

THE CHALLENGES OF IMPLEMENTING FREEDOM OF INFORMATION LAW



BY

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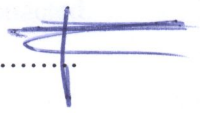
DECLARATION

I, Janet Muyawala-Ilunga, Computer number 2203559, do hereby declare that this dissertation represents my own original work. I declare further that all other works referred to have been duly acknowledged and I verily believe that this research has not previously been presented for a degree for this or any other university.

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APPROVAL

This dissertation of Janet Muyawala-Ilunga is approved as fulfilling the requirements or partial fulfillment of the requirements for the award of the Bachelor of Laws degree in Directed Research by the University of Zambia

Date: 13th FEB 2009 Signature: Dr. P. MATIBWI 

ABSTRACT

Freedom of Information (FOI) law giving the public free access to official documents has long been recognised as one of the pillars of upholding democracy. In fact FOI law has increasingly become recognised as a human right. Many countries have even enshrined the right to information in their Constitutions. Governments have come to realise that FOI law is essential for citizens to participate in the governance of their countries. It is also one of the ways that Governments can be held accountable. However, the ability for citizens to exercise the right to information lies not only in good and necessary legislation. It requires proper implementation, which is by no means an easy task.

After years of dragging its feet, the Zambian Government seems ready to enact FOI law. And it now faces the challenge of implementation. Elsewhere, countries that have put in place FOI laws-some of the best pieces of legislation-are still struggling with implementation. It has become apparent that the FOI regime is more than a legislative process. It requires a radical culture shift in attitude and style of operation in public authorities. Proper administrative and organisational structures need to be in place. Information systems should be such that they can handle the increased flow of information as well as release information in the most timely fashion. Public officers too must know and understand their role under an FOI regime. Also critical to the success of FOI law, is the level of awareness and participation of the citizens. Citizens, the media inclusive, must be able to test the law but they can only do so if they are aware of and appreciate the existence of the law.

In its current state, the public service cannot facilitate free access to information. Public service workers are still bound by various regulations and statutes that reinforce the withholding of information from the public. Moreover, the penalties for breach of Service Commission regulations are heavy. Coming from a long history of a One-Party regime, information is still a closely guarded secret. The continued use of these regulations and statutes will only serve to negative the spirit in which the FOI law is being introduced. Furthermore, the information system is uncoordinated and does not conform to international standards. A more systematic change and increased advocacy is needed otherwise the FOI law will be dogged with non-compliance of varying degrees, or even hostility and resentment as highlighted in this study. This study proposes measures which do not necessarily have to wait for the FOI law to be enacted.

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DEDICATION

Dedicated to my husband Marvin Ilunga and children, Kazembe, Chalwe, Mulenga and baby Chappa for their unwavering support throughout the research

TABLE OF LEGISLATION

Constitution of the Republic of South Africa

National Archives Act Chapter 175 of the Laws of Zambia

Official Secrets Act of 1980 of Sweden,

Printed Publications Act Chapter 161 of the Laws of Zambia

Promotion of Access to Information Act of South Africa No. 2 of 2000

Service Commission Act Chapter 259 of the Laws of Zambia

State Security Act Chapter 111 of the Laws of Zambia

The Freedom of the Press Act SFS 1949 of Sweden

Zambia National Broadcasting Corporation (Amendment) Act No. 20 of 2002

Zambia Independent Broadcasting Authority Act No. 17 of 2002

TABLE OF CASES

Masetlha v President of the Republic of South Africa CCT 38/07 **30**

National Independent Newspapers (Pty) Ltd v Minister of Intelligence Services CCT 01/07 **30**

ABBREVIATIONS AND ACRONYMS

ALAC	Advocacy and Legal Advice Centre
CCT	Constitutional Court
FOI	Freedom of Information
FXI	Freedom of Expression Institute
IBA	Independent Broadcasting Authority
ICT	Information and Communication Technology
IEC	Information Education and Communication
IFMIS	Financial Management
ISO	International Standardisation Organisation
LRF	Legal Resource Foundation
MISA	Media Institute of Southern Africa
MKSS	Mazdoor Kisan Shakti Sangathan
NAZ	National Archives of Zambia
ODAC	Open Democracy Advice Centre
PAIA	Promotion of Access to Information Act
PANOS	Media Support Organisation
PAZA	Press Association of Zambia
PFC	Press Freedom Committee
PMEC	Payroll Management
PSMD	Public Service Management Division
PSRP	Public Service Reform Programme
SAHRC	South African Human Rights Commission
TIZ	Transparency International Zambia
UK	United Kingdom
UNZA	University of Zambia
US	United States
ZSIS	Zambia Security Intelligence Service

KEY TERMS

Access to Information	To give the public or citizens the right to obtain public documents. It also called the right to know or freedom of information or right of access to information
Administrative Capacity	Characteristics of a public body relating to performance and ability to implement public policy, rules, regulations and laws
Administrative Non-compliance	Failure or refusal to comply or conform and adapt one's actions to a rule, regulation, policy or law
Adversarial Non-compliance	Adoption of broad interpretation of rules to protect self interests
General Non-compliance	Undermining of requests through weaknesses in administration. Normally unintentional
Malicious Non-compliance	Intentional combination of actions designed to undermine requests
Mute or Flat Refusal	Instances where public officers simply ignore requests for information

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CHAPTER ONE

THE QUEST FOR THE PUBLIC'S RIGHT TO KNOW

1.0 INTRODUCTION

Freedom of Information (FOI) law giving the public free access to official documents has long been recognised as one of the pillars for upholding democracy, and in particular for enhancing the fundamental freedoms of expression and the press. It has also increasingly become recognised as a human right and is enshrined in most Constitutions. Many countries across the globe have passed legislation to give effect to this right while others are in the process of developing the law.¹ In Zambia the FOI concept has been embraced on account that a free press and an informed citizenry are better able to hold government accountable for its actions thus ensuring transparency and good governance. Passage of the FOI law has been slow shrouded with lack of political will and procrastination, but there are now serious attempts towards enactment of the legislation. However the passage of FOI law is only one step. Zambia will now face the daunting challenge of implementation and enforcement of the law.

Experience elsewhere shows that where the FOI law is in place, access to information is still far from being a reality to such an extent that it raises questions as whether FOI laws are not merely symbolic instead of substantive. Studies that have been conducted regionally and globally show that there is still a lot of work that needs to be done in terms of institutional capacity, awareness to encourage use of the FOI laws and breaking the chain of government secrecy and bureaucracy.

While in some countries the laws are dormant due to failure to implement them properly, in

¹ T.Mendel, Freedom of Information-A Comparative Survey, UNESCO (2006) p iii

others, implementation of FOI laws has been frustrated by governments abusing exemptions in order to withhold information from the public.²

Countries like South Africa have been singled out as having the most progressive FOI law in the Southern Africa. In that, apart from the constitutional guarantee of the general right to freedom of expression in Section 16(1) (b) augmented by an explicit provision for the right of access to information in Section 32 of the new South African Constitution³, the South African Parliament has enacted the Promotion of Access to Information Act (PAIA)⁴ giving access to information not only held by government, but private bodies as well. However, surveys conducted by the Open Democracy Advice Centre (ODAC) reveal that use of the PAIA is very limited. This is not only due to the newness of the law, but also due to inconsistency in implementation.⁵ Successful implementation of FOI law can also be hindered by provisions that undercut the very right (i.e. to access to information) that is set out in the Act. Namely, provisions such as the requirement that an individual requesting information should show legal interest or disclose reasons for the information required. By and large it is such weaknesses in the law, implementation and oversight that have left access to information in many places largely unfulfilled.

