHA an out of court settlement in terms of which fresh copies of the lists were made available with this information unmasked. Despite the obstacles,
SAHA has demonstrated that PAIA can be an effective tool for ensuring public access to records held by the state. The substantial archive of released materials built up by it in less than two years has been admired by international freedom of information commentators. Good working relationships have been secured with a number of state agencies out of which have come numerous clarifications on the often complex and vague provisions in PAIA. And the successful court action of Richard Young in relation to decomentation on the arms deal investigation, raise hope that use of the Court appeal mechanism will broaden the scope of freedom of information in South Africa.47"

With all these problems encountered by South Africans, a Canadian expert, Tom Reilly48 describes the Act as the most progressive in the world. As will be seen from a number of writer-ups from a number of countries, this need of such an Act has not only been recognized in Zambia:

The Freedom of Information Campaign in Argentina

Buenos Aires-based journalist Martha Farmelo reports for freedominfo.org on Argentina's current campaign for a freedom of information law, which was passed in May 2003 by the lower house of the national congress and is now pending in the senate. Farmelo describes

47 Statement by Verne Harris released on December 30, 2002. Harris is Director of the South African History Archive (SAHA)
48 Tom Reilly is a Canadian expert on Freedom of Information legislation who was very instrumental in the drafting of the South Africa Freedom of Information Act. In his address to the South African task force he informed them that on a national level there are only 15 Freedom of Information Acts (FOIA) in the world
the workings of pioneer access laws in the city of Buenos Aires, the constructive role of the city ombudsman and the national Anti-Corruption Office, and lessons learned from the continuing campaign effort.

**The Philippines: A Liberal Information Regime even without an Information Law**

The Philippines has no freedom of information law, but Filipinos hardly lag behind citizens of democratic states that have statutes providing access to information held by the State. The Philippines in fact can boast of having the most liberal information regime in Southeast Asia.

**Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information**

This project looks at the struggle for openness and freedom of information in the European Union over the past decade. It starts with the Code of access to EU documents introduced in December 1993 and the first challenges in the courts and to the European Ombudsman. Despite their public commitment to openness, EU institutions - especially the Council of the European Union (the 15 EU governments) and the
European Commission wanted to control which documents were released and which were not\textsuperscript{49}.

**Freedom of Information in Ireland: Five Years On**

The leading freedom of information expert in Ireland, Maeve McDonagh of University College Cork, reviews the first five years of the Irish law, passed in 1997 and implemented in 1998, and deconstructs the latest amendments, from April 2003, that roll back parts of the law. In addition to a penetrating analysis of the statute, Professor McDonagh provides striking examples of public disclosures resulting from Ireland's access to government information.\textsuperscript{50}

**The Birth of the Freedom of Information Act in Japan: Kanagawa 1982**

Lawrence Repeta of the Information Clearinghouse Japan board of directors (and currently an Abe Fellow at the National Security Archive) reports on the 20-year experience with freedom of information in Kanagawa prefecture -- the most influential early Japanese access law, passed in 1982, two decades before the national FOI law.\textsuperscript{51}

\textsuperscript{49} Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information - Posted October 1, 2002

\textsuperscript{50} Freedom of Information in Ireland: Five Years On - Posted September 22, 2003

\textsuperscript{51} The Birth of the Freedom of Information Act in Japan - Posted September 8, 2003
India: New Campaign in Delhi to Promote Electoral Openness

The Delhi Campaign for People's Right to Information (DCPRI), Parivartan, and the National Campaign for People's Right to Information (NCPRI) have begun a new campaign to promote openness initiatives.\textsuperscript{52}

U.S. vs Japan: A Comparison of Freedom of Information Laws

After more than 20 years of lobbying by Japanese citizen's groups, opposition political parties and others, Japan's national Information Disclosure Law came into effect on April 1, 2001 ... This law creates for the first time a legally enforceable right of access to Japanese national government files.\textsuperscript{53}

\textsuperscript{52} India: New Campaign in Delhi to Promote Electoral Openness - Posted August 14, 2003

\textsuperscript{53} U.S. vs Japan: A Comparison of Freedom of Information Laws
CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

When looking at the Freedom of Information Act, it is important to make the extent of application of the Act broad, because the efficacy of the rights to information could be undermined if there are extensive exemptions from the general principle of openness. The public information commission, will draw its membership from independent minded and reputable persons nominated by non-governmental organizations and eventually the nominations should be ratified by the National Assembly. The functions of the commission are to act as a conduit for requests for access to information and to act as an umpire in the event of disputes relating to requests for information. A central feature of the Act should create a general right of access to information which is under the control of a public authority. Such an Act will ensure that a person who requests for information need not give any reasons or justification for that person’s interest in the information being requested for. Such an Act should also ensure that freedom of information, includes the public’s right to know what the government is doing on its behalf and to participate in the decision making process.

