The quest for freedom of information law – the Zambian experience

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*"This legislation springs from one of our most essential principles; a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest."**

1 INTRODUCTION

The concept of freedom of information is said to be imprecise and uninstructive.[1] Despite the imprecise nature of the concept, freedom of information is generally understood to convey the notion that there is a right to access information held by government. Although the concept of freedom is imprecise, in practice freedom of information is closely tied to freedom of expression. It is for this reason that freedom of expression and freedom of information are often mentioned in the same breath, so to speak. For instance, guarantees of freedom of expression in constitutions and international instruments expressly or impliedly include certain aspects of freedom of information and freedom of expression, viz, the right to seek and impart information.[2] The impression that the two freedoms are closely interconnected is also fostered by modern international instruments, such as, the United Nations Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedoms (the European Convention) and the American Convention on Human Rights (the American Convention).[3] Although the African Charter on Human and Peoples Rights (the African Charter) does not guarantee the right to access information, nonetheless it protects the right to receive information.[4] The two freedoms are understandably perceived to be closely connected because, subject to some qualifications, the Convenant and the Conventions all treat freedom of expression as including freedom of information. The primary objectives of this article are threefold: first, to demonstrate the importance of freedom of information in a democratic state; secondly, to consider the quest for enacting a freedom of information law in

* Statement by President Lyndon Johnson of the USA when he signed the Freedom of Information Act in 1966.

1 Mason A, "The relationship between freedom of expression and freedom of information" In Beatson J and Cripps Y (eds) "*Freedom of expression and freedom of information* (2000) 233.

2 Mason (see fn 1 above) 225.

3 Mason (see fn 1 above) 225.

4 Article 9(1) of the African Charter on Human and Peoples Rights.

2009-1-text.indd 90 10/8/09 11:08:21 AM

Zambia; and thirdly, to highlight the principles of the Freedom of Information Bill that was presented to the Zambian National Assembly.

Zambia attained her political independence from Britain on 24 October 1964. It was bequeathed its Constitution by the British government. In the independence Constitution there was no provision that specially guaranteed the right to access information held by public bodies. On 15 February 1973 the Kaunda led government decreed that it would introduce a "*One Participatory Democracy*". The One Party State subsisted for a period of 17 years from 1973 to 1991, when Zambia reverted to a multiparty system of government. Since then successive governments have sought through various Constitution Review Commissions to consolidate democracy in Zambia. In the context of the Constitution Review Commissions, attempts have been made to enact freedom of information legislation. The next section will, therefore, consider the importance of freedom of information in a democratic state.

2 IMPORTANCE OF FREEDOM OF INFORMATION IN A DEMOCRATIC STATE

Freedom of information is vital to the proper functioning of a modern representative government; it enhances the notion of deliberative, or even participatory, democracy. In this regard, just as freedom of expression is considered to be an indispensable concomitant of modern democracy, so also is freedom of information.[5] Freedom of expression, unsupported by freedom of information, is unlikely to play as effective a part in sustaining modern representative government as it would in situations where there is free access to information relating to the working of government.[6] What then is the rationale advanced to support the imposition on government of a statutory obligation to make information available to the public? The rationales are manifold. First, government must be open to public scrutiny so as to be accountable and exposed to the judgment and evaluation of the citizens.[7] Secondly, the provision of adequate information leads to higher levels of public participation in the process of policy making and government.[8] Without information citizens are unable to exercise their rights and responsibilities effectively.[9] Thirdly, access to information must be a pre-requisite for the proper and effective functioning of a healthy democratic society.[10] Fourthly, the executive is not sufficiently responsible to Parliament.[11] The work of Select Committees, the efficacy of parliamentary questions, the effectiveness of opposition parties and pressure groups, all depend on the availability of,

5 Mason (see fn 1 above) 230.
6 Mason (see fn 1 above) 230.
7 *Freedom of information*. Report by the Australian Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 para 3.4.
8 *Freedom of Information* (see fn 7 above) para 3.5.
9 Mason (see fn 1 above) 253.
10 Mason (see fn 1 above) 253.
11 Mason (see fn 1 above) 253.

