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## SUNLIGHT IS THE BEST DISINFECTANT: WHY NAMIBIA NEEDS ACCESS TO INFORMATION

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### Some Provisional Comments

It should be noted that the terms *Access to Information*, *Freedom of Information*, *Right to Information*, and the *Right to Know* are used interchangeably when speaking about what will be termed for the purposes of this paper *Access to Information*. Whilst there are slight differences conceptually with the meaning of each term, they are generally used to describe the same right.

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### Key Aspects of this paper

Access to Information in Namibia is limited by a number of factors. The current legislative framework is not conducive to facilitating the right of citizens to access information by virtue of the fact that there is currently no access to information law in place in the country. Namibia's Constitution, whilst guaranteeing the right to Freedom of Expression, does not expressly provide for the right to access to Information. In addition, Namibia's legal environment is predominantly skewed in favor of promoting secrecy, with apartheid legislation, such as the Protection of Information Act 1982, still awaiting repeal.

Globally, there are now a number of countries that have access to information legislation, along with the number of constitutions that provide for the right. In fact the number of countries with Access to Information legislation has increased dramatically from 12 to 90 over the past two decades. In addition, there are a number of International, Regional, and sub-Regional Instruments that recognize the right to information. Namibia, despite its commitment to enact Access to Information legislation and its zero tolerance policy on corruption has not made any significant efforts to date to ensure that an adequate framework is put in place.

There have been some positive developments such as *Namibia's Statistics Act*<sup>1</sup>, which was adopted in 2011, policies around ICT and development, and a clear commitment to promote transparency and accountability in Government through efforts to combat corruption, particularly with the adoption of the Corruption Act 2005 and the establishment of the Anti-Corruption Commission. However, developments that promote particular aspects of the right, without providing an overarching legal framework, are too limited in scope and result in citizens being denied their human right to access information at all levels. The current piecemeal approach to Access to Information does little to combat a culture of secrecy where citizens are discouraged from participating in all aspects of public life unhindered. In addition, it does not allow the citizens of Namibia to access basic information, such as their personal records, or vital information about education, employment and health amongst many others. It also undermines good governance and accountability that are essential elements of any democracy.

If Namibia is to give effect to the principles upon which the State was founded and its Constitution enacted, namely the principles of 'constitutionalism, the rule of law, and respect for human

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<sup>1</sup> Act no. 9 of 2011

rights',<sup>2</sup> fulfill its International and Regional obligations, as well as credibility put in place measures to prevent corruption, it should develop and enact legislation guaranteeing the right to Access to Information for all of its citizens.

## The following recommendations are made:

### 1. Legislative Measures

- The lack of current legislation weakens the institutional framework of Namibia. It is necessary that legislation be put in place that guarantees citizens Access to Information. Such legislation should not only be Access to Information legislation in name only, but should follow the basic principles as provided by the AU model law on Access to Information and the African Platform on Access to Information Declaration.
- A strict timeframe should be put in place for the drafting and adoption of a Namibian Access to Information law.
- Broad public consultation should be carried prior to drafting an Access to Information bill. Civil society representing a number of sectoral issues, the media, the private sector, and wide cross section of Namibia's citizenry should be involved in the consultative process. This consultative process should continue throughout the drafting period.
- Whilst Namibia's Policy on Access to Information originated in conjunction with its anti-corruption policy, the Government should be careful when drafting legislation that such legislation is in line with international and regional best practice and is suitably broad to encompass all of the facets of this right in accordance with the recommendations of the Commonwealth Human Rights Initiative.<sup>3</sup>
- Namibia's legal framework should be harmonised. This should include repealing antiquated laws like the Protection of State Information Act 1982 that restrict access and ensuring that new laws are compatible with the ATI principles
- Namibia should provide explicitly for the right of Access to Information by expanding article 21 of the Constitution.

### 2. Practical Measures

- An implementation plan should be drawn up prior to adoption and training of public servants should be carried out prior to enacting legislation so that they will be adequately prepared to respond to information requests.

- It is extremely important that both citizens and government are educated about their right to access information.
- Namibia should develop an 'Access to Information' culture. Legislation must be accompanied by practice in order for the right to be successfully realised. Once these laws have come in to be, it is also necessary that the laws be implemented adequately.
- September 28th should be recognised by the Namibian Government as a National Right to Information day and used to promote awareness around Access to Information.
- The Government of Namibia should engage with civil society and other stakeholders to ensure widespread information demand and effective implementation of laws and policies to advance access to information by all persons, especially marginalised groups.
- The media should increase public awareness with regard to the importance of Access to Information.
- Regional best practice documents such as The African Platform on Access to Information and the AU model law should be widely distributed to Namibia's population.
- The Anti-Corruption Commission should revise their 2010-2014 strategic plan and ensure that 'Access to Information' is included as a necessary component to its successful realisation. Whilst 'inadequate legislation' is referred to in the plan, no specific mention is made of what type of legislation needs to be enacted to allow the Commission to carry out its functions.<sup>4</sup>

## Introduction

*"We are a democracy, and there is only one way to get a democracy on its feet in the matter of its individual, its social, its municipal, its State, its National conduct, and that is by keeping the public informed about what is going on. There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice that does not live by secrecy. Get these things out in the open, describe them, attack them, ridicule them in the press, and sooner or later public opinion will sweep them away."*

**John Pulitzer<sup>5</sup>**

According to the African Union Commission's Department of Political Affairs "corruption continues to deepen poverty in Africa, and could be a major factor in Africa's (especially Sub-Saharan Africa) inability in meeting the Millennium develop-

<sup>2</sup> Amoo, S. K., Skeffers, I., 'The Rule of Law in Namibia' in Horn, N., Bosl, A., (2009), 'Human Rights and the Rule of Law in Namibia', Macmillan Namibia

<sup>3</sup> Commonwealth Human Rights initiative, 2007, 'Analysis of the Government of the Republic of Namibia: Revised Policy 2006', p.2

<sup>4</sup> Anti-Corruption Commission Namibia, (2010). 'ACC Strategic Plan 2010 - 2012' pp.1 - 14

<sup>5</sup> Ireland, A., (1920), 'An Adventure with a Genius: Recollections of Joseph Pulitzer', New York: E.P. Dulton & Company, Inc., p.110

ment goals (MDGs) by the target year of 2015".<sup>6</sup> In the Namibian context, corruption is seen as one of the major stumbling blocks to economic development.<sup>7</sup> A recent report compiled by the Anti-Corruption Commission indicated that during the financial period 2011/2012 it received and investigated 297 alleged corrupt practice reports. The Commission also reported that over half the Namibian population felt that corruption is high in the country.<sup>8</sup>

Globally, the negative effect that corruption has had on economic growth has led to a number of governments committing themselves to the fight against corruption.<sup>9</sup> This has led to a huge increase in the number of countries that have enacted Access to Information legislation. In fact, during the period spanning from 1990 – 2012, the number of countries with Access to Information legislation has increased from 12 to 90, a significant increase in only 2 decades. In addition to legislation that specifically provides for a right to Access to Information, there are currently 57 Constitutions in the world that expressly guarantee a right to Access to Information. 16 Countries in Africa provide express protection for the right, whilst an additional 14 provide protection within the 'broader context of Freedom of Expression'.<sup>10</sup>

Despite the fact that three of Namibia's neighboring countries; South Africa, Zimbabwe, and Angola (although Zimbabwe and Angola's laws lack credence) have enacted legislation, and two others; Botswana and Zambia have begun the process of enacting Access to Information legislation, Namibia is yet to produce an Access to Information bill. The notable absence of legislation not only undermines Namibia's position as one of the most democratic countries on the continent but also makes it virtually impossible for it to succeed in its battle against corruption.

## Continental Developments: The African Platform on Access to Information and the AU Model law

Access to Information laws have been in place for over two centuries, with Sweden passing the first law in 1766. Rapid implementation of legislation, however, has only been seen

in the last two decades, with many countries across the globe expressing a renewed commitment to 'democratic governance' and the fight against corruption.<sup>11</sup> However, whilst this rapid progression was taking place on a global scale, activities on the African continent did not mirror what was happening elsewhere. In fact, prior to 2011, there were only five countries, which had enacted legislation, three of these in Southern Africa.