² D. Banisar, Freedom of Information and Access to government Record laws Around the World, Online Freedominfo.org global survey, (May 2004) p7

³ Act No. 108 of 1996

⁴ Act No. 2 of 2000

⁵ M. Memeza, An Analysis of Weaknesses in Access to Information Laws in SADC and in developing Countries, [Freedom of Expression Institute](http://FreedomofExpressionInstitute.org) (FXI) p10-16

1.1. STATEMENT OF THE PROBLEM

Owing to the problems experienced by other countries in the implementation of FOI law, problems which are not peculiar to those countries alone, does Zambia have the institutional framework to enforce the FOI law? It is common knowledge that the civil service, which is the primary public authority that holds public information, is beleaguered with bureaucracy and red tape. It is also common knowledge that Government institutions have poor record keeping systems. For instance, the struggles that civil servants face in tracing records for purposes of effecting pension payments or appointment and promotion all attest to this. It is therefore argued that public authorities may not have the capacity to handle the large volume of information that will be rolled out on account of the FOI law and more so in a timely fashion to meet the expectation of users. In the same vein government is yet to appoint Public Information officers who are to handle requests. It is submitted that the level of preparedness and understanding of these officers would have a bearing on what information will eventually be accessed.

Furthermore, due to the secretive nature of government it is argued that with a public that is not aware or does not fully appreciate the FOI law and what it entails, may result in information being restricted under the pretext of exemptions. In addition, the continued existence of laws which are an impediment to freedom of expression and press freedom alongside the FOI law may only serve to frustrate the objectives of FOI law, rendering it *otiose*.

1.2. PURPOSE OF THE STUDY

The FOI law being new will present a number of challenges in implementation which if not addressed, will defeat the purpose of making information accessible to the public, the media inclusive. It is therefore necessary to identify the impediments to ensure not only the effective

enforcement of the law, but also proper use of the law. Otherwise the FOI law runs the risk of becoming an elite instrument.

The objective of the study was twofold. Namely, to: -

- (a) Examine the institutional capacity of the public service to implement FOI law;
- (b) Examine of the capacity of the public, media inclusive to use the FOI law

1.3. SIGNIFICANCE OF THE STUDY

The implementation of the FOI law poses a challenge to the users - the public and the media- for whom the legislation is intended. Therefore there was need to examine the possible pitfalls and thereby avert them.

1.4. METHODOLOGY

This study was qualitative aimed at analysing government structures and the ability for the users to use the FOI law.

1.4.1. Data Collection and Analysis

- (a) Face to face interviews with identified stakeholders
- (b) Structured questions were administered to selected respondents
- (c) Desk research

1.5. ETHICAL CONSIDERATIONS

Given the nature and area of study, most of the people interviewed could not speak openly and therefore did so only on condition of anonymity.

CHAPTER TWO

TRANSLATING FREEDOM OF INFORMATION INTO A TOOL TO ENHANCE DEMOCRACY

2.0. INTRODUCTION

“A popular government, without popular information or the means of acquiring it is but a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power which knowledge gives.”⁶

Information has been described as “*the oxygen of democracy*”, because without it, citizens cannot participate effectively in decision making that affects them nor can they assess the performance of their government. For this reason, many governments have come to recognise FOI as a key tool for enhancing transparency, good governance and public accountability, and that in order to fulfill this objective, a free press and an informed citizenry are paramount. The FOI, is therefore, seen not only as an essential ingredient for democratic governance, but also as a fundamental human right. This is because it gives members of the public the right to access official documents held by government and in some cases, private enterprise. The aim is to lift the veil of secrecy that governments tend to operate in and also entrench the idea that information is held by government on behalf of the people who elected them into office. In short, FOI law can be said to be one of the key tools in fighting corruption and wrong doing in government.

⁶ American president James Madison (1882) quoted in Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures, ARTICLE 19 (1993) p89

Whereas in some countries, the right to freedom of information comes as an incident of freedom of expression, many governments that have adopted the culture of openness, have gone ahead to enshrine the right in their Constitutions. Today, a number of countries have even gone a step further by passing legislation to give effect to the right of access to information while many more are in the process of developing the law.⁷ However, the ability to exercise the right of access to information lies not only in having necessary and good legislation, but also in effective and thorough implementation by the organs holding the information. Thus the main question is how to translate access to information law into a practical instrument that the public can use to exercise their rights.

2.1. PRE-REQUISITES FOR FOI LAW IMPLEMENTATION

Literature on the research subject has shown that development and implementation of such laws is not an easy and straightforward task. A number of pre-requisites need to be put in place as these play a key role in determining the success or failure of FOI law. Once the FOI legislation is enacted, public authorities are obliged to release information upon a request being made unless it can be shown that public harm is likely to override public interest in doing so.

2.1.1. Administrative Capacity

Administrative and institutional capacity, in this respect, refers to a set of characteristics of a public body relating to the performance and the success of public policies, rules, regulations and laws⁸. Some typical aspects of capacity relate to the quality of civil servants, organizational

⁷ T.Mendel, Freedom of Information-A Comparative Survey, UNESCO (2003) piii

⁸ http://www.ec.europa.eu/regional_policy/sources/docgeneral/evaluation/evalsed/download/sbl-institutional_capacity/doc Accessed November 4, 2008

structures and information management systems. Public authorities need to have sufficient capacity to manage the flow of requests that will come as a result of the FOI law as well as be armed with information as to what exactly is required of them.⁹ Studies conducted show that in many countries there is still a lot of work that needs to be done in terms of administrative and institutional capacity, awareness to encourage use of the FOI law and breaking the chain of secrecy. It has been demonstrated that where there is a lack of awareness by administrators in public bodies about their duties in terms of the FOI Act, poor information management systems, procedural inconsistencies and even lack of awareness of the existence of the law and what it entails by the public, implementation of the FOI law has been seriously hampered.¹⁰

2.1.2. Administrative Compliance

Administrative compliance or adherence to the letter and spirit of FOI legislation is an absolute necessity. This is because the level, type and frequency of administrative compliance are a useful measure of the efficacy and well-being of the FOI regime. Public authorities not only have to process requests for information in the timeliest fashion, but also, have to pay heed to the need for as much disclosure as possible. Decisions on the release of information should be made on merit and free of political and other considerations not specified in the legislation. Furthermore, the formal training provided to public officials should be calculated to encourage release to foster an attitude that exemptions were to be applied in a limited manner and as a last resort.¹¹ But this has not always been the case. In countries where the FOI law has been put in place, there has been negative or non-compliance from public administrators.

⁹ A.Tilley, Access to Information Law and the Challenge of effective Implementation: The South African Case Open Democracy Advice Centre 2002 p73

¹⁰ www.sahrc.za/sahrc/cms/publish/cat_index_22.shtml. Accessed on 16 October 2008

¹¹ www.ucc.ie/law/foi/conference/snell_mexico_2005.pdf . Accessed on 18 September 2008

2.1.3. Roberts' Theories of Non-Compliance

Canadian legal academician and FOI advocate Alasdair Roberts formulates a model of administrative non-compliance. The theories go beyond just looking at basic administrative procedure to ensure compliance in an FOI regime such as timely release of information. They also examine the nature of administrative compliance. Roberts' analysis brings a new dimension to understanding FOI legislation in practice. Many countries that have long implemented FOI law are now applying Roberts' model in the review of their legislation. This has come out of a realization that countries that pioneered implementation of FOI laws had committed a serious oversight by viewing the regime more, as merely a legislative matter as opposed to a change process. Other studies have shown that governments have merely been paying lip service to the FOI concept,

“Always deep down believing that a magic mix of watertight exemptions, right interpretative approach, and appropriate mechanism of judicial review would suffice. And if necessary a degree of training might complete the process.”¹²

Thus, it has been discovered that the key policy dynamic associated with the implementation of the right to know legislation, is how a radical culture shift for public officials is to be implemented and then maintained in terms of short and long term administrative compliance with legislation. In Roberts' model, administrative non-compliance comes in three categories namely, malicious non-compliance, adversarialism and general non-compliance. Malicious non-compliance is a combination of actions normally intentional and illegal, and is designed to undermine requests for access to records. This is an extreme case, examples of which include

¹² www.ucc.ie/law/foi/conference/snell_mexico_2005.pdf. Accessed on 18 September 2008

destruction of records subject to FOI request, avoiding responding to requests or deliberate manipulation of administrative practices so that information that would ordinarily be released under the FOI law would be covered by an exemption.¹³