2009-1-text.indd 91 10/8/09 11:08:21 AM

and accessibility to, information. Lastly, everyone has a right to know what information is held by government about him or her personally.[12]

3 THE QUEST FOR A FREEDOM OF INFORMATION LAW

It is important to point out that, shortly after Zambia reverted to the multiparty system of government in 1991, the Ministry of Information and Broadcasting Services, between 2 to 4 October 1992, convened a "*National Seminar on Democracy and the Media in Zambia – the Way Forward*". Following the deliberations of the Seminar, a Media Reform Committee (MRC), comprising representatives from a broad section of the Zambian media, was constituted. The mission of the MRC was to recommend to government ways and means in which the media could be reformed in order to advance press freedom and the democratic process.[13] One of the recommendations was the enactment of a freedom of information law. Despite the recommendation of the MRC, no action was taken by government.

As a result, in November 1999, the Parliamentary Committee on Information and Broadcasting Services in its Report to the National Assembly observed that government was delaying, amongst other laws, the enactment of the Freedom of Information Act.[14] By 31 March 2000 the government was still considering the possibility of enacting a freedom of information law that would give the public and journalists access to public information which would not comprise matter relating to national security.[15] Under such law the government would set conditions under which such information could be obtained.[16] However, sometime in February 2001, the government published for stakeholder input a draft Freedom of Information Bill. The Zambia Independent Media Association (ZIMA), a forerunner of the Zambian Chapter of the Media Institute of Southern Africa (MISA), responded to the publication by suggesting amendments and additions to the draft. Despite ZIMA submitting its recommendations in respect of the government draft, there was no reaction from government.

Consequently, the Zambian media community galvanised itself into action, and commissioned a private law firm, Messrs MNB Legal Practitioners, to draft, amongst other laws, a Freedom of Information Bill. The Freedom of Information Bill commissioned by the media community was published in the *Government Gazette* on 18 October 2002. The Bill was scheduled to be presented by opposition members of Parliament or back benchers.[17] However, efforts by opposition members of Parliament to

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12 *Freedom of Information* (see fn 7 above) para 3.3.

13 *Recommendations for media reform in Zambia.* Report prepared by the MRC (September 1992) 3.

14 *Report of the Committee on Information and Broadcasting Services for the Third Session of the Eighth National Assembly* (1999) 6.

15 *Governance – national capacity building programme for good governance in Zambia.* Report commissioned by the Government of the Republic of Zambia (2000) 81.

16 *Governance* (see fn 15 above) 13.

17 The Freedom of Information Bill No 14 of 2002 was scheduled to be presented by Sakwiba Sikota and Nelson Nzowa of the United Party for National Development (UPND) and Heritage Party (HP), respectively.

2009-1-text.indd 92 10/8/09 11:08:21 AM

present three private members' Bills,[18] were thwarted by the invocation of a constitutional provision which requires Bills with financial implications to receive the consent of the President or the Minister of Finance before they are presented to the National Assembly.[19] The consent was withheld, and, instead, the government gazetted and published in the state media its own version of the Freedom of Information Bill, which borrowed heavily from the formulation by the media community. However, in fairness, it must be acknowledged that the media community had also in turn relied heavily on the draft Freedom of Information Bill published by government in 2001.

4 THE FREEDOM OF INFORMATION BILL OF 2002

On 22 November 2002 the Minister of Information and Broadcasting Services presented the government version of the Freedom of Information Bill (National Assembly Bill (N.A.B.) 22 of 2002) to the National Assembly for first reading. This signalled the start of consideration of the Bill.[20] Later, on 28 November 2002, the Minister of Information and Broadcasting Services presented the Bill for second reading. During the second reading the Minister pointed out that the Bill sought to accomplish the following:[21]

(a) establish the Public Information Commission and define its functions;

(b) provide for the right of access to information;

(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 the foregoing.