The tide, however, is slowly changing, with African citizens and governments alike recognizing the fundamental role Access to Information has to play in the everyday lives of citizens and future development of African States. A number of events, spanning from 2010 – 2012, have illustrated that access to information is now playing an increasingly important part on the African policy agenda.

In 2010, the African Commission on Human and People's Rights (ACHPR) issued a resolution authorizing the Special Rapporteur on Freedom of Expression and Access to Information in Africa to initiate "the process of developing a model law to Information legislation for Africa". The law was intended to guide African States on the adoption of Access to Information legislation, as well as provide benchmarks for their effective implementation.<sup>12</sup> After a number of sub regional consultations, the law will be adopted at the next session of the ACHPR in October 2012.

Whilst 2010 saw the initiation of important processes such as the model law, as well as the recognition by the ACHPR that uniform benchmarks should be put in place. A number of important events took place in 2011 that put Access to Information squarely back on the agenda for the continent.

2011 was marked by a number of successes, both on a regional and national level in Africa. On a national level, the number of countries with Access to Information legislation doubled with five additional countries adopting access to information legislation. In 2011 alone five countries enacted Freedom of Information legislation, these included South Africa, Liberia, Nigeria, Niger, Guinea-Conakry and Tunisia, who joined the five countries who had previously enacted legislation, namely Uganda, Ethiopia Niger, Angola, Zimbabwe, and South Africa.

On a regional level, the *African Platform on Access to Information (APAI)* campaign also began to take shape. In September 2011, marking the 20<sup>th</sup> anniversary of the *Windhoek Declaration on Promoting an Independent and Pluralistic Media*, the largest gathering of experts on Access to Information on the African Continent was convened in Cape Town, South Africa around a common goal of promoting access to information in Africa. *The Pan African Conference on Access to Information (PACAI)* was

6 Department of Political Affairs, African Union Commission, (2011), 'ECA Develops "Regional Anti Corruption Programme"', African Governance Newsletter, Document Publishing Unit – PCMA, UNECA, vol. I Issue 01, January- March 2011, p.13

7 Sherbourne, R., (2010) 'Guide to the Namibian Economy', Institute for Public Policy Research

8 Nakala, A., (2012), 'ACC Faces Multiplicity of Challenges', New Era, 11 April

9 Baena Olabe, P., Cruz Vieyra, J., (2011), 'Access to Information and Targeted Transparency Policies', Inter-American Development Bank, p. 4

10 Right to Information, 'Constitutional Protection of the Right to Information', @ [http://right2info.org/constitutional-protections-of-the-right-to-constitutional-protections-of-the-right-to/#\\_ftnref5](http://right2info.org/constitutional-protections-of-the-right-to-constitutional-protections-of-the-right-to/#_ftnref5)

11 Roberts, A., (2010), 'A Great and Revolutionary Law? The First Four Years of India's Right to Information Act', Suffolk University Law School, p. 1

12 Centre for Human Rights, University of Pretoria, (2010), 'Draft Model Law: Access to Information in Africa' @ <http://www.chr.up.ac.za/index.php/comments.html>

attended by Government representatives, the African Union, the United Nations, public institutions, media organisations and civil society. At the Summit of the Conference, known as AIMS (the Africa Information and Media Summit), which was held on September 19th, ‘upon a motion for adoption moved by Advocate Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights, and seconded by Honourable Norris Tweah, Deputy Minister of Information of the Republic of Liberia, the first African declaration on Access to Information was signed and adopted in Cape Town.’<sup>13</sup>

The APAI declaration sets out minimum standards for Access to Information on the Continent. It also sets out a list of principles taking into account how access to information affects various sectors of society and how these principles should be applied. The APAI declaration call son States to:

- *Adopt or revise existing comprehensive laws on access to information in line with the principles in this Declaration and the proposed AU Model Law, and fully implement them.*
- *Harmonise legal frameworks to ensure access to information including repealing or revising antiquated laws that restrict access and ensuring that new laws are compatible with the ATI principles.*
- *Engage with civil society and other stakeholders to ensure widespread information demand and effective implementation of laws and policies to advance access to information by all persons, especially marginalised groups.*
- *Join and implement multi-stakeholder efforts including the Extractive Industries Transparency Initiative (EITI), the Construction Sector Transparency Initiative (CoST) and the Medicines Transparency Alliance (MeTA) to further transparency*
- *Promote availability of public domain information through ICTs and public access to ICTs.*
- *Support AU efforts to adopt an instrument on access to information.*
- *Officially recognise 28 September as International and African “Right to Information Day.*
- *Adopt and effectively implement legislation and policies ensuring whistleblower-protection.*<sup>14</sup>

In May 2012, the African Commission on Human and Peoples’ Rights, noting both the African Platform on Access to Information (APAI) and the AU model law, passed a resolution authorizing the Special Rapporteur on Freedom of Expression and Access to Information in Africa to expand article 4 of the Declaration of Principles on Freedom of Expression to include Access to Information, and recommended that the AU officially

recognize September 28<sup>th</sup>, as International Right to Information day in Africa.<sup>15</sup> The report will be considered at the next AU summit in July 2012.

## Access to Information in Southern Africa: From Progression to Regression

The initiation of the Model law process, the adoption of the African Platform on Access to Information, and the adoption of Access to Information legislation by a growing number of African states all indicate the growing importance of Access to Information in Africa. However, whilst there is significant progression in Africa as a continent, some much publicized developments in Southern Africa, particularly on the part of Namibia’s neighbor, South Africa, have lead to worries that governments in the region are back peddling towards more regressive rather than progressive legislation, preferring a culture of secrecy over that of transparency.

Prior to 2011, countries in Southern Africa represented three of the five countries on the continent that had enacted specific legislation guaranteeing their citizens a right to Information. South Africa, the first country in Africa to adopt such legislation, enacted its ‘*Promotion of Access to Information Act*’ in 2000. The South African legislation was intended to “overcome the historical legacy of secrecy and socio-economic disadvantage which the apartheid Government created.”<sup>16</sup> South Africa’s ‘*Promotion of Access to Information Act*’ was followed by the adoption of legislation in Zimbabwe and Angola in 2002, as well a number of countries throughout the region proposing draft Access to Information legislation.

Southern Africa has traditionally taken the lead with regard to promoting Freedom of Expression in Africa. In particular, South Africa, Namibia, and Botswana have been recognised for their adherence to democratic principles. However, recently, it would appear that the region is been overtaken by neighbouring regions such as East Africa, who is the past year have had four countries who adopted Access to Information legislation. The Economic Community of West African States (ECOWAS) is also moving towards the adoption of a *Uniform Legal Framework on the Freedom of Expression and Right to Information*, which illustrates a regional commitment to ensuring that citizens of West Africa are enabled to exercise their right to access to information.

15 ACHPR/Res.222 (LI) 2012: Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information

16 South African History Archive (SAHA), 2008, ‘PAIA Workshop Guide: A Guide to requesting Information in terms of the Promotion of Access to Information Act of 2000 (PAIA), p. 4

13 African Platform on Access to Information, adopted September 19th, 2011

14 *ibid*, Principle 11



Similar enthusiasm has not been seen in Southern Africa, with a few notable exceptions. In November 2011, South Africa's National Assembly passed the Protection of State Information Bill. The bill has been widely criticised for threatening Freedom of Expression and Access to Information, which are provided for both in South Africa's Constitution as well as expressly legislated for through South Africa's Promotion of Information Act (PAIA), as well as undermining attempts to combat corruption. Aspects of the bill that are causing particular concern, include the absence of a public interest defence, and 5 – 25 years imprisonment for been in 'possessing, intercepting or disclosing classified information.'<sup>17</sup>

It is feared that the introduction of what has been termed the 'Secrecy' bill will have a severe knock-on effect in the region, particularly given South Africa's position as the a country that was once lauded for it's promotion of the principles of Freedom of Expression. A 2011 study conducted by the Media Institute of Southern Africa, which examined the levels of transparency amongst public institutions also indicated that that a culture of secrecy was prevailing in the region. Across the board, the results of the study indicated that Governments were violating citizens' rights to access information across the region. In general web-sites did not have the relevant information, a particularly common problem was a lack of financial or budgetary information. Response to written requests were poor, with Institutions often not responding at all, or questioning why the applicant wanted the information in the first place. In Mozambique, for example, out of nine surveyed institutions only one institution responded to a request for information, and in Botswana no public institutions responded at all.<sup>18</sup>

However, whilst there have been some negative developments in the region, it is not all doom and gloom. Botswana has developed an Access to Information Bill, which has been tabled before parliament. Botswana's bill is not only progressive, but will also be the first law, if it adopted, to have incorporated best practice principles from both the APAI declaration and the AU model law. The second reading of the bill will take place in July 2012. In addition, neighbouring Country, Zambia's Access to Information bill will go before parliament in September 2012.