New information on the FOI regimes shows that whereas many governments have in the last decade become more open, elsewhere FOI laws are being frustrated by some governments, and public officials employing various tactics in a bid to withhold information. Some are abusing exemptions in order to withhold information from the public using supporting laws on the pretext of preserving certain information e.g. Data Protection laws.¹⁴ These laws, which deal with the classification and de-classification of government information, are used in a manner, which is contrary to the spirit of openness and transparency embodied in the FOI law. It is reported that in the US, more information is being restricted and in some cases being erased from websites and government records. The George Bush administration is said to have made 58.7 million decisions to classify records and related documents in the first three years of office compared to 65.5 million in the entire eight years of his predecessor, Bill Clinton's tenure of office.¹⁵ This is an attitude, which directly falls under Roberts' category of malicious non-compliance and threatens to undermine FOI as long as such legislation remains in the statute books. The other form of administrative non-compliance, adversarialism is not necessarily illegal but is aimed at ensuring the interest of government or departments are adequately protected. For example, public officials may adopt very broad interpretation of the exemptions or even deliberate delays until towards the end of the mandatory time limit. The third form, general administrative non-

¹³ *ibid*

¹⁴ D.Banisar, Freedom of Information and Access to Government Record Laws around the World (At Online Freedominfo.org global survey, May 2004) p7, Cox News Service, 11 February 2005

¹⁵ Cox News Service February 11, 2005

compliance is less extreme and a very common feature in FOI regimes being implemented elsewhere. This is where public bodies undermine the right of access to information through inadequate resourcing, deficient record keeping or other weaknesses in administration.¹⁶

2.1.4. Supportive Measures

Countries like South Africa have given Constitutional guarantee to the right of access to information giving citizens for more freedoms of expression than has ever been enjoyed for many years. However the realisation of the right is said to have been riddled with faults. The problem arises not only out of the FOI law being new, but also due to inconsistency in implementation.¹⁷ This has led to the PAIA, despite being one of the best pieces of legislation, to have limited use among South African citizens. The inconsistencies stem from the failure to develop institutions as well as personnel alongside the implementation of the Act. The impact of these inconsistencies shall be examined in a later chapter. Needless to say, that in order for FOI law to fully serve its purpose, it is important that there is in place concurrent or supportive laws, rules or regulations.¹⁸ Infrastructural and, political and social pre-conditions are also necessary. There has to be political stability i.e. government should not be averse to openness. Secondly, there has to be an independent judiciary and one that is informed in the event that the appeal for review of a decision ultimately finds itself before the Courts of law. Thirdly, communication infrastructure is an absolute necessity and it requires not only physical infrastructure, but also a literate public.¹⁹ According to author Rick Snell, the absence of these principles or the failure to

¹⁶ www.ucc.ie/ucc/depts/law/foi/conference/snellInts99.html. Accessed on 18 September 2008

¹⁷ M. Memeza, An Analysis of Weaknesses in Access to information laws in SADC and developing Countries, Freedom of Expression Institute (2006) p10-16

¹⁸ K. Sokoni, Freedom of Information Law, Zambia Law Journal Vol 35 (At UNZA Press 2003)

¹⁹ A. Arko-Cobbah, The Right of Access to Information: Opportunities and Challenges for Civil Society and Good Governance in South Africa, (International Federation of Library Associations and Institutions (IFLA) Journal Vol 34 (2008) p124-224

implement supportive measures highlighted above, increased non-compliance with legislation will become a more significant feature of FOI administration as time goes on.²⁰ The initial years of implementing FOI laws, therefore, are critical for the creation of faith and ability in the public to obtain information from the public authorities. Furthermore, public activity for the FOI must continue even after the legislation has been enacted into law.

2.2. STATUS OF FOI LAW IN ZAMBIA

In Zambia, the enactment of FOI law has been very slow. In his book, the Struggle for Media Law Reforms in Zambia,²¹ Media Lawyer Dr Patrick Matibini describes the quest for the FOI law and other media law reform, as a long and hard struggle characterised by inertia, ambivalence and plain resistance to change on the part of successive governments²². Up until now, government has shown no political will to see the FOI Act through Parliament. The FOI Bill²³ was withdrawn, as late as the Committee stage, on December 18, 2002 on grounds that further consultation was needed.²⁴ Various reasons have been advanced including the remote terrorism attacks in the United States (US) on September 11, 2001. Government feared that the enactment of FOI law would compromise State Security and argued that it needed to be cautious before introducing laws that would give uninhibited access to information in its custody. However, there now appears to be serious attempts towards enactment of the FOI Bill. President Levy Mwanawasa announced in his opening address to Parliament in 2008, in relation to the media reforms, that the FOI Bill would be reintroduced. He said government realised the importance of the media in fighting corruption and providing checks and balances in the

²⁰ www.ucc.ie/law/foi/conference/snell_mexico_2005.pdf . Accessed 18 September 2008

²¹ Dr.P.Matibini, The Struggle of Media Law Reforms in Zambia MISA Zambia (2006)

²² Ibid p174

²³ No 22 of 2002

²⁴ Dr P. Matibini, The Struggle for Media Law Reforms MISA Zambia (2006) p120

society.²⁵ This was followed by assurances from the Minister of Information and Broadcasting Services, Mr Mike Mulongoti that the FOI Bill would be presented to Parliament before the end of 2008. His statements however, have been somewhat contradictory as in one breath he attributes the delay in enacting the Bill to the need to iron out any serious impediments and prepare civil servants who were to administer the FOI law.²⁶ In another, he says the media first needs to show more responsibility in their reporting.²⁷ Although Mr Mwanawasa did not live to see his wish through²⁸, the new government of Rupiah Banda has pledged to implement all media law reforms²⁹.

2.3. CONCLUSION

By and large, the weaknesses in the implementation of the law that have left access to information in many places largely unfulfilled, reducing it to merely good law left to gather dust. Given the background highlighted above, it is prudent to examine the institutional and administrative capacity of the public bodies that will implement the FOI law in Zambia as well as the ability of the users, the public and the media, to use the law once enacted.

²⁵ Zambia, National Assembly, Debates (11th January 2008)

²⁶ Times of Zambia, 5 May 2008

²⁷ Times of Zambia, 4 June 2008

²⁸ President Mwanawasa died in France on August 19, 2008 after suffering a stroke while attending the African Union (AU) Heads of State Summit in Egypt

²⁹ Zambia, National Assembly, Debates (16th January 2009)

CHAPTER THREE

REVIEW OF PUBLIC ADMINISTRATION STRUCTURES AND STATE OF MEDIA AND CIVIL SOCIETY ORGANISATIONS

3.0. INTRODUCTION

The success or failure rate of the implementation of FOI law lies in the level of preparedness of the public authorities that hold the information, which is to be accessed by the public. This chapter will be devoted to examining the current state of some of the public service institutions as well as the level of awareness and general attitude of government workers towards FOI law. The smooth administration of the FOI law is heavily dependent on having a cadre of well-trained and competent civil servants. Public servants must be fully aware of what their obligations are with regard to record keeping, and the process of making records available to the public.³⁰ Similarly, the people, for whom the law is intended to benefit, must be aware of its existence. Guidelines to ensure successful implementation of the FOI law require that there must be effective participation of the citizens, both in the enactment and implementation process. Citizens, therefore, must test the law by making as many requests as possible and they can only do so if they know the law and what it entails. There is also need for a strong civil society involvement to educate the citizens and give them a sense of ownership of the legislation. This chapter, therefore, will also look at the rate of advocacy and awareness among civil society, media organisations and members of the general public about the FOI law.