Like the practice the world over, the Freedom of Information legislation should have some exemption from disclosure of certain information. This means that drafters will
have to be very careful so that these exemptions are not made vague, a thing that would open such an Act to abuse by the government.

In this respect, these exemption should cover information about national security, private commercial activities of government bodies, information that would impede criminal investigations and prosecutions, personal privacy, third party commercial information, records supplied in confidence, the safety of individuals and security of institutions, buildings or systems as well as international relations. While canvassing for such an Act, it will be important that there could be frivolous or vexatious requests, such requests should be exempted. But in deciding what is frivolous and what is not, it will be important to give room to the judiciary to decide on that. The judiciary should also decide on the limits of such exemptions.

There is also need to make sure that there are no claw back laws that tend to give a right and take it away on the other hand. As such even the national security exemption should be narrowly defined to make sure that it is watertight to abuse, especially the politicians. A similar issue was litigated upon in South Africa during the Cameron Commission of Inquiry. This Commission was appointed by then Republican President Nelson Mandela to investigate particular arms transactions between South Africa and a Middle-East arms dealer, Eli Wazen. Towards the end of 1994, days after the Minister of Defence had given a public assurance that all clandestine arms trade from South Africa to other countries had ceased, a ship was discovered carrying South African arms apparently intended for Yemen. Yemen is a
country embargoed for arms trade by South Africa. Naturally the Minister of Defence was severely embarrassed and requested the immediate appointment of a Commission to investigate Armiscor, South Africa’s national import and export weapons agency, in relation to the particular transaction. Lawyers representing the Freedom of Expression Institute (FXI) argued before the commission that a secret policy document, the Log 17 pamphlet, should be publicly disclosed by the commission. Log 17 shows to which countries South Africa is willing to sell weapons to. It goes further in specifying what kinds of weapons can be sold to which countries. Obviously it reveals important foreign policy considerations on the part of South Africa. The South African National Defence Force (SANDF), Armiscor and the Department of Foreign Affairs on the other hand came up with the defence of national security by saying that the document was a classified document and the law forbade its public disclosure.

However, FXI, argued that South Africa now had a new Constitution and the law had to be evaluated in terms of it. FXI continued by saying that the new constitution contained as a core value a commitment to “openness and democracy in a society based on equality and justice.” They said the old definition of national security could not stand the impact of this core value and therefore would have to be reformulated. FXI proposed a new formulation which included that national security exemptions should be very narrowly defined and that this could be achieved in the following ways: Firstly, the courts, statutory commissions and other authorities which are called upon to adjudicate the definition should independently verify the classification of information. They should not leave it to cabinet, the parliament, or an agency of state
to decide the scope of classification of information deemed to constitute the subject of national security. Secondly, the substantive content of national security should be limited to national defence matters. Other concerns such as foreign policy and commercial consideration should be considered separately and should not form the basis of national security. Thirdly, the standard of proof to determine whether the disclosure of information will breach national security should be disclosure that would with a high degree of certainty lead to immediate and identifiable harm.

In addition, the FXI argued that should some portions of documents conform to the criteria above, then it is nevertheless important to release the balance of the information, i.e. that exempted information should be severed off and the remainder of the document must still be disclosed\textsuperscript{54}.

Judge Edwin Cameron, who chaired the commission, accepted these arguments and ruled that the document in question, Log 17, would be publicly disclosed. This new interpretation of national security was studied by the Open Democracy Act task group of South Africa and was included in the Open Democracy Bill. What the ruling of Judge Cameron entails is that the state has to prove that immediate and identifiable harm will result from the release of such information. Merely claiming that it would, will not be good enough.

\textsuperscript{54} Argument presented to the Cameron Commission of Inquiry by advocate Derek Spitz appearing for the FXI in December 1994
PROCEDURE FOR REQUESTING INFORMATION

It is important to make sure that the procedure in requesting this information is user friendly and not susceptible to abuse by those in authority. An ideal situation will be whereby, after making a request the normal time period granted for the disclosure should not be more than 15 days. However, if the information officer is uncertain as to whether the information is exempted from disclosure, or perhaps partially exempted, then the information officer has to present the matter to his or her head of department for a ruling. Another 15 days should be granted for this. However, there should be urgency provision which should be able to override these time frames. This means that urgent requests must be dealt with immediately and this can be within days like five. It will not make sense for one to make a request for information and for that information to only come out months later. Such information would be rendered useless after being overtaken by events. In countries where this legislation is in place like South Africa, where bureaucracy is involved, journalists find it too tedious to use the legislation. Any delays may also not suit their deadlines. They therefore tend to continue to rely on conventional sources of information.