It should also be reiterated that there are currently countries in the region with Access to Information legislation, South Africa<sup>19</sup>, Zimbabwe<sup>20</sup>, and Angola<sup>21</sup> (clearly difficulties with the credibility of both Zimbabwe's and Angola's Access to Infor-

mation laws should be noted here – Zimbabwe's AIPPA law has been used to restrict press freedom and to control information flow rather than promote access, Angola's law has not been implemented effectively), as well countries with constitutional provision, these include Malawi<sup>22</sup>, Mozambique<sup>23</sup>, South Africa<sup>24</sup>, and Swaziland<sup>25</sup>. There are also a number of countries with draft Access to Information legislation, including Mozambique and Malawi, as well as those who have draft legislation and have shown a clear intention to adopt such legislation, such as Botswana and Zambia. Namibia and Lesotho have not yet produced draft legislation.

## Namibia's policy on Access to Information: 1998 - Present

*"VISION 2030: Namibia aspires to be a developed society, and this will require of it to become an information society. Policy and laws development must be directed towards this ultimate vision" (Office of the Prime Minister – Republic of Namibia)<sup>26</sup>*

Access to Information has been on the Namibian policy agenda for well over a decade. In 1998, the Office of the Prime Minister began the process of introducing Access to Information legislation. A consultative conference held on 'Anti Corruption and Ethics' which resulted in a commitment from the Office of the Prime Minister committing to the adoption of both an Anti-Corruption Act which was adopted in 2003, the other was a Freedom of Information Act.<sup>27</sup> §

At a consultation meeting commissioned by the Ministry of Information and Broadcasting in 2007, the Minister of Information and Broadcasting, Netumbo Nandi-Ndaitwah stated that "The Namibian government believes that freedom of expression and access to information will lead to greater transparency and accountability, good governance and the strengthening of democracy and should not be used as breeding ground for insecurity" She further stated that the Namibian Government would invest resources in to an information policy, as Access to Information represented one of the three pillars that supports good governance and anti-corruption"

17 Tiwana, M., (2012), 'Why South Africa must not enact a Secrecy Bill', Civicus @ <https://www.civicus.org/news-and-resources/502-why-south-africa-must-not-enact-the-secrecy-bill>

18 Media Institute of Southern Africa., (2011) 'Government Secrecy in an Information Age: A Report on Open and Secretive Public Institutions in Southern Africa', @ [www.misa.org](http://www.misa.org)

19 Promotion of State Information Act (Act no. 2 of 2000)

20 Access to Information and Protection of Privacy Act 2002 ((GN 116/2002))

21 Lei de Acesso aos Documentos Administrativos (Lei n.º 65/93, 2002)

22 Article 37 of the Constitution of Republic of Malawi, 1994

23 Article 74 of the Constitution of the Republic of Mozambique, 2004

24 Section 32(1) of the Constitution of the Republic of South Africa (no, 108 of 1996)

25 Article 25 of the Constitution of the Kingdom of Swaziland, 2002

26 Elliot, G. D., (Coordinator – E laws Working Group) Under Secretary – Office of the Prime Minister), (2008), 'STATEMENT ON PROVISIONAL POLICY FRAMEWORK ON THE DEVELOPMENT OF ACCESS TO INFORMATION LEGISLATION FOR NAMIBIA OFFICE OF THE PRIME MINISTER' 18 August, ADMINISTRATIVE JUSTICE CONFERENCE, WINDHOEK

27 Op. Cit.,

In 2008, the Prime Minister stated that Namibia had moved beyond the stage of ‘why’ and ‘should’ debate Access to Information, and that the time had come to discuss ‘when’ such a law should become practice.

In 2012, four years after this renewed commitment and 14 years after the Government initially committed to the enactment of legislation, an Access to Information law is still not in place. This not only undermines Government’s efforts to combat corruption, but also effects the everyday operations of the Country.

## Access to Information in the fight against corruption in Namibia

Corruption tends to flourish in situations where there is little chance of discovery; it is this undeniable fact that makes access to information legislation the most important safeguard in the fight against corruption. In this regard, it not only increases instances of detection, but also acts as a deterrent – Individuals are less likely to engage in unsavory activities where the chance of detection is high.<sup>28</sup>

There is a perception in Namibia that Corruption is widespread, particularly amongst high-ranking officials. A 2011 survey carried out by the Namibian Anti Corruption Commission reported that 54% of respondents felt that there were high levels of corruption in Namibia.<sup>29</sup> The 2008 Afrobarometer also found that 41% respondents thought that Namibian police officers were involved in corruption.<sup>30</sup> According to Robin Sherbourne’s Guide to te Namibian Economy 2010 post-independent Namibia has been ‘littered with corruption allegations surrounding the tender process for state construction projects’.<sup>31</sup>

Transparency Internationals’ Corruption Index, which measures perceived levels of public sector corruption, awarded Namibia a score of 4.4 in 2011. The Corruption Perceptions index rates countries between 0 (highly corrupt) and 10 (very clean). Namibia, whilst ranking 57<sup>th</sup> in the world out of 183 Countries is still far from been perceived as very clean with a score falling below the half way mark of 5.

‘The Strategic Plan of the Anti-Corruption Commission 2010 – 2014’ states that it expects Namibia to be rated at least 7 on the Transparency International Corruption perception index by 2012.<sup>32</sup> However, whilst the Anti-Corruption Commission’s

strategic plan deals with information management it does not expressly point to the need for an access to information framework in Namibia. Although, the Commission does call for the introduction of new legislation, which would facilitate the workings of the commission, there is no specific reference to what type of legislation they are referring to. Whilst, it could be possibly inferred that the plan is calling for ‘access to information’ legislation, further clarification is necessary, and the plan should be revised to further clarify this issue.<sup>33</sup>

## Namibia’s Legislative Landscape

### The Constitution

*The human rights culture to which the Government has subscribed both internationally and in terms of our Constitution, calls for access to information in accordance with a specific legal framework, as this is touted as ensuring accountability.*<sup>34</sup>

Article 1 of the Namibian Constitution states that Namibia is ‘sovereign, secular, democratic, and unitary state, founded upon the principles of democracy, rule of law, and justice for all’<sup>35</sup> Access to Information is an intrinsic part of the realisation of Citizen’s right under article 1. It is key to Citizen’s ability to actively engage in public life and to hold Government accountable, as well allowing them to exercise a number of other rights. In this regard, The UN general assembly has illustrated this point, stating: “Freedom of Information is a fundamental human right and is the touchstone to all of the freedoms to which the United Nations is consecrated”<sup>36</sup>

Although there is no express right to Access to Information in the Namibian Constitution, Article 21 (1) (a) provides for right of Freedom of Expression and states that: ‘All person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media’

It is now commonly understood that the right to Access to Information is implied within the right to Freedom of expression. In 2011, the UN Human Rights’ committee adopted General Comment 34, detailing its interpretation of the governments’ obligations to protect freedom of opinion and expression, as guaranteed by Art. 19 of the International Covenant on Civil and Political rights (ICCPR), and stated that Access to Information is