³⁰ K. Sokoni, Freedom of Information Law, Zambia Law Journal Volume 35 University of Zambia Press (2003) p26

3.1. THE PUBLIC SERVICE

The Public Service covers all the government ministries and departments, and is headed by Secretary to the Cabinet. Each ministry falls under a minister who is responsible for policy and actions of a political nature. All of the administrative issues are handled by the Permanent Secretary. The Permanent Secretary as controlling officer controls and coordinates the ministry's activities with other ministries. He also advises Cabinet on issues relating to the ministry.³¹

3.1.1. Information Management System in the Public Service

Under the Africa Public Service Charter³², to which Zambia is a party, State Parties are required to among other matters, modernise administrative structures by mastering the new communication technologies, ensuring basic infrastructure as well as adapting to and responding in a more sustainable, quality conscious and efficient manner while ensuring transparency and respect for human rights and democracy.³³ The Charter defines principles and general rules governing African public services with respect to transparency, professionalism and ethical standards. It requires member states to have administrative units that would make available all necessary information on procedures in their respective domains as well as information required to assess their management, with a view to enabling those interested to have full access. The administration is further required to establish reception and information units for users (of public services) in order to assist them gain access to services, and in recording their views, suggestions and complaints.

³¹ Zambia Public Administration Country Profile,

www.unpan.un.org/intradoc/groups/public/UN/UNPAN02293.pdf. Accessed on January 24, 2009

³² Adopted at the third Pan-African Conference of Ministers of Civil Service in Windhoek, Namibia

³³ Africa Public Service Charter www.unpan1.un/intradoc/groups/public/documents/UN/UNPAN00498 . Accessed on November 11, 2008

3.1.2. Public Service Regulations

Until 2003, the operations of the Public Service have been governed by the General Orders of 1990. The orders have now been replaced by four separate documents. These are the Service Commission Policies and Procedures for Employment in Public Service, Disciplinary Code and Procedures for handling offences in the Public Service, Service Commission Regulations,³⁴ and the Terms and Conditions of Service for the Public Service.³⁵ In addition, the Secretary to the Cabinet, from time to time, also issues Administrative Circulars and Instructions. But for purposes of this research, the document of concern is the Terms and Conditions of Service for the Public Service as these are the regulations that guide public service employees on matters that relate to communication and dissemination of public information. The regulations state *inter alia*,

- a) Officers shall undertake in writing on Form CSB 10 to comply with all the provisions of the State Security Act³⁶ and shall acknowledge that they are aware of the serious consequences which may follow any breach of those provisions. The unauthorized disclosure by an officer of any information which has been obtained as a result of his or her position in the Public Service may be in breach of the State Security Act. In addition, these provisions continue to apply even after leaving office.³⁷ (Penalties for breach of State Security Act could range from 15-25 years imprisonment³⁸)

³⁴ (Made under Section 21 of the Service Commission Act Cap 259 of the Laws of Zambia., June 2003)

³⁵ Office of Secretary to the Cabinet, June 2003

³⁶ Cap 111 of the Laws of Zambia

³⁷ Regulation 62(a) and (b)

³⁸ Section 5(1) of Cap 111 of the Laws of Zambia

- b) No officer, whether on duty or leave, shall grant interviews or discuss matters affecting the defence or security of Zambia. Doing so shall constitute misconduct.³⁹
- c) Wherever possible, communication with the press on official matters shall be conducted through the Responsible Officer. Any Responsible Officer or senior officer granted permission to answer inquiries from the press may do so only on matters which do not involve State Security. Officers are also required to report, to their superiors, the substance of their answers.⁴⁰

3.1.3. Code of Ethics

Until recently, the Public Service has operated without a Code of Ethics. The Code of Ethics was only launched in December 2008.⁴¹ The Code, which sets out principles of core values and behavioural standards, reinforces the oath of secrecy and the Service Commission regulations. Public service workers are reminded that they are under oath not to disclose, without authority official information which has been communicated in confidence within government or received in confidence from others. Further, it binds public service employees to observe confidentiality even after leaving office. The recently launched Code of Ethics, however, does not in a way override existing statutory or common law obligations to keep confidential or to disclose certain information.

3.1.4. Public Service Reform Programme

Since 1993, government has been implementing Public Service Reform Programme (PSRP) under World Bank sponsorship, aimed at reorganizing and restructuring the Civil Service. The

³⁹ Regulation 63

⁴⁰ Regulation 67(a), (b) and (c)

⁴¹ Times of Zambia, December 3, 2008

ultimate goal is to improve quality, delivery, efficiency and cost effectiveness of public services. The reforms are meant to completely transform the public sector including adoption of professional ethics whereby accountability, transparency, punctuality, innovativeness and responsibility will become the hallmark of the civil service.⁴² The programme includes strategies such as down sizing and introduction of improved organisation and information management system to enable government to effectively compile and manage data. However, the PRSP has been dragging for 16 years. Implementation suffered setbacks ranging from lack of political will, political interference to lack of monitoring mechanism and, in some cases conflicting development needs.⁴³ The PRSP has also been affected by poor information flow within the Civil Service such that information about the reforms, themselves has remained a closed door issue. It was only after the donor community raised concern about the overly secretive way the reforms were being conducted that an Information, Education and Communication (IEC) component was introduced to publicize the reform programme.⁴⁴

3.1.5. Government Registry Departments

All public information is stored in the registry department of individual government institutions. The department is directly supervised by the Registry Control Unit under the Public Service Management Division (PSMD). Ordinarily, the Registry Control Unit is supposed to carry out regular inspection to ensure laid down regulations on the filing, storage and preservation of records are followed. However, investigations at selected ministries showed that these inspections are rarely done. The study covered five ministries namely Community Development

⁴² Prof A Chanda, National Integrity Systems, Country Study Report-Zambia *Transparency International* (2003) p29
⁴³ [www.unpan/un.org/intradoc/groups/public/documents/CAFRAD/UNPAN029243.pdf](http://www.unpan.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN029243.pdf). Accessed on January 24, 2009

⁴⁴ Interview January 9, 2008

and Social Welfare, Home Affairs, Justice, Works and Supply, and Information and Broadcasting Services where it was discovered that information was predominantly stored manually. A few government departments are in the process of storing data on computer but due to non availability or insufficient government funding, the process is slow. Most of the projects are largely dependent on donor funding. In isolated circumstances funding has been made available under specific government programmes like good governance. For instance, the Ministry of Justice is computerizing its registry starting with the headquarters under the Director of Public Prosecution (DPP) Access to Justice Programme⁴⁵. Although government is currently implementing Information and Communication Technology (ICT) programme, as part of PSRP in areas such as Financial Management (IFMIS) and Payroll Management (PMEC)⁴⁶, the bulk of information in the civil service is stored in paper or file form. Effectively, this makes the process of retrieving documents not only tedious and slow but also, frustrating and time consuming due to misfiling or missing records. Some files are said to go missing for long periods or are never even traced. Because of the poor state of affairs as regards record management, some public officers have resorted to holding back documents in their offices or maintaining their own copies for fear of failing to track down the documents once turned over to the registry.

3.1.6. Major drawbacks in management of information

The major difficulty in so far as record management is concerned, is the lack of a uniform system in the Public Service. Many registries are not adhering to the creation of records, tracking and storage system as set out by the International Standardisation Organisation (ISO). With an organised system in place movement of records would be monitored easily within the various

⁴⁵ Interview November 7, 2008

⁴⁶ National ICT Draft Policy, November 19, 2003 Ministry of Communication and Transport

government departments. The system includes proper file indexing and subject titles. Among the ministries examined for purposes of the research study, only the Ministry of Justice religiously carried out a search, every fortnight, to locate files⁴⁷. Part of the problem has been attributed to the low qualification of those employed in the registry thereby leading to a lack of appreciation of what the department entails. At the moment, the entry point in the Civil Service for a Registry Clerk is Grade 12, while the departmental head who is Registry Principal or Chief is required only to possess a diploma in Record Management. The current civil service structure does not provide for higher qualifications for persons in the Registry Department. Even in terms of hierarchy, the head of registry is at GSS 6 level, which is middle management yet, his or her equivalent, for example Chief Accountant is at GSS 3. There is strong feeling by those who use the services of registry department that standards of record management would be raised if the departments were ran by persons with a degree or higher qualification.⁴⁸

Also, staff in the registry is often overwhelmed by the large volume of records that is churned out on a daily basis building a backlog of documents requiring filing. The demand for documents internally means that they frequently have to recall active information from closed files which takes a lot of time to retrieve from the data strong room. Thirdly, the secretiveness in which government operates often impedes the free flow of information internally, even among departments. Documents are classified as “Top Secret” if relating to issues of governance and political or constitutional offices, and “Confidential” if it is of personal nature e.g. appointments, emoluments and disciplinary matters. Even, information relating to government policy and human resource is classified as confidential. Ministries like Community Development and Social

⁴⁷ Interview: Judy Hamusonde Senior Registry Officer, November 27,2008

⁴⁸ Interview: November 11, 2008

Welfare, have a Documentation Centre where only information relating to social welfare is for public consumption. In one instance, a senior management official said his secretary was privy only to 60 percent of the records in his office while the office orderly only 5 percent. Another problem was related to the categorizing of documents, which led to the rampant of mis-filing or filing under wrong or unrelated subjects or multiplicity filing.