The Minister, in introducing the Bill for the second reading, also pointed out that the right to access information facilitates more effective participation in the governance of any country as it promotes transparency and accountability of public officers. The Minister went on to state that freedom of information is derived from the old concept of the right to know, enacted by the 17th century British libertarian and fiery advocate of a free press, John Milton. Further, the Minister indicated that among the strong statements in support of the right to know was that the backbone of representative government is the direct participation by the people in the affairs of government.[22] To this end, the Minister informed the House that the Constitution of Zambia, the supreme law of the land, approves:[23]

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18 The Broadcasting Bill No. 12 of 2002; the Independent Broadcasting Authority Bill No. 13 of 2002; and the Freedom of Information Bill No. 14 of 2002.

19 Article 81 of the Constitution of Zambia.

20 Bill No. 22 of 2002.

21 *Daily parliamentary debates* Thursday 28 November 2002 xi.

22 *Daily parliamentary debates* (see fn 21 above) xii.

23 *Daily parliamentary debates* (see fn 21 above) xiii.

2009-1-text.indd 93 10/8/09 11:08:21 AM

(a) the recognition of the equal worth of men and women in their right to participate in, and freely determine and maintain, 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 without interference, freedom to receive ideas and information without interference, and freedom to impart and communicate ideas and information without interference.

The Minister concluded by advising the House that the government viewed information as a national resource which should be made public for the benefit of public debate and understanding.

5 PRINCIPLES OF FREEDOM OF INFORMATION LEGISLATION.

The Freedom of Information Bill that was commissioned by the media community, and later adopted by the government, was inspired to a very large extent by principles of freedom of information legislation developed by *Article 19*, an international non-governmental organisation that is committed to the promotion and protection of freedom of expression. *Article 19* has produced a set of international principles to set a standard against which anyone can measure whether domestic laws genuinely permit access to official information.[24] The principles set out clearly and precisely the ways in which governments can achieve maximum openness in line with the best international standards and practice. This section of the article will, therefore, consider these principles as forming the backdrop to the Bill.

5.1 Maximum disclosure

A fundamental principle that underpins freedom of Information legislation is the principle of maximum disclosure:

> "The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. This principle encapsulates the basic rationale underlying the concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right." [25]

For instance, the South African Constitution provides that everyone has the right of access to any information held by the State, and any information that is held by another person and that is required for the exercise or protection of

24 Mendel T, *The public's right to know: Principles on freedom of information legislation* (1999) 2.

25 Mendel (see fn 24 above) 2. *The Report of the Constitution Review Commission* (2005) 170 has recommended that every person should have the right of access to public information.

2009-1-text.indd 94 10/8/09 11:08:21 AM

any rights.[26]Therefore, the overriding goal of freedom of information legislation should be to implement maximum disclosure in practice.

The Bill provides for the right of access to information.[27] In so doing, the Bill provides that "every person shall have the right of access to information which is under the control of a public authority".[28] Public authorities will also be required to make available to the general public information which is under their control. Interestingly, the Bill provides that any person who requests information should be required to state the reason or justification for their interest in the information requested, and to disclose his or her identity.[29] This provision can have a negative effect because it may discourage members of the public from requesting information from a public authority. It is important that the exercise of the right to access information should not require individuals to demonstrate a specific interest in the information sought. At any rate, "where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings".[30] Thus, "the public authority must show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions".[31]

5.2 Limited scope of exceptions

Another important issue relating to freedom of information is the range of exceptions or exemptions available to prevent access to information. In this regard, the efficacy of freedom of information legislation could be undermined, if there are extensive exceptions or exemptions to the fundamental principle encapsulating maximum disclosure, or the general principle of openness. Thus, all individual requests for information made to public authorities should be met, unless the public body can show that the information falls within the scope of the limited regime of exceptions. The goal of providing a limited range of exceptions and exemptions is to ensure that a proper balance is struck between providing the public with access to information and the need to uphold legitimate claims for the protection of public interests.