28 Baena Olabe, P., Cruz Vieyra, J., (2011), ‘Access to Information and Targeted Transparency Policies’, Inter-American Development Bank

29 Op. Cit., Anti-Corruption Commission

30 Amoo, S. K., Skeffers, I., ‘The Rule of Law in Namibia’ in Horn, N., Bosl, A., (2009), ‘Human Rights and the Rule of Law in Namibia’, Macmillan Namibia

31 Op. Cit., Sherbourne

32 Anti Corruption Commission Namibia, (2010), ‘Anti Corruption Strategic Plan 2010 - 2014’ p. 4

33 *ibid*, p. 11

34 Op. cit., Office of the Prime Minister

35 art.1(1), The Constitution of Namibia, cited in Op. Cit., Amoo, Skeffers

36 G.A Resolution 59(1), 14 Dec. 1946, cited in Yamali, N., ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ General Directorate of International laws and Foreign Affairs, Ministry of Justice Turkey

a Human Right.<sup>37</sup> Several Courts have interpreted the right to be included within the right to Freedom of Expression, for example, the Constitutional Court of South Korea noted that the ‘free formation of ideas’ is directly connected to the ‘Free expression of ideas’, stating that “[f]ree formation of ideas is in turn made possible by guaranteeing access to sufficient information.”<sup>38</sup> The Supreme Court in India has also ruled that access to information is a fundamental part of the right to Freedom of Expression. In a 1982 ruling the court stated that:

*“The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.”*<sup>39</sup>

However, this is a minimum standard and the right should be expressly provided for within the constitution. A number of countries have expanded the right to freedom of expression in their constitutions to provide guarantee the right to Access to Information. Section 32 of The South African Constitution, for example, provides that:

- 1) Everyone has the right of access to-
  - (a) any information held by the state; and
  - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable

### Restrictive Legislation

There are a number of pieces of legislation that are in violation of the right to Access to Information of Namibia Citizens. These include the following<sup>40</sup>:

- *Protection of Information Act 1982*<sup>41</sup> (Apartheid law protecting state secrets)
- *Namibian Broadcasting Act 1992*<sup>42</sup> (Sections 5 and 4(2) interfere with Broadcaster independence)

- *Namibian Communications Commission Act* <sup>43</sup> (Sections 3, 20 and 26 interfere with editorial independence)
- *1995 Public Service Act 1997* <sup>44</sup> (article 25 – prohibition on Civil Servants from releasing information without prior permission)
- *Namibia Central Intelligence Service Act*<sup>45</sup> (*overbroad Limitations*)
- *Namibia Film Commission Act 2000* <sup>46</sup> (*Secrecy provisions*)
- *2002 Defence Act*<sup>47</sup> (*Article 54 Stretches limitations far beyond the boundaries of permissible restrictions on Access to Information with regard to state security*)

All of the above legislation is indicative of a trend to protect rather than promote access to Information. Of particular concern because of its broad applicability and severity, and because it is in direct violation of articles 1 and 21 of the Constitution, and Namibia’s international and regional obligations, is the Protection of Information Act, which was enacted during the apartheid era prior to Namibian Independence and is still in force. The secrecy requirements of the bill have a detrimental effect on the ‘free flow of information’.<sup>48</sup> Section 4 of the Act ‘forbids a person from disclosing information based on his or her employment with Government’

It has been argued that the Protection of State Information Act is ‘informed by the demands of an authoritarian and secretive apartheid state’ and as such completely disregards the principles of transparency and openness.<sup>49</sup>

## A small step in the right direction: Namibia’s Statistics Act 2011

Although Namibia has not enacted an Access to Information law, the Namibia’s Statistics Act was enacted in November 2011, article 46<sup>50</sup> deals with the ‘Dissemination and the right if access’ and states that:

*‘(1) Subject to section 44, statistics producers collecting statistics under this Act while using public funds must produce, dis-*

37 General Comment no. 34 on Article 19 of the ICCPR

38 Forests Survey Inspection Request Case, (1989) 1 KCCR 176, 88Hun-Ma22 (S. Kor.).

39 S.P. Gupta v. President of India [1982] AIR (SC) 149, p. 234 cited in Article 19, CHRI, CPA, HRCP. (2001), ‘Global Trends on the Right to Information: A survey of South Asia’, July 2001, p.25

40 United Nations Educational, Scientific, and Cultural Organisation (2011) ‘Communication and Information: Media Legislation and Regulation’, @ <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/africa/media-legislation-and-regulation/>

41 (Act 84 of 1982) cited in ibid

42 (Act 9 of 1991) cited in ibid

43 (Act 4 of 1992) as amended by the 1995 Namibian Communications Commission Amendment

44 Act (Act 23 or 1995) and the 2000 General Law Amendment Act cited in ibid

45 (Act 10 of 1997) cited in ibid

46 (Act 6 of 2000) as amended by the 2001 Namibia Film Commission Amendment Act (Act 11 of 2001) cited in ibid

47 (Act 1 of 2002) cited in ibid

48 Louw, R., ed. (2004) ‘Undue Restriction: Laws Impacting on Media Freedom in the SADC’, The Media Institute of Southern Africa, the United Nations Educational, Scientific, and Cultural Organisation, and The European Union, pp.53 - 64

49 Mc Kinley, D. T., ‘The State of Access to Information in South Africa, Centre for the Study of Violence and Reconciliation’, p.5

50 Statistics Act , 2011, Government Gazette of the Republic of Namibia



seminate and make them available and accessible to users of statistics as a public good in accordance with the purpose of the National Statistics System and the principles of statistics referred to in section 4(2).

- (2) All statistics producers and custodians of spatial data must formulate an access to information policy within the prescribed period and in the form and containing the requirements set out in the standards, to be made publicly available, setting out -
- (a) the methods and procedures used to compile and produce statistics and to capture, manage, maintain and integrate spatial data;
  - (b) an inventory of official and other statistics available, including any spatial data; (c) such other matters as may be prescribed.

Whilst, the 'Statistics Act' promotes citizen's rights to access statistical information, and will have a positive effect on many sectors, particularly for planning purposes within Namibian society, it is limited to statistical information, and is a small step in terms of the realisation of Access to Information in Namibia.

## Access to Information Provisions under International and Regional Law

Namibia is subject to a number of international and regional instruments that make provision for the right to Access to Information. Section 144 of the Constitution of Namibia provides that:

*"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia"*<sup>51</sup>

### International Obligations:

Namibia is a monist country, which means that International Human Rights Instruments, which have been ratified by Namibia, automatically become part of domestic law. Article 19 of the Universal Declaration of Human Rights (UDHR) states

*'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'*<sup>52</sup>

Article 19(2) of the International Covenant of Human and People's Rights (ICCPR) states that:

*'Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'*

The ICCPR was ratified by Namibia in 1994 and places obligations on States to not only protect the rights of individuals, but further to take 'take the necessary steps (...) to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant' in accordance with article 2(2) of the convention.

## Regional Obligations

The Right to Access to Information is also enshrined in Article 9 (2) of the *African Charter on Human and People's Rights* (ACHPR), which provides that:

*"Every Individual shall have the right to express and disseminate his opinions before the law"*

In 2002, the African Commission on Human and People's Rights developed principles to further clarify article 9 of the Convention Article 9 of the *Declaration of Principles on Freedom of Expression in Africa*<sup>53</sup> expressly provides for the right to Access\Information, and states that:

*"1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.*

*2. The right to information shall be guaranteed by law in accordance with the following principles:*

- *everyone has the right to access information held by public bodies;*
- *everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;*
- *any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;*
- *public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;*
- *no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment*

51 Constitution of the Republic of Namibia

52 Universal Declaration of Human Rights (UDHR) of December 10, 1948.

53 2nd Session, 17 - 23 October, 2002: Banjul, The Gambia.