3.1.7. National Archives of Zambia

The National Archives of Zambia (NAZ) is a creation of an Act of parliament⁴⁹ mandated to effectively manage and preserve public records, archives and printed publications, and also facilitate the lawful access of information to all stakeholders so as to promote governance and human rights, and efficiency in government administration. It is also mandated to collect all printed publications from publishers. As it is the official national repository, NAZ is directly answerable to the government and the general public on matters relating to the state of information generation and production in the country in printed form. Materials received by NAZ are entered in the Accessions register and given accession numbers, then catalogued and classified before they are taken into the repository or special library for storage. As of August 2005, there were 759 registered periodicals. NAZ is concerned with government records at all stages of their existence and as such all government departments are required by law to deposit non-active material and publications with the institution⁵⁰. But this has not been the case. Although the Act provides that public records can be withheld for administrative purposes or for special reasons⁵¹, there is still a large volume of inactive documents in the custody of many government departments. Some records are withheld for unusually long periods such as the

⁴⁹ National Archives Act CAP 175 of the Laws of Zambia

⁵⁰ Printed Publications Act CAP 161 of the Laws of Zambia

⁵¹ Section 9 (4) of the National Archives Act Cap 175

Ministry of Foreign Affairs which was singled out as one government department that has not surrendered any records at all. In its present form, the Act does not provide a proper system to compel government departments to hive off inactive documents. In addition, despite being the main repository for public records, NAZ is barred from inspecting any public records classified as “Secret” or “Confidential” except with consent of the authority having custody of them.⁵² Currently, NAZ is faced with a number of challenges in terms of space and proper facilities for storage of records. NAZ is required, under the Act to inspect and transfer public records,⁵³ but is unable to collect materials from around the country due to inadequate transport. Thus, in the prevailing circumstances, NAZ has been forced to rely on individual government departments to tender the documents. NAZ also lacks an adequate number of trained archivists in order for it to fulfill its mandate to preserve public records.⁵⁴ The institution is at present digitalising through funding by the Government of Finland though more financial resources are still required to complete the whole exercise. Furthermore, under the Act, documents may only be made available to the public if they have been in existence for not less than 20 years.⁵⁵ This provision entails that some information will be withheld from the public on account of a time limit. The Act also provides for the formation of an advisory council, to advise government on all issues relating to public document, but this has not been done.⁵⁶

3.2. PUBLIC OFFICERS’ PERCEPTION OF FOI LAW

Public service officers interviewed in the five government ministries had a general understanding of FOI law. All the eight respondents said they were aware that the law was intended to make

⁵² Section 9 (2) Cap 175

⁵³ Section 9 (3) (a) Cap 175

⁵⁴ Interview: Brian Mwale NAZ Library Assistant October 27, 2008

⁵⁵ Section 11 Cap 175

⁵⁶ Section 19(1)

Development and Social Welfare, has a Documentation Centre where only issues relating to social welfare and community are open to the public while the rest of the information in the ministry's possession is treated as confidential.

Some officers said FOI law should not be applied *carte blanche* as some ministries such as Home Affairs were security in nature and therefore sensitive. One official said information from Zambia Police, Zambia Security Intelligence Services (ZSIS), Investigator General, Zambia Army and all Defense Forces should be treated as classified. Information relating to passports and issuance of national registration cards or materials in the national archives, in the view of some of the officers interviewed, was open for public consumption as they pertained to peoples' rights. Some officers said if information was to be made freely available it would have to be done bearing in mind the exemptions. They however, fear that information would be withheld from the public by those entrusted or mandated to release information such as the Information Officers, because of the secretive way government has been operating and due to bureaucratic red tape. The nature of government officials is not to give even the most basic of information. For instance, circulars relating to salaries or government contracts are considered highly confidential. There was also a fear that those entrusted to release information would abuse their discretionary powers or would use their privileged position to hold back information to protect themselves or the administration even on matters that did not border on national security. Conversely, one out the eight respondents felt that the FOI law should be put into effect expeditiously in order to remove speculation and misinformation about the workings of government. A registry clerk said civil service regulations, in their present form, barred even the release of a government minister's speech without following procedure. One official from the

Ministry of Information said there was a misconception within government circles and among the public in general that the FOI law was only for journalists, a perception that still needed to be corrected as well as address issues of privacy for smooth implementation to take place.

3.3. ROLE OF CIVIL SOCIETY: AWARENESS AND ADVOCACY

3.3.1. Transparency International Zambia (TIZ)

TIZ is a local chapter of the international anti-corruption movement organisation and has been among the civil society organisations that have been very instrumental in pressing for the enactment of the media laws. These include the Independent Broadcasting Authority (IBA) and the Zambia National Broadcasting Corporation (ZNBC) Acts, and the FOI Bill. TIZ was formed in June, 2000 and has been involved in high profile activities to raise awareness on anti-corruption and the need for a consolidated approach to tackling corruption at all levels of society. As is its objective elsewhere, Transparency International's main interest in FOI law is to see to it that the law serves as a tool for obtaining information in order to fight corruption or at least narrow the range of opportunities for mismanagement and diversion of public funds by permitting public scrutiny, for instance, of budgets and administrative decision-making.⁵⁸ TIZ has been running a myriad of programmes namely, Corruption and Prevention Awareness meant to educate people at the grassroots on transparency, integrity and accountability, and the Good Governance programme in collaboration with District Development Coordinating Committees. Other programmes include Community and Coalition Building, community radio programmes on the anticorruption crusade, governance and transparency among other community sensitisation programmes.

⁵⁸ Using the Right to Information as an Anti-corruption Tool, Transparency International, (2006) p3

However, despite these programmes that have the capacity to cut across all levels of society, the rate of awareness and advocacy as regards FOI law has not been very significant. The problem has been attributed to the centralised administrative approach. TIZ operations are mainly concentrated at its Secretariat in Lusaka, making it difficult to spread out to other parts of the country.⁵⁹ Secondly, TIZ has within its establishment an Advocacy and Legal Advice Centre (ALAC), a project spearheading citizen's corruption prevention and promotion of greater transparency campaign in order to create effective citizen monitoring and reporting mechanisms. Under the project, TIZ receives and records complaints from citizens as regards corruption in public service delivery and empower citizens with the necessary information on how to contribute to combating corruption in government institutions. Since inception in 2007, ALAC has received 220 complaints relating to the Ministry of Lands, Immigration department, Zambia Revenue Authority and ministries of Education, Local Government and Housing, Defence, Judiciary, police, local councils and pension funds. The major limitation is that the Centre can only refer complaints to relevant institutions such as the Anti-Corruption Commission, Judicial Complaints Authority, Human Rights Commission, Police Complaints Authority or the Legal Resource Foundation (LRF) because it does not have prosecution and litigation powers.