There is also need to make sure that there is an appeal mechanism should a Department Head deny information requested. The Department Head must be able to hold an appeal at least five days after such information has been denied. If after the
request is still refused, then the matter should be referred to a court that should be set up specifically to deal with information matters. It should be able to operate like the Commercial Court. This should a specialized court. It will also be important to make sure that the court should be given a specific time frame because as already alluded to, any delay in giving out the requested information it will be overtaken by events. If the Information Court rules against disclosure, then the matter should be referred to the Supreme Court for a judicial review. It will also be necessary to give the Information Court the same status as the High Court. A situation that applies to the Industrial Relations Court of Zambia. As such should a case be reviewed by the Supreme Court a precedency should be set that would make other Information Court follow the law as set by the superior court.

The great fear when dealing with a government that is bent on misrule is that they will always look for loopholes in the legal system in order to meet their will. As such, it will be important to assist the public in the face of a difficult bureaucracy. The South African model may be the most ideal – it provides for a Public Protector. Such an office can be invoked to assist the public in various ways. Firstly in helping to reduce a request for information in writing. This form of help may be very important especially where you are dealing with a country like Zambia which has very low literacy levels. Secondly, when an information officer on the lowest level of bureaucracy refuses information, the Public Protector can be asked to intervene to mediate on behalf of the requester. This can be done in relation to the Head of Department. The Public Protector can also represent a member of the public during an
appeal hearing adjudicated by the Department Head. The use of the Public Protector may be an ideal thing as seen from the South African situation because some people will not want to resort to an information court if information has been denied. Particularly citizens who are frightened of bureaucracy and intimidated by the power of the state. In fact, citizens should be able to make requests in any of the seven official languages of Zambia.

Another obligation should be put on these information officers. For instance when they refuse to disclose information they should be obliged to provide sufficient reasons in writing as well as inform the requester about how to initiate the next phase of appeal and the procedures to be followed. An information officer should be able to assist a requester whenever necessary to reduce a request in writing for the same reason of illiteracy. The information officer has to ensure that not only is the request in writing, but that it has been formulated clearly enough so that it can be attended to. Such a requirement will avoid situations where requests will be denied on the basis that the requester was too vague.

It will also be important to ensure that while granting the whistleblowers immunity, that the news media should also enjoy the same immunity. Failure to do so, will result in a situation where the news media could be harassed. As such there is need to grant the news media specific protection that should enshrined in the Act. The biggest fear that must be guarded against is a situation where the government will arrest journalists who obtain information in the usual way, i.e. through leaks from
confidential sources of information. The government may argue that since a law exists through which information should be requested, then that law must be used by journalists as well. Should they not request information through official channels, and receive it in other ways, it is not inconceivable that they could be breaking the law.

**CONCLUSION**

The important feature of a Freedom of Information Act is that the government will be compelled to release information pro-actively, without having to wait for the public to request information. Each government department should be able to publish a manual probably annually. The manual should list in all relevant categories the information it holds and describes the internal organizations of that department. Where it has been the media that has being crying for this kind of legislation it is important at the end the media should not be the primary beneficiary of this kind of legislation, but the ordinary citizen. It should be noted that in our present democratic frame work, free flow of information for the citizens and non-governmental institutions suffers from several bottlenecks including the existing legal frame work, lack of infrastructure at the grass root levels and attitude of secrecy within the civil service as a result of the current frame work of rules. As such it is proposed that all these aspects should be dealt with so that Freedom of Information became a reality consistent with the objectives of having a stable, honest, transparent and efficient government.
As Lusaka lawyer, Patrick Matibini observed\textsuperscript{55}, it is however necessary to engage the executive branch of government on the need to re-submit the Freedom of Information Bill to the House.

Adopting the words of the mover of the private member’s motion in the House\textsuperscript{56}, it is not expected that the introduction of the Freedom of Information Act will immediately, automatically and completely remove the culture of secrecy in government and other public authorities. However the introduction of the Freedom of Information Act, will no doubt enable citizens to be more informed about the government’s actions, policies and decisions. Without information, citizens are unable to exercise their rights and responsibilities.

\textsuperscript{55} Matibini, P, A Review of the Freedom of Information Bill, A Strategy paper presented to the ZIMA on the re-submission of the Freedom of Information Bill to the National Assembly (June 20, 2003)

\textsuperscript{56} Sakwiba Sikota, Supra note 4
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Professor Etiene Mureinik is a member of the South African task force on the introduction of the Access to Information Act and head of the school of law at the University of Witswatersrand in Johannesburg.

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Leite de Vasconcelos, is a Mozambican journalist who addressed a regional workshop on Freedom of Expression and Information in a Democratic Society held in Lusaka from May 30 to June 1, 1995.

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Patrick Matibiti is a Lecturer at the University of Zambia in the School of Law and media lawyer

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