*save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and*

- *secrecy laws shall be amended as necessary to comply with freedom of information principles.*

3. *Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies”*

Namibia also ratified the SADC protocol on Culture, Information and Sport in 2002. The Protocol promotes the free flow of information and requires states to make a commitment to the right to information... for all citizens<sup>54</sup>, as well as developing and implementing “policy in the area of...information”<sup>55</sup>

## Namibia’s duty to Implement Access to Information Legislation to combat corruption under International and Regional law

Although, Access to Information is still unrealized in a number of countries in Africa, there is growing consensus that Access to Information is essential in the fight against corruption. According to Roberts, most of the countries that have adopted Access to Information laws over the last two decades are those that have had significant problems with corruption.<sup>56</sup> Article 11 of the APAI declaration’s “Application of Principles” illustrates the importance of Access to Information to the fight against corruption, as well as emphasizing State’s duty to implement access to information legislation. Article 11 states:

*“By contributing to openness and accountability, access to information can be a useful tool in anti-corruption efforts. Besides ensuring that access to information legislation is effectively implemented, governments have a duty to guarantee a broader legal and institutional framework conducive to preventing and combating corruption.”*

Namibia’s international and regional obligations require that an ‘Access to Information framework’ is put in place to fight corruption. Article 9 of the *African Union Convention on Preventing and Combating Corruption* requires State parties to adopt legislation to ‘give effect to the right of access to information that is required to assist in the fight against corruption’.

In addition, Namibia was one of the first countries to ratify the United Nations Convention against Corruption on the 3<sup>rd</sup> of

August 2004.<sup>57</sup> The Convention provides for a number of key measures necessary to combat corruption, including ‘access to information. Article 10 (a) requires that states adopt:

*“Procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public”.*<sup>58</sup>

## Best Practice Principles

Whilst Namibia’s policy on Access to Information is linked to its fight against corruption, it is important that legislation adopted by the State goes beyond the need to combat corruption and is in line with best practice principles<sup>59</sup>. Article 19, an organisation with a specific mandate to defend the promotion of Freedom of Expression and Freedom of Information has developed principles that reflect best practice with regard to Access to Information. The principles provide that a good Access to Information law should have the following characteristics:

1. *MAXIMUM DISCLOSURE: Freedom of information legislation should be guided by the principle of maximum disclosure*
2. *OBLIGATION TO PUBLISH: Public bodies should be under an obligation to publish key information*
3. *PROMOTION OF OPEN GOVERNMENT: Public bodies must actively promote open government*
4. *LIMITED SCOPE OF EXCEPTIONS: Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests*
5. *PROCESSES TO FACILITATE ACCESS: Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available*
6. *COSTS: Individuals should not be deterred from making requests for information by excessive costs*
7. *OPEN MEETINGS: Meetings of public bodies should be open to the public*
8. *DISCLOSURE TAKES PRECEDENCE: Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed*

54 Art. 2(a), SADC protocol on Culture, Information and Sport

55 *ibid.* art. 2 (d)

56 *Op. cit.*, Roberts, pg. 1

57 United Nations Office on Drugs and Crime (2012), ‘United Nations Conventions Against Corruption: UNCAC Signature and Ratification Status as of 12 March 2012’, @ <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

58 United Nations Convention against Corruption(A/RES/58/4)

59 *Op. Cit.* p. 2

9. PROTECTION FOR WHISTLEBLOWERS: *Individuals who release information on wrongdoing – whistleblowers – must be protected*”<sup>60</sup>

## Limitations

All Access to Information legislation is subject to limitations, but as Pope points out one has to be careful on how far certain limitations are taken. Balance is key, and the harm caused by the release of information if released must outweigh the public interest in the limited cases where information is disallowed. Both the ICCPR and the UDHR determine the legitimacy of restriction on freedom of expression by virtue of a ‘three part test’ which provides that the right can only be restricted where it is provided for by law, serves a legitimate purpose, and is necessary for a democratic society. In accordance with best practice, Article 8 of the African Platform on Access to Information Declaration defines “Limited Exemptions’ and provides that:

*“The right of access to information shall only be limited by provisions expressly provided for in the law. Those exemptions should be strictly defined and the withholding of information should only be allowed if the body can demonstrate that there would be a significant harm if the information is released and that the public interest in withholding the information is clearly shown to be greater than the public interest in disclosure. Information can only be withheld for the period that the harm would occur. No information relating to human rights abuses or imminent dangers to public health, environment, or safety may be withheld.”*<sup>61</sup>

In accordance with Article 19(3) of the ICCPR, restrictions should only be placed on the right of Freedom of Expression: “for the purpose of securing due recognition and respect . . . in a democratic society” and should be:

- *Provided by law*
- *Necessary for respect of the rights and reputation of others*
- *Protection of national security*
- *Protection of public order*
- *Protection of public health and morals*<sup>62</sup>

Particular care is necessitated in cases dealing with national security. Whilst it is a necessary limitation, it is often the case, according to Pope points out that the “national security card is overplayed” and as such undermines the entire purpose of enacting Access to Information legislation in the first place. One such example is the case of the *Business Times* in Singapore. The

newspaper was prosecuted by the state for publicising an ‘official prediction’ on the country’s economic growth. The circulation of *The Economist* was subsequently curbed because they criticised the actions taken by the State.<sup>63</sup>

In accordance with the Johannesburg principles which were produced to provide a ‘clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place un justified restrictions on the exercise of these freedoms.’ limitations on the basis of National Security should only be in accordance with the law and necessary for ‘in a democratic society to protect a legitimate security interest.’<sup>64</sup>

## Best Practice Examples: The Role of Access to Information in Preventing Corruption and the Advancement of Socio Economic Rights

A useful example for developing countries who are considering adopting or implementing Access to Information laws is India. India has a number of economic and political challenges, in addition to having two thirds of its population living in rurally.<sup>65</sup> India adopted its RTIA (Right to Information Act) in 2005, and received 2 million information requests within two years of its implementation.<sup>66</sup>

The campaign around access to information was initiated in the 1990’s in village of Devdoogri in the state of Rajasthan, where local villagers became concerned about spending malpractices. The villagers attempted to request information on how funds were been allocated to different communities. Government officials were initially reluctant to provide information claiming that citizens had no right to official information. With the assistance of officials sympathetic to the concerns of local villagers, the requesters were able to obtain information that confirmed corrupt spending practices by public officials. A public reading of local government accounts revealed that a number of officials who had deceased were being paid, as well as a number of unimplemented projects.<sup>67</sup>

The Devdoogri experience led to the enactment of an Access to Information law in the state of Rajasthan, which was followed

60 ARTICLE 19, (1999), ‘The Public’s Right to Know: Principles on Freedom of Information Legislation. ARTICLE 19, London, June at [www.article19.org](http://www.article19.org)

61 Article 8, African Platform on Access to Information

62 Fatah, A. A., ‘Free Press in Egypt’, The American University in Cairo

63 ‘Newspapers: a Ban Is Not a Ban unless Restricted’ by Francis T. Seow (former Solicitor-General of Singapore), April 1998, [www.sfdonline.org/Link%20Pages/Link%20Folders/Press%20Freedom/seow.html](http://www.sfdonline.org/Link%20Pages/Link%20Folders/Press%20Freedom/seow.html) in *ibid*, p.

64 *Op. cit.*, Fatah

65 *Op. cit.*, Roberts, A., p. 1

66 *ibid.* p. 1

67 Pope, J., (2003), ‘Access to Information; whose right and whose information’, Global Corruption Report, p. 10

in quick success by a number of states implementing Access to Information legislation. The movement led to the enactment of Indian Right to Information Act in 2005.