⁵⁹ Interview: Ronald Tembo TIZ Information Officer October 22, 2008

3.4. MEDIA AND PUBLIC PERCEPTION AND AWARENESS OF FOI LAW

The three main media representatives, Press Association of Zambia (PAZA), Media Institute of Southern Africa (MISA) Zambia Chapter and the Press Freedom Committee (PFC) have been the major proponents of the FOI law and have put in place various programmes to sensitise journalists as well as the public on the need for the right to information. PAZA has, through its affiliates, the press clubs, been educating members about the FOI law and its benefits once enacted. The Association has also held workshops for community leaders and Members of Parliament. Some of the campaigns have been done in conjunction with other media associations such as MISA Zambia and PANOS Southern Africa. However, due to limited financial resources, sensitisation campaign has not been sufficient as most journalists still do not have information. PAZA President Andrew Sakala concedes that there is a level of apathy or plain ignorance among the media. He said it was more pronounced at senior levels of management in media institutions. This attitude was evidenced by the lukewarm response to media campaigns by senior managers and the type of stories published on the FOI law. An example was given of where a workshop participant was denied permission to attend an FOI workshop because, in the view of the station manager, the law did not apply to radio stations. Another official said they were reluctant to support the FOI campaigns because the propagators were deemed to be anti-government and media institutions did not want to be seen to be “fighting government”. This coupled with the misconception, even among public officers that FOI law is only for the media and government’s delay to enact the right to FOI, have greatly hampered efforts by media associations to push for FOI law. Mr Sakala feels strongly that more needs to be done especially that even the legislators, opposition Members of Parliament inclusive held a belief, or some fear, that the law would be used by journalists to invade their privacy and scandalize them. The

erroneous belief stemmed from the wrongly held view that the FOI law would only benefit journalists.

On the other hand, MISA Zambia has been running live radio discussion programmes on QFM Radio station to educate both the media and the public on the benefits of enacting FOI law. The association has also been lobbying for the FOI law on a MISA sponsored, “Face the Media” programme on Radio Phoenix, ZNBC Radio four and 16 community radio stations in the country. This, notwithstanding, MISA Zambia president Henry Kabwe admits that the level of awareness is still quite low. He attributes the failure to the inability by media bodies to simplify or fully explain the benefits of FOI law. The PFC also notes the low levels of awareness of FOI law not only among the public but, among the media and attributes this to a misconception that the law is only for the benefit of the media. The insistence of legislators for statutory regulation of the media has further watered down appreciation of the right to information. Media bodies had an additional task to educate the public as well as the media on the importance of FOI law, and change the mindset of Members of Parliament over the enactment of the law

3.4.1. Individual Journalists’ Perception of FOI law

Individual journalists spoken to, in major urban centres, showed a general understanding of FOI law. Although many appreciated the law as for both public and the media, some saw it as an avenue mainly for journalists to freely access information for their stories. One journalist said FOI law was a right for people to freely express their opinion and views on any matter affecting them. Another said FOI law was also for those charged with the responsibility to release information to do so freely without fear of reprisal. Some said public officials were not free to release information due to ignorance while others were over protective. As for journalists in the

more remote parts of the country, the view was that the FOI law was to allow journalists only to access information. A journalist at a community radio station in Mongu said the FOI law was mainly for journalists to access information for the benefit of the public. He complained of government bureaucracy, which made it difficult to obtain information from the provincial administration. A senior manager said the law would enable members of the public demand information from any government official, including the minister, within a stipulated period.

3.4.2. Public Perception of FOI law

In order to gauge public views of the FOI law, structured questions were directed to newspaper vendors. On the whole, many expressed ignorance about the law and what it entails. Despite selling newspapers, many said they had not even heard of the FOI Bill. Only one vendor said he had learnt about FOI from secondary school and explained that such a law would allow people access information from government. Some said they had heard of the law but did not know what it was about. Another vendor said what he knew was that the FOI law would allow people to get information from anywhere including bars.

3.5. CONCLUSION

As has been highlighted above, clearly public institutions do not have a proper, well-organised and uniform information management system. In its present state, the organisational and the information infrastructure is not sufficient to support the large volumes of information that may be expected to roll out in view of the FOI law, once enacted. One of the key attributes of FOI law is to have timely release of information but in the current state of government records it would be expecting too much for responses to be made within the stipulated period. Similarly, the general

attitude of public officers towards the FOI law speaks volumes about the levels of administrative compliance as regards implementation. There is an element of insecurity and, to some extent resentment towards an open society and for some, there appears to be a strong desire to keep the status quo of government secrecy. Much of the civil service operates as if still under a One Party State regime where all information was treated as classified. If retained in the present form the Service Commission regulations and Code of Ethics, a lot of information will still be withheld. The regulations would only serve as a hindrance to the smooth administration of FOI law. In addition, in the absence of guidelines or Code of Practice, it will be difficult for the administrators to determine how and what kind of information should be released to the citizens, leaving room for those who may want to withhold information to protect themselves or cover up their misdeeds. On the other hand, the low levels of awareness of FOI law among the users, i.e. the media and the public will have a significant bearing on the effective use of the law. The role of the civil society has also not been fully appreciated.

CHAPTER FOUR

A COMPARATIVE ANALYSIS: LESSONS TO LEARN FROM THE SOUTH AFRICAN EXPERIENCE

4.0. INTRODUCTION

This chapter discusses the practical implementation of the FOI law and possible pitfalls drawing on experiences from countries such as South Africa. Given the state of the public institutions and the attitudes towards FOI law highlighted in the preceding chapter, Zambia may be charting waters that countries that are already implementing FOI law, have navigated and thus may fall into the same difficulties.

4.1. POSSIBLE PITFALLS IN IMPLEMENTING FOI LAW

4.1.1. Consequences of Poor Administrative Structures

With poor institutional culture relating to procedure and system, record keeping and administration, and organisational culture coupled with strong political attitudes, there is a danger that the FOI law once enacted in Zambia will remain no more than just some piece of legislation gathering dust on the shelves. ODAC carried out a survey, two years into the implementation of the PAIA and found there was rampant non-compliance among government departments and municipalities. These public authorities were blatantly ignoring requests to information. Part of the problems were attributable to the lack of synchronisation between the enactment of the PAIA on one hand, and the development of the institutions that were to implement the Act, and raising the standard of knowledge of the apparent users to encourage

effective use of the law. Clearly the administrative structures in terms information and record management, defined information categories and the overly secretiveness nature of the public service can have a telling effect on the implementation of the FOI law.

4.1.2. Consequences of lack of awareness among public officers

Closely related to poor administrative structures is the level of awareness of FOI law of public officers. In order to achieve appreciation of FOI law, the procedure and duties of those involved need to be clearly defined and communicated. A situation where over half of the people in public bodies may be aware of the Act but do not know what their duties are, will affect implementation. Without sufficient training and grounding on FOI law, even those who will be appointed as Information Officers may face difficulties in meeting the requirements of the law. The training need not be done only when the law is in place but even well before. In South Africa, the Human Rights Commission (SAHRC), the body that plays the role of FOI Ombudsman, found that apart from poor information management systems with its attendant lack of file plans, many public bodies were not aware of their duties. As a result, there was a lack of seriousness in fulfilling the PAIA obligations. An ODAC survey showed that only 46 percent of the officers in South African public organisations were aware of the PAIA, while 54 percent said they were not. Of the 46 percent that was aware, only 65 percent were implementing the PAIA. About 90 percent of the respondents said they were facing difficulties in implementation citing time, financial constraints, centralised information system and poor filing systems. Furthermore, due to lack of clarity in procedure, quite a number of organisations had not appointed information officers.⁶⁰

⁶⁰ A. Tilley and V. Mayer, Access to Information law and the Challenge of Effective Implementation: The South African case, *ODAC* (2002) p78

Other reasons for failure to implement PAIA included the absence of delegatory powers for information officers within the public bodies, a problem which is akin to civil service practice. For instance, although the PAIA states that there ought to be a wide range of government information available, it is still very difficult to obtain information from public offices. A research project on effective service delivery in the education and health sector was seriously hampered due to limitations in accessing detailed information. It has been difficult to obtain information deemed politically sensitive such as HIV/AIDS infection rates and the drop out rate among school-going children. Although information officers were said to be helpful, they were unable to provide information without the permission of the department's Director General. In other instances Director Generals refused to grant interviews to public officials. In others, responses to questions were slow, going beyond the stipulated 30-days.⁶¹ Similarly, in the Zambian public service, at present, the only official spokespersons are the Secretary to the Cabinet and the Permanent Secretary. There is danger of falling into the same bureaucratic tendencies, if the *status quo* is retained. In addition, the absence of clear and simplified guidelines, and sufficient capacity for public authorities to be able to apply the law has seriously hampered implementation of PAIA.⁶²