In this regard the Bill provides that a public authority shall not be required to disclose information which is exempt from disclosure.[32] The Bill goes on to provide that information shall be exempt from disclosure if a public authority claims an exemption or determines that the disclosure is not justified in the public interest.[33] A public authority may claim exemption in several circumstances or instances. First, a public authority shall claim exemption where it reasonably determines that the information requested involves the privacy

26 Section 32 of the South African Constitution.
27 Section 10 of the Bill.
28 Section 10(1)(a) of the Bill.
29 Sections 10(2)(a) and (b) of the Bill.
30 Mendel (see fn 24 above) 1.
31 Mendel (see fn 24 above) 1.
32 Section 11 of the Bill.
33 Sections 12(a) and (b) of the Bill.

2009-1-text.indd 95 10/8/09 11:08:21 AM

interests of a third party.[34] Secondly, a public authority may claim exemption where disclosure of information under the Act:[35]

"*(a) would, or could, reasonably be expected to cause damage to the security of Zambia, the defence of Zambia or would divulge any information or matter which relates to the defence or security of a foreign government and which is communicated in confidence by or on behalf of such foreign government;*

(b) would divulge information that has been submitted to the Cabinet for its consideration or information that is proposed to be so submitted;

(c) would result in the breach of privileges of the National Assembly;

(d) would result in the disclosure of trade secrets and commercial or financial information obtained with the assurance that it will be kept confidential;

(e) would divulge information on personnel and medical files and other similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy;

(f) would or could reasonably be expected to disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law or endanger the life or physical safety of any person;

(g) would or could reasonably be expected to cause substantial harm to the legitimate interests of Zambia in crime prevention and any preliminary investigation of crime or other unlawful acts; or

(h) would or could reasonably be expected to cause substantial harm to the legitimate interests of Zambia in the protection of the deliberative process of a public authority in so far as it involves the expression of an opinion, advice or recommendation by a public authority, an employee thereof, or any person acting for or on behalf of the public authority but not in respect of factual, statistical, scientific, or technical information".[36]

It is submitted that the exemptions outlined above are too broad, and, if enacted in their present form, would tend to diminish the efficacy of the freedom of information law.

5.3 Public interest

It is suggested that a refusal to disclose information is not justified unless a public authority can demonstrate that the refusal meets a strict three part test, viz:

"(a) the information must relate to a legitimate aim listed in the law;

(b) the disclosure must threaten to cause substantial harm to that aim; and

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34 Section 13 of the Bill.

35 Section 14 of the Bill.

36 The South African Promotion of Access to Information Act 2 of 2000, in s 12, for instance, provides: "This Act does not apply to a record of –
(a) the Cabinet and its committees;
(b) the judicial functions of –
(i) a court referred to in section 166 of the Constitution;
(ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996; or
(iii) a judicial officer of such court or Special Tribunal; or
(c) an individual member of Parliament or of a provincial legislature in that capacity; or
(d) relating to a decision referred to in paragraph (gg) of the definition of "administrative action" in section 1 of the Promotion of Administrative Justice Act 3 of 2000, regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law."

2009-1-text.indd 96 10/8/09 11:08:21 AM

(c) the harm to the aim must be greater than the public interest in having the information." [37]

Clearly, the test for exemption of materials under freedom of information legislation ought to be based on an assessment of the harm that disclosure might cause to the public interest. The substantial harm test sets a high hurdle for a public authority to establish. The formulation of the test also suggests that it is necessary to demonstrate that substantial harm would follow the release of the information, as opposed to the possibility that it could do so. The public interest test referred to above has been incorporated in the Bill. The Bill provides that "[a] public authority shall disclose the information requested notwithstanding that it has claimed an exemption… where to do so would be justified in the public interest having regard to both any benefit and harm that may accrue from doing so".[38] The Bill goes on to provide that

> "[i]n determining whether disclosure is justified in the public interest, the public authority shall have regard to considerations such as, obligations to comply with legal requirements, the prevention of the commission of offences or other unlawful acts, miscarriage of justice, abuse of authority, neglect in the performance of an official duty, unauthorised use of public funds, the avoidance of wasteful expenditure of public funds or danger to the health or safety of an individual or the public, or the need to prepare and protect the environment, and the need to improve public participation in, and understanding of, public policy making". [39]

The preceding clauses cover a broad range of grounds under which disclosure may be compelled in the public interest.[40] If disclosure of the information in respect of which a public authority has claimed an exemption is determined to be in the public interest, it shall notify the third party that the information shall be disclosed.[41] The point that requires to be underscored is, that even if it is demonstrated that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits outweigh the harm. The net effect of the public interest test is to deter public authorities from automatically withholding requested information simply because it falls within a permitted exemption. Therefore, disclosure through the public interest test provides an opportunity to access an enormous amount of information which would otherwise be exempted.