Since its enactment, reports from India overall show that RTIA has been used mostly in the fight against ‘mismanagement and corruption’<sup>68</sup> According to Roberts, since RTIA came in to force, a number of requests have led to revelation of corrupt practices. In one such case two Non Governmental Organisations found that Government officials in collusion with businessmen were guilty of stealing four million kilograms of rice intended for the poor. The rice was eventually returned to its intended recipients.<sup>69</sup>

RTIA in India has also been used by citizens to gain Access to Information about ‘passports, land allotments, refunds and pension benefits. The Konrad Adenauer Stiftung list a number of success stories associated with the enactment of the RTIA:

- *“An Income tax refund that was pending for 5 years was reported to have paid been in a weeks time.*
- *Payment of compensation for land acquired which was pending for more than 18 years was paid by the authorities after filing an application under RTI.*
- *Women living in slum clusters secured admission for their children in public schools.*
- *The social activists could unearth huge quantities of essential commodities meant to be supplied to the weaker sections of the society through the Public Distribution System (PDS) were found to have been diverted to the black market and appropriate action could be initiated against them.*
- *Corruption in local government institutions like municipalities and municipal corporations in the discharge of their obligatory functions such as maintenance of roads, cleaning of drains, functioning of schools and dispensaries were exposed and the engineers involved were got arrested by the Anti-corruption Department.*
- *RTI was used to compel the Pollution Control Board to close down polluting Units.*
- *Acts of official high handedness of the Forest Department against tribals were revealed through RTI. The officials had slapped cases on the tribals for trivial offences like stealing forest fruit or collecting firewood of nominal value. Thousands of such cases were withdrawn through RTI.”*<sup>70</sup>

Whilst a number of cases of corruption have been unearthed by RTIA in India, what is interesting to note is that the law has been used at the most practical level to further the socio economic rights of its citizens.

Similarly PAIA (The Promotion of Access to Information Act) in South Africa, which was adopted in 2000, making it the first African Country to adopt such legislation, has demonstrated that Access to Information laws are often used to ensure better ‘service delivery’, in turn promoting the socio economic rights of it’s citizens. Mukelani Dimba in ‘How the Right to Information makes a difference’ points to the example of women living in one of the most impoverished areas of KwaZulu Natal, Entambanana, to ensure water was delivered to the community. Using RTIA, the women unearthed local council meeting minutes, as well as a budget, which indicated that plans existed to provide water to the community. A year after the information request was made, water was delivered to the Entambanana.<sup>71</sup>

## Conclusion

The notable absence of Access to Information legislation is undoubtedly creating a major obstacle for future progress in Namibia. It is clear that Access to Information not only affects the right to freedom of expression, but also affects Namibia’s economic growth, its promotion of democratic principles, the socio-economic rights of its citizens, as well as the fight against corruption amongst many others. There is no doubt that the Government of Namibia has shown its willingness to embrace this process, and this paper has discussed many of the reasons why Namibia needs such legislation. However, after fourteen years of sitting on the policy agenda of Namibia, it is questionable whether it is still appropriate to discuss ‘why’ legislation is necessary; the need for this legislation was already recognized in 1998. As Namibia’s Prime Minister stated in 2008 the time has now come to discuss ‘when’ this legislation will be put in place.

Access to Information is a fundamental human right which all citizens are entitled to, the Government as representatives of the people has the responsibility to ensure that legislative measures are put in place to allow citizens to enjoy this right. It should be stressed, however, that enacting legislation is not enough, there must be willingness on the part of Government to implement and enforce such legislation, and citizens must be educated on how they can use it. This is not an easy process, and there will undoubtedly be many challenges. It is not easy to transition from a culture of secrecy to an open and transparent society, and often attitudes are slow to change. However, enacting and implementing legislation can only lead to a more positive future for Namibia in all facets of life.

68 Roberts, pg. 4

69 Op. Cit., Roberts, p. 7

70 Hill, C., (2011), ‘Access to Information Laws in Asia, Germany, and Australia: A Reader’, Konrad Adenauer Stiftung, pp. 19-20

71 Dimba, M., (2011), ‘How the right to information makes a difference’ in Berger, G. (2011) ‘Media in Africa: Twenty years after the Windhoek Declaration on press freedom’, Media Institute of Southern Africa, pg. 164



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# Appendix A

## **STATEMENT ON PROVISIONAL POLICY FRAMEWORK ON THE DEVELOPMENT OF ACCESS TO INFORMATION LEGISLATION FOR NAMIBIA OFFICE OF THE PRIME MINISTER 18 August 2008 ADMINISTRATIVE JUSTICE CONFERENCE, WINDHOEK**

*GD Elliott (Coordinator – E Laws Working Group)  
Under Secretary – Office of the Prime Minister*

### **1. Introduction and Background**

1.1 The Government of Namibia has since Independence adopted a policy of transparency and accountability to guide the development of Namibia's democracy. This policy has led to the Namibian public administration becoming more open in its dealings, consultation on policy developments have become the norm and the doors of the policymakers have opened up.

1.2 Yet access to ministers and decision makers does not automatically equate to access to information. Where many of our statutes do provide for the divulging of information, there are so many provisos that the public body in question is virtually free to determine when and what sort of information to publish. The Parliamentary process is not viewed as doing enough either – although ministers are accountable to Parliament and they can be questioned in the House, this takes place against a backdrop where there is no guaranteed freedom of information.

1.3 The human rights culture to which the Government has subscribed both internationally and in terms of our Constitution, calls for access to information in accordance with a specific legal framework, as this is touted as ensuring accountability in the truer sense of the word – a most important requisite for democracy. As in other areas, Namibia is fortunate in that it can draw on the experience of several countries which enacted freedom of information or access to information legislation. Furthermore, in line with its membership of international bodies, advice and model laws have been provided as to how we could be approaching this policy challenge.

1.4 A start in this connection was made during the National Consultative Conference on Anti-Corruption and the Promotion of Ethics in October 1998, held under the auspices of the Office of the Prime Minister. The OPM took the recommendations to Cabinet, which indeed endorsed it as policy. Thus, the Consultative Conference had two major outcomes which it required of the OPM to pursue: The first concerned the fight against corruption. As we should by now be aware, this led to the enactment of

the Anti-Corruption Act, Act no. 8 of 2003. The Prime Minister gazetted the implementation of this Act as from April 2005.

1.5 The second recommendation was that a "Freedom of Information Act" be adopted for Namibia. Now the question arises: what has the OPM done about this recommendation, and if indeed there has been progress, at what stage are we with this recommendation? Both these questions have again been raised by stakeholders, and indeed, even by other Government agencies. For example, the former Ministry of Information and Broadcasting and the OPM have been regularly engaged in this connection by the regional SADC block and through reports commissioned on the status of Namibia's "media and communications legislation" – last year in September there was a consultative workshop on this and related issues. Indeed, this conference in itself indirectly calls upon the OPM to address the issue of the access to information legislation for Namibia – especially in the context of administrative justice.

1.6 A number of international commitments by Namibia inform the way forward regarding the need to formulate access to information legislation. Namibia became a signatory to the SADC Protocol on Culture, Information and Sport in August 2000, which Parliament ratified in 2002. This protocol requires of State parties to, among others, establish and strengthen the institutional framework for the implementation of information policies. In what could be termed a related Declaration of August 2001, SADC requires of its Member States to promote the use of Information and Communications Technologies, with among others, affordable access to information which was identified as one of its core elements. Namibia also became a signatory in 2002 of the Africa Union's Declaration of Principles of Freedom of Expression. One of the principles of this Declaration is to enhance the freedom of expression and access to information of the African people. The Declaration was adopted on the basis of the African Charter of Human and Peoples' Rights, which Namibia has also ratified. Furthermore, Namibia is a signatory to the Plan of Action of the World Summit of the Information Society in terms whereof countries are obliged to undertake policy actions to promote information as part of its developmental agenda.

1.7 Namibia has for all intents and purposes an outdated law on information in place which clouds its modern policy intentions. Here we refer to the “Protection of Information Act of 1984”, a piece of legislation of the apartheid security apparatus - it is still on our books. This legislation is the very antithesis of the promotion of a culture of access to information – it provides for the protection from disclosure of certain information. The report commissioned by the former Ministry of Information and Broadcasting raises a number of issues regarding our communications legislation, and it advises that it should now be considered a priority for Namibia to review and reform existing legislation if it is to conform to the “African standards it is legally obliged to uphold”.