4.1.3. Mute or flat refusals

The immediate consequence of absence of guidelines results in a lack of cooperation from the people assigned to release information or a certain amount of hostility towards the regime. In

¹ Discussion paper, Effective Service Delivery in the Education and Health sectors, Afrimap and Open Society Foundation for South Africa (2007) p15

² ODAC 5 year review newsletter (2003) p19

South Africa, the number of mute or flat refusals was said to have risen since the Act came in to operation in 2001. This was higher than the average in 14 countries with the Department of Defence being the worst performer. A typical example of this was in a case involving a community newspaper, Leseding News that was denied access to documents held by Rustenburg local municipality. The newspaper filed an access to information request on September 27, 2005, and had not received any correspondence from the municipality. The request, which complied with the guidelines highlighted in the PAIA, requested documents used for procedural running of the municipality. Some of the information requested by the newspaper included a list of all media organisations in the province, and the amount spent by the municipality in advertising. The Council was further requested to state their position with regards to media diversity in the province. Also requested was a list of all the councillors and officials who own businesses and have disclosed their business activities. The municipality was also asked to state its position regarding transparency and accountability of elected public figures.⁶³

4.1.4. Shunning of FOI law

The bureaucracy and institutional incapacities in the implementation of FOI law tend to have a negative effect on the intended users. The South African media has on occasion used the PAIA to obtain information, and even challenged some government departments for refusal in the courts of law. A case in point is National Independent Newspapers (Pty) Ltd v Minister of Intelligence Services,⁶⁴ where an application was made in the Constitutional Court seeking the disclosure of certain parts of the record of proceedings in the matter of Masetlha v President of the Republic of South Africa⁶⁵, that were deemed classified. However, the media are reportedly

⁶³ www.za.misa.org/index_page_1.htm. Accessed on July 17, 2008

⁶⁴ CCT 38/07

⁶⁵ CCT 01/07

shunning use of the FOI law, as they are not so charmed by the bureaucratic procedure of accessing information in terms of the PAIA, preferring to rely on their cultivated sources.⁶⁶ In its commentary on the judgment, the Freedom of Expression Institute (FXI) stated that:

“Practical problems still exist in the struggle to ensure that the public are allowed to receive proper and timeous (sic) information. The problem remains a practical one in that the applicant is at a considerable disadvantage in attempting to draw papers, while the Government can easily suppress and censor information that is in the public interest and should rightfully be in the public domain.”⁶⁷

There is also a danger of government enacting Protection of Information Laws on the pretext of preserving certain information. The South African government has recently introduced a Protection of Information Act, which creates categories of information. These include valuable, sensitive, commercial and personal information, which should be protected from disclosure. Civil society in South Africa have however criticised the Act as being, not only a parallel and incoherent regime, but also a ploy for refusing information. This is because under the Act, the South African government has included information that does not fall under the exemptions outlined in the PAIA. From the above, it is clear that as long as government officers continue to resist releasing information and using every means possible to withhold or classify information on the pretext of preserving public security or in public interest, the FOI law will be rendered ineffective.

4.1.5. Consequences of lack of public awareness and Illiteracy

The efficacy of a law depends on the public being aware of it. Professor Carlson Anyangwe states in his book, An Outline of the Study of Jurisprudence, that an unknown law is an

⁶⁶ Interview: Mukelani Dimbe ODAC Training and Advocacy Coordinator May 29 2008

⁶⁷ www.fxio.org. Accessed June 11, 2008

ineffective law.⁶⁸ In so far as the public awareness is concerned, South African citizens generally do not know that they have the right to information that directly affects them. The Markinor National Survey on the awareness of right to information showed that only 25.4 percent had heard of the PAIA, while the majority representing 74.6 percent had not.⁶⁹ Out of those who had heard about the Act, 21 percent or one in every five had used their right to access information while 79 percent had not. This is an indication that not much awareness had been done to promote the PAIA. For a country with 30 percent of the adult population being illiterate, it is even more difficult to generate requests for information and get results. MISA-South Africa states that one of the major challenges of implementing the PAIA has been the low literacy level. Much has still to be done to reduce the bulky PAIA document into a language that the local people can understand. In its current state, the Act does not cater for people who cannot read and write. Conversely, there are instances where the public may know their right to information, the person or institution holding the information may not be conversant with the process of releasing the information.⁷⁰ Yet still, there are indications in other studies that requests are excluded on account of race, class, language, age or gender. An elderly black woman was denied information from organisations in three provinces on account of being illiterate. The woman who was unable to write the requests herself was not given help. Officials simply refused to give her information while in other instances the officer repeatedly asked her why she wanted the records and even suggested that the woman might have been a journalist in disguise!⁷¹

⁶⁸ UNZA Press (2005) p78

⁶⁹ Markinor, Whistle Blowing, the Protected Disclosure Act, Accessing Information and Promotion of Access to Information Act (PAIA): Views of the South Africans, *ODAC*, (July 2007)

⁷⁰ Interview: Manana Stone MISA SA Media and Advocacy Officer November 18, 2008

⁷¹ ODAC5 year review newsletter (2003) p19

4.2. CONCLUSION

Though South Africa is widely acclaimed for having the best legal framework in relation to ensuring access to both state and privately held information that country is still struggling to implement the PAIA. It serves a useful lesson to Zambia. One of the key lessons is that it is not enough to simply enact legislation but this must be accompanied by the development of the administrative organs that will administer the law.

CHAPTER FIVE

5.0. CONCLUSIONS AND RECOMMENDATIONS

This research has examined organisational and information management structures to determine the state of administrative preparedness to implement the FOI law as well as the level of understanding and rate of advocacy to assess the capacity of the users to use the law in order to exercise their right to information.

5.1. CONCLUSIONS

5.1.1. Organisational and Administrative Structures

It has been observed, that countries that have enacted FOI laws, some several decades ago, are still struggling to implement the law. Previous studies have shown that there has to be an effective and efficient administration to ensure compliance. In addition, there must be corresponding development of administrative institutions in terms of infrastructure, information management system and a proper, and user-friendly regulatory framework to govern the operations of the public service. Public authorities that will be releasing information must have a cadre of well-trained civil servants who understand their role and what the FOI law requires. There is need for public officers to know what is required of them in order to ensure not only timely release of information, but also an effective structure that will promote consistent flow of information in the long term.

5.1.2. Culture Shift

The research has demonstrated that legislation of FOI law alone is not sufficient. There has to be a radical shift in the way that the public service operates and this requires a greater attitude of openness. It has to be inculcated in the public officers that the information that is in their custody belongs to the people. It should be recognised that it is the people who put the government in office. It should also be appreciated that for democracy to flourish, information must be available to the people so that they can hold the government accountable for their actions. It is only through open public opinion in the running of public affairs that the tenets of democracy; transparency and accountability can be achieved. From the study, the Zambian public service is still a closed shop that it has always been. Though the country is under plural politics, tendencies akin to a One-Party State are still present in the operations of the public service. Information is still a closely guarded secret. The continued use of provisions in the State Security Act in the Service Commission regulations (the Terms and Conditions of Service for the Public Service and oath of secrecy in the Code of Ethics) conflicts the spirit of free access to information that is intended in FOI law. Furthermore, it casts a blanket cover classifying all documents even on matters that do not threaten public security. The overly sensitive way in which the public service operates has no place in a modern democracy. In more advanced democracies like Sweden, a secret document refers only to information that falls strictly within the exemptions that appear under the Press Act of 1949. Even then, it is only the *Riksdag* (Swedish Parliament), and not government that determines what documents should be categorised secret in the Secrecy Act. In that regard, the only notation allowed to distinguish classified public documents is “secret” and not even the words “confidential” or “for official use only” would be suffice.⁷³ Unless there is a change of attitude among public officers there is bound to be some resentment, resistance, fear or

⁷³ Public Access to Information and Secrecy with Swedish Authorities (Ministry of Justice brochure) p13, 25

apprehension towards FOI law, as has been witnessed in South Africa. This may result in officers frustrating the administration of FOI law, to the various degrees outlined in Roberts' theories of administrative non-compliance.