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37 Mendel (see fn 24 above) 6.

38 Section 16(1) of the Bill.

39 Section 16(2) of the Bill.

40 The South African Promotion of Access to Information Act 2 of 2000, in s 46 provides:

> "Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or 3, 43(1) or (2), 44(1) or (2) or 45, if –
> (a) the disclosure of the record would reveal evidence of –
> (i) a substantial contravention of, or failure to comply with, the law; or
> (ii) an imminent and serious public safety or environmental risk; and
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

41 Section 16(3) of the Bill.

2009-1-text.indd 97 10/8/09 11:08:21 AM

5.4 Disclosure takes precedence

> "The law on freedom of information legislation should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly held information should be subject to principles underlying the freedom of information legislation….In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information laws."[42]

This issue is addressed by the Bill when it provides that "[t]he provisions of a written law in force immediately before the commencement of this Act prohibiting, restricting or providing for disclosure of information under the control of a public authority shall have no effect to the extent to which those provisions are inconsistent with this Act".[43] However, in the long term, a commitment should be made to bring laws relating to information in line with principles underpinning freedom of information legislation.

5.5 Obligation to publish information

> Freedom of information implies not only that public bodies should accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity…. The law should establish both a general obligation to publish and key categories of information that must be published. Public bodies should, as a minimum, be under an obligation to publish the following categories of information:
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> - operational information about how the public body functions, including costs, audited accounts, standards, achievements and so on, particularly where the public body provides direct services to the public;
> - information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
> - guidance on processes by which members of the public may provide input into major policy or legislative proposals;
> - the types of information which the body holds and the form in which this information is held; and
> - the content of any decision or policy affecting the public, along with reasons for the decision and background material of material importance in framing the decision."[44]

The Bill incorporates most of these principles. To this extent, the Bill provides[45] that

> "every public authority shall cause to be published, as soon as practicable after the commencement of this Act but not later than twelve months after that commencement, by *Gazette* notice and in a newspaper of general circulation in the Republic, a publication that includes –
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> (a) a description of its structure, functions, and responsibilities including those of any of its statutory officers or advisory committees;
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> (b) a general description of the categories of documents held by it;
>
> (c) a description of all manuals, and similar type of documents which contain policies, principles, rules, or guidelines in accordance with which decisions or recommenda-

42 Mendel (see fn 24 above) 10.
43 Section 4 of the Bill.
44 Mendel (see fn 24 above) 4.
45 Section 19(1) of the Bill.

2009-1-text.indd 98 10/8/09 11:08:21 AM

tions are made in respect of any person or body of persons in that person's or those persons' capacity; and

(d) a statement of any information that needs to be made available to members of the public who wish to obtain official information from the public authority which statement shall include particulars of the officer or officers to whom requests for official information or particular classes of information should be sent".

A scheme relating to the publication of information is, therefore, crucial for freedom of information legislation to achieve its objectives.