1.8 The Prime Minister is aware of these developments and it is his view that the legal framework required that would enable persons to exercise their “access to information” rights is indeed a very important matter. It might seem long in coming but a lot has happened to prepare the way for this law, among other related ones, to become a reality sooner rather than later: we have moved beyond the stage where we are debating the “why” and “should” questions on this matter: rather, we concern ourselves now with “when” a legal framework on Access to Information (the preferred term) will be tabled in Parliament. Prior to getting a draft Bill revealed, however, there are “related policy developments”, many now in their varying stages of completion, which must be taken into account and must of necessity impact the formulation of content and structure of such a law.

## **2. Creation of an environment for Access to Information legislation for Namibia – the role of the OPM**

2.1 In the absence of a clearly stipulated right of access to information in chapter 3 of the Constitution, the OPM views the need to give expression to the access to information rights as being rather one of those policies founded upon the principles of State Policy set out in chapter 11 of the Constitution. (Of course, the fundamental rights enshrined in article 18, and the fundamental freedoms, such as the freedom of speech and expression, often referred to as the basis for the right to access to information, give the exercise of this right greater importance.) Thus, the principles of the aforementioned Chapter require of the State to actively promote and maintain the welfare of the people by the adoption of policies which are in line with article 95 of the Constitution. In our context, there are two sub-articles of note here: firstly, article 95 (e) stipulates that the Government must “ensure that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law”, whereas sub-article (k) seeks of the State to encourage “the mass of the population through education and other activities

and through their organisations to influence Government policy by debating its decisions”. Some very specific provisions in our statutes on labour, social security, legal aid, the environment, children, equality laws (eg., on marriage), local and regional government, etc, find their linkages through this article of the Constitution. It is interesting to note, specifically in this connection, for example, that the Public Service Act of 1995, establishes the Public Service for Namibia as a body which must “serve the people of Namibia and promote their welfare and lawful interests” (section 5). Another example is the Labour Act of 2004, which in its preamble states that the enactment of the law places the welfare of the people as first and foremost. We see a similar approach on the present version of the draft Information and Communications Bill, which can be accessed on the website of the Namibia Communications Commission: it has several provisions on public access to information and open hearings on some of its deliberations where the public interest so dictates. With the aforementioned laws, and those to be still enacted, as having a constitutional basis, one specific remark by the late Chief Justice Mahomed on our constitutionalism is probably worth remembering: The Constitution must serve “to enable it to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government” (Cultura 2000 case).

2.2 Another aspect which must be placed in context as the OPM proceeds to craft the policy and legal framework on access to information, concerns some fundamental realities concerning “information” as a public policy concept. This is a very complex topic in itself but we could perhaps just mention one or two core aspects. It is generally acknowledged, especially in today’s information society, that knowledge based on information is power. But this information comes in a variety and a bewildering array of guises. It is not only physical in its manifestation, when we can see it on paper, for example, but it is intangible – especially in the manner in which it is kept nowadays. We know now that it is also kept as programmed data and voice, and in computer networks, which are increasingly also mobile. And neither is it kept only in known and identifiable locations. In this manner it is owned as property, it is traded, and it is used in a variety of ways for purposes not often clear to the outsider. Information is possessed by the many organisations and structures on which people depend for their daily needs. In Namibia, the main sources of information are held and controlled by the public administration and the many entities of the private and NGO sectors. An access to information legal framework for Namibia must take into account these realities if it is to be relevant and effective. The question arises then: should the law on access to information only apply to the public administration, or should it equally apply to the privately-owned entities, such



as the banks, insurance companies, other service providers, other corporations, the media, medical care entities, etc?

2.3 Just as access to such information is important to enable a person to use it for his or her own purposes, so does the Constitution jealously guard and give rights to one's privacy of correspondence and communications (i.e., one's data provided to a hospital, insurance company, or bank, is often given because of the assurance that it will be held as secure and privileged communications). (The interference of the exercise of this right in article 13 is on the basis that it must be in accordance with law.) Additionally, and in a related context, so does the constitution protect rights to one's moveable property (i.e., intangible assets, such as copyright, trademarks, and patents), and one's right to practise any profession, occupation, trade or business. It is, therefore, required that the intended legislation must balance these competing interests: the right to access to information as a matter of public interest and social need stands in relationship to the right to privacy which must be controlled, and public policy should be developed around this healthy tension between the two. The laws now being developed will have to find the appropriate balance which meet Namibian society's needs on information utilization. The question, therefore, arises whether we can simply proceed to develop an access to information law in the absence of a law on the protection of data and personal information / privacy, particularly where both are so importantly formed today by electronic means?

2.4 Therefore, the OPM did and continues to do much ground-work on the policy development front that will set the stage for Namibians to articulate their information rights vis-a-vis the administration. Thus, the following related policy developments have already had an impact on the formulation process of the access to information legislation:

2.4.1 VISION 2030: Namibia aspires to be a developed society, and this will require of it to become an information society. Policy and laws development must be directed towards this ultimate vision.

2.4.2 The development of the National Development Plans: The Government has adopted the Third development Plan for the 2008 – 2013 (five year) period. The OPM must monitor and coordinate its execution, and it has a key role to play on the implementation of strategies on the development of the knowledge economy. This Plan clearly acknowledges the mistakes of previous plans – and the new Plan articulates a more inclusive approach to development, with the emphasis on poverty eradication and rural development. Unlike the previous plans, a greater emphasis is placed on the need to develop the knowledge economy as one of the pillars of development, and as a result key

results areas are set for the creation of Namibia as an information society – which must include the marginalised population and those of us in the rural areas. Information must reach them and be available to them as well, and as effectively as it does the urban dweller, the educated and the rich. Thus, provision is made for the enactment of laws to promote the information society and to promote knowledge management.

2.4.3 The promotion of ICT for development: There have been two seminal policies issued in this regard: The Information and Communications policy and the E-governance (as distinct from government) policy for Namibia. Both have already been adopted by the Cabinet; additionally, the ICT policy has been endorsed by the National Assembly. The ICT policy is now being revised, especially in light of the establishment of the newly created Ministry of Information and Communications Technology. The OPM must monitor and coordinate the implementation of the e-governance policy. Both policies stress the need for information usage also in terms of their underlying legal frameworks. Its main objective is the improvement of “public and democratic processes and strengthening of support to public policies”. The underlying basis for e-governance of course, is that of electronic interaction between the government and the citizens and business – this involves the delivery of government products and services, exchange of information, communication and systems integration. Apart from the obvious benefits of driving down costs of service delivery and improvements in efficiencies, another benefit which the policy attempts to pursue is betterment of information and transactions that will in turn enable improved transparency and accountability. However, there are specific challenges underlying the implementation of these policies: one of these is that provision must be made to ensure access to information and this requires that there should be cooperation between the private and public sectors to avail the benefits of the new technologies to the public. 2.5 There are other, which we could call micro-policy developments, which also aim to prepare the public administration for the execution of laws on data protection, electronic transactions and communications, protection of personal information, and, indeed, access to information. The OPM is now in the process of making significant investments to upgrade and improve Government's ability to maintain its recordkeeping and documentation systems (about N\$40 million), enable e-government interaction with the members of the public and business systems and to improve the ICT literacy levels of Government staff members (between 2007/08 to 2010/11, the amount on budget to be spent on this area alone will amount to nearly N\$100 million), and major training of civil servants to close skills gaps and to prepare them for the demands of the information society, are to be supported by the Namibia Institute of Public Administration and Management (a project that will by 2009/10, require expenditures in buildings,

operations and training programmes of an amount in excess of N\$70 million). Other ministries such as Finance, Home Affairs, Justice, Trade and Industry, are similarly busy with projects to improve their interaction with the public, especially by way of the electronic means of information processing, transacting and dissemination. We must, therefore, view the development of the laws, including that of access to information, as part of a holistic public policymaking process that aims to serve the information society at all levels. Unfortunately, this has taken and will continue to take some time to evolve. The objective is to avoid a disjointed effort in this area, essentially one of national knowledge management, which is still in its nurturing stages. Namibia is after all a developmental state. As such available and scarce resources must be utilised in the best interest of its national policy objectives. Public policy in this context, especially such as the ones we are dealing with here, must be relevant and appropriate for it to be effective.