5.1.2. Uncoordinated information systems

The availability of clear information systems is critical to the success of FOI law. In stressing the need for an organised information management system, Former British Lord Chancellor and Secretary of State for Justice, Jack Straw had this to say,

“Any Freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they can not be found when needed or if the arrangements for their eventual archiving or destruction are inadequate.”⁷⁴

An examination of the current structure shows that the information management system is disorganised, chaotic and uncoordinated. The system does not conform to international standards. Inspections by the relevant authorities are rarely carried out, leaving individual departments and ministries to devise their own ways of storing, tracking and managing records. As a result most public bodies do not know what information is in their possession. Standards set by ISO, to which Zambia is a member, give guidelines on the best practice for storage and retrieval of information.⁷⁵ But these standards are not being followed. In addition, reform programmes such as the PRSP that are meant to improve service delivery in the public service have not moved quickly enough to move the civil service to greater efficiency. In fact it turns out

⁷⁴ Lord Chancellor's speech during presentation of FOIA Code of Practice on Record Management to UK Parliament on November 20, 2002. www.dca.gov.uk/foi/reference/imp/imp/codemanager.htm. Accessed on January 9, 2009

⁷⁵ ISO 154891-1 International Standard of Information and Documentation-Records Management (General) First Edition ISO(2001)

programmes such as the PRSP that are meant to improve service delivery in the public service have not moved quickly enough to move the civil service to greater efficiency. In fact it turns out that the PRSP is seriously hampered by lack of political will, political interference and lack of monitoring mechanism.⁷⁵

5.1.3. Preservation of Public Records

Although NAZ is the national repository and plays a critical role in storage, preservation, accessibility and destruction of public records, its operations are severely hampered by under-funding and under-utilisation of its services. Furthermore, in its current form the National Archives Act⁷⁶ does not facilitate or promote free access to information. Elsewhere, public records are supposed to be transferred to the archives on a more consistent basis or at least within stipulated period. The National Archives Act is silent on this aspect. As a consequence, some Government ministries and departments have ended up holding on to records for unusually long periods. In some cases, never even bother to transfer them. Also, NAZ is unable to go around the country to collect the documents because of lack of funding. Furthermore, the archival procedures entail that the archives are supposed to be involved right from the early stages in records creation to safeguard the preservation and future accessibility of information but this has not been the case.

Secondly, public documents may only be made available for public inspection if they have been in existence for not less than 20 years.⁷⁷ The exception to the rule is at the discretion of the

⁷⁵ www.unpan/un.org/intradoc/groups/public/documents/CAFRAD/UNPAN_029243.pdf Accessed on January 24, 2009

⁷⁶ Cap 175 of the Laws of Zambia

⁷⁷ Section 11

Minister.⁷⁸ This is not practical. In fact many countries elsewhere have done away with this rule. The United Kingdom (UK) has scrapped the 30 year rule “closure” period so that information is assumed to be “open” right from the start unless it applies to one of the exemptions set out in the Act.⁷⁹ Thirdly, to date some provisions such as the formation of an advisory council has not been constituted. Among the functions of the council is to advise the Minister on all matters relating to retention or destruction of public records, transfer of public records to national archives, access by members of the public to the public archives and services of the national archives and such other matters relating to public archives and to historical records.⁸⁰

5.1.4. Professional Qualifications

It is paramount that persons who will be administering the FOI law or are at least directly in charge of retrieving information are equipped with the necessary qualifications. Currently the registry department is still looked upon as merely auxilliary such that even the Department Head is several grades lower than his equivalent in other departments. This, coupled with the problem of under-staffing has lowered the credence of the records office. The United Kingdom, which enacted its FOI law in 2000 and is only beginning to implement it now, has had to employ the services of Universities to devise training programmes for public officers. To this effect, a postgraduate programme on Information Rights law has been introduced.⁸¹

⁷⁸ Section 11(2)(b)

⁷⁹ 3rd Annual Report on the Operation of the FOI Act in Central Government Ministry of Justice (2007)

⁸⁰ Section 19(1) and Section 19(3)

⁸¹ 3rd Annual Report on operations of FOI Act in Central Government Ministry of Justice (2007)

5.1.6. Citizens' Participation

It has been observed that the level of awareness as regards the FOI law has not been as expected. This is notwithstanding the fact that media bodies and civil society organisations have initiated various sensitisation programmes. In addition, there is a misconception that the FOI law is meant to benefit only journalists. This conclusion may be due to the fact media bodies have been in the forefront in advocating for the FOI Bill among other media law reforms. This has led to calls for statutory regulation of the media before the FOI law can be introduced. These calls are misdirected and are in no way related to the enactment of FOI law. However the inability for the media to form a more united front will give room to detractors to sway the people from putting in place FOI law, as a fundamental right for *all* citizens. An all-encompassing approach is required in order to raise awareness about the FOI law. That is one way to elicit appreciation from the general public, public service workers and the media and subsequently encourage use of the law. In the same vein, civil society participation should have been more pronounced than it is currently. In countries like India, civil society organisations are playing a major role in not only sensitising communities about the FOI law but, have also taken the lead in litigating cases where access to information has been denied. In India, the *Mazdoor Kisan Shakti Sangathan* (MKSS) has been very instrumental in demanding documents from state departments for the purposes of holding "public hearings" or a people's audit. ODAC in South Africa has also been fashioned after MKSS.⁸² As has been highlighted in Chapter three, one of the major reasons for failure to implement the model PAIA in South Africa, is that apart from poor institutional structures and information management systems, the level of awareness of the Act among the public who are supposed to be the users has been virtually non-existent. SAHRC, civil society and the media bodies such as MISA SA now have to act retrospectively to promote the PAIA, and where

⁸² ODAC 5 Year Review newsletter (2003) p2

necessary assist the public to lodge requests and litigate in the courts of law, when requests are rejected.

Zambia is still in the process of enacting FOI law but does not have to wait until the Act is in place to take measures that will facilitate implementation. Some of the measures can be taken even before the legislation is enacted, or simultaneously to ensure a smooth flow of information. Further research may be required, once the FOI law is enacted, to determine the actual compliance by the administrators.

5.2. RECOMMENDATIONS

1. Record System

Apart from reinforcing political will by the administration, there is need to design a uniform record system, which incorporates strategies, processes and practices in compliance with ISO standards. The record system should support an orderly way of creating, managing, preserving and disposing of public records to ensure easy retrieval of public documents. The system should accommodate records both in paper and electronic form. The system should also take into account the exemptions contained in the FOI law. There is also need for an information survey or record audit to determine what records are being held in each public institution.

2. Policy guideline and Code of Practice

Policy guidelines on information management should be formulated and be made available to all staff in the public service. The Code of Practice or guidelines should be issued immediately in order to enable public authorities see what is expected of them under FOI law. Individual departments can design or develop their own manuals and adopt the best practices.

3. Reclassification of Documents

Public documents should be re-classified so that only those that fall within the exemptions are classified as secret. The documents so identified should bear the notation of “secret” only. In view of this, the Service Commission Regulations should be amended along with the State Security Act to declassify information. Parliament must legislate a list of documents that are to be classified as secret.

4. Amendment of National Archives Act

The National Archives Act must be amended in order to conform to requirements under FOI law and facilitate access to information. The 20-year rule for documents to be made available must be repealed.

5. Training

Public Information officers and all those involved in the implementation of FOI law require training. The University of Zambia (UNZA) should design a programme specifically on Information Rights Law. At the same, individual government departments

should organise training programmes for record managers and any other persons associated with the handling of information.

6. Advocacy and Legal Advice Centres

Advocacy and Legal Advice Centres can be established where legal practitioners, members of civil society and media bodies can educate and provide assistance to the public to access information or even make requests on their behalf . The Centres can also litigate cases in instances where requests are denied.

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