5.6 Processes to facilitate access to information

Requests for information should be processed rapidly and fairly. In addition, "[w]here necessary, provision should be made to ensure full access to information for certain groups, for example those who cannot read or write, those who do not speak the language of the record, or those who suffer from disabilities such as blindness".[46] It is also essential that the law should provide for strict time limits for the processing of requests, and also require that any refusal must be accompanied by substantive reasons. In this regard, the Bill provides that a request for access to information may be made orally or in writing.[47] The request will be required to be addressed to the head of the public authority or any other authorised person.[48] The request for information should provide sufficient details to enable the public authority to identify the information.[49] Where the applicant is unable to write the request for information, the request shall bear the thumb print of the applicant.[50] The Bill goes on to provide that

"[w]here access to a record is requested, the head of the public authority or any other authorised person to which the request is made shall…, within fourteen days after the request is received –

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

(b) if access is to be given, promptly give the person who made the request access to the record or a part thereof in the form of a copy or an opportunity to examine the record."[51]

In the event that "a public authority requires further information in order to identify and locate the information requested, it shall notify the applicant of the need for such further information within seven days of receiving the request for information".[52] In such a case "the period of fourteen days referred to … [above] … shall be reckoned from the date on which such further information is received."[53] The point is, that the processing of information should be done in an efficient and transparent manner.

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46 Mendel (see fn 24 above) 8.
47 Section 22(1) of the Bill.
48 Section 22(1) of the Bill.
49 Section 22(2) of the Bill.
50 Proviso to section 22(2) of the Bill.
51 Section 23(1) of the Bill.
52 Section 23(2) of the Bill.
53 Section 23(2) of the Bill.

2009-1-text.indd 99 10/8/09 11:08:22 AM

5.7 Independent scrutiny and enforcement

An effective independent system of enforcement of the public's right to access information is essential. An independent administrative body should be assigned the role to investigate complaints that a public body has failed to comply with the requirements of the freedom of information legislation, either by refusing to disclose information or by imposing excessive charges for the information. The decisions of an independent administrative body should, however, be subject to judicial review or control. In this regard the Bill proposes the establishment of the Public Information Commission.[54]

The Commission shall consist of part-time members appointed by the President on the recommendation of the Appointments Committee, and subject to ratification by the National Assembly.[55] It is proposed that the functions of the Commission shall be:[56]

"(a) to ensure that the purposes of this Act are effectively carried out;

(b) on request –

(i) act as conduit for requests for access to information from members of the public;

(ii) identify the relevant public authority; and

(iii) collect the requested information;

(c) assist in realising the right to comment on information held by a public authority;

(d) to receive, and consider applications for the review of decisions of public authorities relating to access to information by persons requesting for information under this Act;

(e) to make recommendations to the relevant public authorities resulting from the review of applications referred to in paragraph (d); and

(f) to perform such other functions as are conferred upon the Commission by or under the Act."

The primary function of the Commission, therefore, shall be to act as umpire between a person requesting information and a public authority. Thus:

"A person who, having made a request for the disclosure of information under this Act, is aggrieved by the decision of a public authority in relation to the request, may apply to the Commission for a review of such a decision in respect of any of the following:

(a) the refusal of access by the public authority to the information requested;

(b) the payment of fees or charges…which the person considers unreasonable;

(c) the failure of the public authority to comply with the time limits [within which access to the information is to be provided] or

(d) any other matter relating to a request for or access to information under this Act."[57]

The fact that the Commission is empowered to review the decisions of the public authorities does not preclude a person who makes a request for the review from either proceeding to make a complaint to the Human Rights Commission, or seeking redress in the High Court against a public author-

54 Section 5(1) of the Bill.
55 Section 6(1) of the Bill.
56 Section 7(1) of the Bill.
57 Section 28(1) of the Bill.

2009-1-text.indd 100 10/8/09 11:08:22 AM

ity or the Commission or both.[58] However, a complaint or allegation to the Human Rights Commission or an application to the High Court shall not be made unless proceedings for review have been concluded by the Commission.[59] Therefore, members of the public would be at liberty to apply to the Commission for a decision concerning a request for information or seek redress in the High Court. Clearly an application to court may only be made after internal appeal procedures have been exhausted.[60]

5.8 Commercial information

Freedom of information legislation ought to protect individuals and companies against disclosures that may result in material loss, prejudice the outcome of contract negotiations, or place them at a competitive disadvantage. Through the use of reverse information procedures, individuals and companies are given an opportunity to be notified, and to make representations prior to public disclosure of information by a public entity. To this end, the Bill provides that

> "[w]here a public authority reasonably determines that a request for access to information involves the confidential commercial interests of a third party, the authority shall forthwith notify the third party in writing of the specifics of the request and that the disclosure of the information is imminent unless the third party, within fifteen days of receipt of the notice, responds in writing that it considers the information to be confidential and gives reasons as to why harm would result from disclosure."[61]

Upon receipt of such response, the authority shall claim an exemption.[62] This provision seeks to strike a balance between accessing information held by public authorities and, in appropriate cases, protection of commercial interests.

5.9 Protection of whistleblowers

Freedom of information legislation ought to protect individuals from any legal, administrative or employment related sanctions for revealing information of wrongdoing. "Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing."[63] In addition, [s]uch protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement".[64] In meeting this requirement, the Bill provides that "an employee of a public authority may disclose to the Commission, or any other authority which has power to act upon the infor-

58 Section 28(6) of the Bill.
59 Section 28(7) of the Bill.
60 Similarly, in s 78(1) of the South African Promotion of Access to Information Act 2 of 2000, "[a] requester or third party referred to in section 74 may only apply to court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74."
61 Section 15 of the Bill.
62 Section 15 of the Bill.
63 Mendel (see fn 24 above) 8.
64 Mendel (see fn 24 above) 8.

2009-1-text.indd 101 10/8/09 11:08:22 AM

mation disclosed, or any other authorised person the contents of a document, communication or information which exposes the wrongdoing of another employee or officer of the public authority".[65] "Wrongdoing" is defined as "fraudulent, dishonest or criminal conduct or maladministration".[66] It is further provided that "[no] action, disciplinary or otherwise, shall lie and no proceedings may be brought against any employee who discloses information…[of wrongdoing]... for damages...".[67]

5.10 Destruction of records

In order to protect the integrity and availability of records, freedom of information legislation ought to provide that obstruction of access to, or the wilful destruction of, records are criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies.[68] The Bill places an obligation on every public authority to maintain complete records of documents "for a period of twenty years after the date on which the document is generated by the public authority or on which the document or record comes under the control of the public authority".[69] The Commission has also the liberty to examine records maintained by a public authority at all reasonable times.[70] It is noteworthy that the Bill does provide for criminal sanctions for destroying records or documents. However, the preservation of records and documents can only be possible if sufficient resources are allocated to ensure public record keeping is adequate.

5.11 Cost of accessing information

"The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information. It is well established that the long-term benefits of openness far exceed the costs."[71] In this connection the Bill provides that "[a] person who makes a request for information may be required to pay the fees and charges for the consideration of the request and for the cost of examination or reproduction of the information as may, by regulation, be prescribed".[72] The regulations may provide:[73]

> "(a) that no fee shall be payable in specified cases; and
>
> (b) that any fee shall not exceed the maximum fee as may be specified in, or determined in accordance with, the regulations."

65 Section 17(1) of the Bill.
66 Section 17(3) of the Bill.
67 Section 17(2) of the Bill.
68 Section 20(1) of the Bill.
69 Section 20(2) of the Bill.
70 Section 20(2) of the Bill.
71 Mendel (see fn 24 above) 9.
72 Section 27(1) of the Bill.
73 Section 27(2) of the Bill.

2009-1-text.indd 102 10/8/09 11:08:22 AM

It is noteworthy that in some jurisdictions a two tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing the information.[74] In some other jurisdictions higher fees are levied on commercial requests, as a means of subsidising the public cost of providing access to information.

6 WITHDRAWAL OF THE FREEDOM OF INFORMATION BILL

In spite of the eloquent presentation of the Freedom of Information Bill by the Minister of Information and Broadcasting Services, on 18 December 2002, the government in a surprise turn of events deferred the debate of the Freedom of Information Bill, which together with the Zambia National Broadcasting Corporation (Amendment) and the Independent Broadcasting Authority (IBA) Bills, had passed the Committee stage.[75] Since then, a variety of contradictory, oblique and even comical explanations have been offered for withdrawing the Bill as catalogued below:

(a) Then Information and Broadcasting Services Minister, Mutale Nalumango, was quoted as saying that the Freedom of Information Bill would be tabled at the following session of Parliament, which was scheduled to commence in January 2003. Nalumango reiterated government's commitment to media law reforms. Nalumango noted that although Zambia was leading in media law reforms in the region, caution should be exercised to ensure that the reforms were undertaken properly, and also to avoid the pitfalls of the privatisation programmes.[76]

(b) Then Vice-President, Enoch Kavindele, revealed in an interview that government was forced to withdraw the Bill because sufficient research had not been undertaken before taking the proposed law to the National Assembly. Kavindele promised that the Freedom of Information Bill would be re-introduced after completion of the research.[77]

(c) Nalumango informed the National Assembly that whilst government was still committed to media law reforms, there was need to tread carefully. Nalumango reiterated that there had not been a shift in government's policy of good governance, accountability and transparency. Nalumango pointed out that Zambia was a model in media law reforms in the region where so far only one country had a freedom of information law. Nalumango stressed that there was no need to "rush" the Bill as it was important to get the right interpretation of the Bill for the good of the nation.[78]

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74 Mendel (see fn 24 above) 9.
75 Zambia Independent Media Association Alert Update 20 December 2002.
76 *Zambia Daily Mail* (30 December 2002) "Freedom of Information to be tabled in Parliament soon".
77 *Times of Zambia* (2 January 2003).
78 *Times of Zambia* (23 February 2005) "State cautions on Information Bill".

2009-1-text.indd 103 10/8/09 11:08:22 AM

(d) Vice-President Lupando Mwape informed the House during the weekly question and answer session that the Freedom of Information Bill that was withdrawn would not be re-introduced soon, but only after certain concerns were taken care of. Lupando Mwape cautioned that if the Freedom of Information Bill was not handled properly, it would breed chaos, and, therefore, certain measures had to be taken to prevent such chaos. In fact, Lupando Mwape went on to state that excessive freedom is dangerous.[79]

(e) Then Information and Broadcasting Minister, VJ Mwaanga, is quoted as saying that government had no immediate intention to table the Freedom of Information Bill in Parliament. Mwaanga went on to add that he was involved in "intensive consultations both locally and internationally". Mwaanga further asserted that, in the United States, where a similar law was in place, they were encountering difficulties in administering it. Mwaanga was also quoted as saying that the following month, March 2006, his Ministry would send the Permanent Secretary to attend a conference in London to discuss freedom of information law, and to learn how other countries were coping in administering it.[80]

The withdrawal of the Freedom of Information Bill from the National Assembly on insubstantial grounds raised serious questions about government's commitment and political will to enact a freedom of information law. It was, therefore, reassuring when the President in his address to Parliament, at the beginning of January 2008, informed the House that government remains committed to the creation of a conducive environment for the media to operate freely, and to ensure a free flow of information among the public.[81] Finally, President Mwanawasa announced that government would in 2008 re-introduce the Freedom of Information Bill.[82]

7 CONCLUSION

Although the concept of freedom of information is imprecise and uninstructive, it is in practice closely tied to freedom of expression. Freedom of information is vital to the proper functioning of a modern representative government. Freedom of information is an indispensable concomitant of modern democracy. Freedom of information legislation is, therefore, an effective tool for attaining the democratic goals of transparency, accountability and good governance. The media community in Zambia has waged a sustained campaign to bring freedom of information legislation onto the Zambian statute books. Therefore, the announcement by the late President Mwanawasa that his government would, in 2008, re-introduce the Freedom of Information Bill

79 *Times of Zambia* "Freedom of Information to pend".
80 *The Post* (16 February 2006) "Freedom of Information Bill wont be tabled soon"
81 President Mwanawasa's address to Parliament 11 January 2005.
82 President Mwanawasa's Address to Parliament 11 January 2005.

2009-1-text.indd 104 10/8/09 11:08:22 AM

in the National Assembly, gave a flicker of hope that the quest for freedom of information law would finally come to an end.

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2009-1-text.indd 105 10/8/09 11:08:22 AM