### **3. Preliminary Issues for consideration in the drafting of an Access to Information law for Namibia:**

This legislation will take on more or less, the following structure when released into the public domain for comment before the end of the year:

3.1 It will unequivocally provide for person's right of access to documents held by (public/private?) bodies in accordance with the provisions of the Bill / Act;

3.2 Public authorities / other bodies will not be prevented from publishing or granting access to documents in another manner;

3.3 It will prescribe to which entities the law will not apply because of the likelihood of contradictory provisions (eg., in respect of the National Archives); and it will most likely not apply to documents held by the Electoral Commission; the Attorney General; the Auditor General; the Intelligence Services and Defence, and the Cabinet; on Namibia's international interests; those on enforcement of the law and the protection of public safety; legal professional privilege; trade secrets, etc.

3.4 Detail how requests for access are to be submitted (eg., in writing, electronically, identification, etc), and the person's language rights in terms of which such requests could be submitted;

3.5 A duty on the public authority to assist the applicant, including helping to transfer of requests to the right authority;

3.6 Charging of fees for the processing of requests; waiving of fees, indicate circumstances for free services;

3.7 The circumstances for granting of requests; providing extension of time to deal with request (eg., because of the need for searches, large size of information requested, need for consultations, etc);

3.8 Providing access to documents, inspection provisions, sounds, recordings, etc; who can authorise the access request;

3.9 Categorise the exempt documents with deletions, copies, irrelevant material;

3.10 Reasons for refusal (eg., that request is vexatious or frivolous, or trivial); how such decisions may be reviewed( eg., by the Commissioner);

3.11 What categories of information to be made public in any event (eg., annual reports, manuals, etc); reasons for withholding such information;

3.12 Provide for an information commissioner; his/her appointment; his / her functions and powers/ which information he/she cannot get access to – under a category of exempt documents (eg., information of client-legal privilege; trade secrets; specified research and internal working documents);

3.13 The role of the Prime Minister vis-a-vis a decision of the commissioner regarding the request to a ministry;

3.14 Appeals to a Tribunal;

3.15 Regulations and codes of good practice to be issued; and


3.16 The revocation of the Protection of Information Act of 1984.

### **4. Way forward**


In parallel with the drafting of an access to information Bill, there will be drafted policies on privacy, protection of personal information, and data protection. This could result in more draft Bills to be issued in this connection. Institutions must be given a window period to get their information/records in order. The draft Bills will be released for public comment before the end of the year (i.e., 2008). This will allow for further awareness, and alert organizations likely to be affected by the new legal provisions "to get their houses in order."

### **5. Conclusion**

The real work in connection with an Access to Information Act begins with its implementation. Public servants will have to



adopt a greater culture of openness – and this is not easy when they have been dependant for decisions from the top-down and when they see this as an intrusion on their work. The private sector entities could face similar challenges under the provisions of this law – and it could be costly to implement. Additionally, it will be difficult to determine and decide what may or may not be made public, and in what time frames such information must be provided – criticism on such aspects of the law could bring the public entities concerned more in the spotlight. However, if we view it as a right which every self-respecting democratic society should be proud of having, then such challenges will be easily overcome.





## Appendix B



### *African Platform on Access to Information 19 September 2011*

#### Preamble

We, participants at the Pan African Conference on Access to Information, organised by the Windhoek+20 Campaign on Access to Information in Africa in partnership with the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the African Union Commission (AUC) and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights in Cape Town, South Africa, September 17 – 19, 2011:

**Remembering** the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press and viewing the significant progress that has been made in the past 20 years on freedom of expression, access to information and the free flow of information;

**Stating** that access to information (ATI) is the right of all natural and legal persons, which consists of the right to seek, access and receive information from public bodies and private bodies performing a public function and the duty of the state to provide such information;

**Emphasising** that access to information is an integral part of the fundamental human right of freedom of expression, essential for the recognition and achievement of every person's civil, political and socio-economic rights, and as a mechanism to promote democratic accountability, good governance;

**Acknowledging** that access to information is instrumental to fostering access to education and health care, gender equality, children's rights, a clean environment, sustainable development and the fight against corruption;

**Recalling** Article 19 of the Universal Declaration of Human Rights of 10 December 1948, which guarantees that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers", Article 19 of the International Covenant on Civil and Political Rights and the UN Human Rights Committee General Comment No. 34 adopted in 2011 which states that Article 19(2) of the ICCPR includes the right of access to information held by public bodies; and Article 1.2 of the UNESCO Constitution;

**Underlining** Article 9 of the African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity (OAU) on 27 June 1981, which provides that, "Every individual shall have the right to receive information";

**Reaffirming** Article IV(1) of the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32<sup>nd</sup> Ordinary Session held in October 2002, which provides that "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law";

**Cognisant** of the African Union Convention on Preventing and Combating Corruption, the African Charter on Values and Principles of Public Service and Administration, the African Charter on Democracy, Elections and Governance, the African Youth Charter and the African Statistics Charter, all of which promote transparency in public life.

**Welcoming** the efforts of the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information in developing a Model Law for

AU Member States on Access to Information, aimed at assisting Member States in formulating, adopting or reviewing access to information legislation and its implementation;

**Mindful** of the efforts of international organisations and others to develop principles and declarations on the right of access to information and freedom of expression including the 2010 Brisbane Declaration “Freedom of Information: The Right to Know”, the Atlanta Declaration and African Regional Findings, the Accra Agenda for Action, the Lagos Declaration on the Right of Access to Information, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, and the Declaration of Table Mountain;

**Aware** that the World Summit on the Information Society (WSIS) brought to the forefront the importance of access to information in the modern world through the Geneva Declaration of Principles and Tunis Commitment and that the Internet Governance Forum (IGF) plays a crucial role in bringing together all of the stakeholders to facilitate an international internet governance debate that includes issues of access and openness;

**Recognising** the work of the African Union Commission to give practical expression to the various instruments of the African Union on freedom of expression and access to information, through such initiatives as the Pan African Media Network and portal, the new AU website, social networks, the media center, training programmes, ensuring media access to the AUC leadership, and publication of other information materials among others; as well as its efforts in promoting Information and Communications Technology (ICTs) in Africa;

**Encouraged** that over 90 countries around the world have adopted comprehensive national access to information laws or regulations including ten in Africa; that many countries in Africa have joined the Extractive Industries Transparency Initiative, the International Aid Transparency Initiative and the Open Government Partnership; and that the Economic Community of West African States is moving towards adoption of a binding Supplementary Act for a Uniform Legal Framework on Freedom of Expression and Right to Information;

**Concerned** that most African nations have not yet adopted comprehensive ATI laws or regulations and that significant problems remain with both the substantive provisions of many of those that have adopted laws and the full implementation of the laws;

**Acknowledging** that civil society organisations and government bodies around the world have adopted 28 September as International Right to Know Day;

**Convinced** that it is of critical importance that clear and comprehensive principles are established to guide the promotion and protection of the right of access to information in Africa through the adoption and effective implementation of appropriate national laws and regulations;

Resolve to adopt the following Principles on The Right of Access to Information:

## Key Principles

- 1. Fundamental Right Accessible to Everyone.** Access to information is a fundamental human right, in accordance with Article 9 of the African Charter on Human and Peoples’ Rights. It is open to everyone, and no one should be privileged or prejudiced in the exercise of this right on account of belonging to a class or group howsoever defined, and whether in terms of gender, class, race, political association, occupation, sexual orientation, age, nationality, HIV status, and other bases as cited in many African constitutions. It is not required that anyone must demonstrate a specific legal or personal interest in the information requested or sought or otherwise required to provide justification for seeking access to the information.
- 2. Maximum Disclosure.** The presumption is that all information held by public bodies is public and as such should be subject to disclosure. Only in limited circumstances set out in these principles below may disclosure be denied.
- 3. Established in Law.** The right of access to information shall be established by law in each African country. Such law shall be binding and enforceable and based on the principle of maximum disclosure. The law shall take precedence over other conflicting laws that limit access to information.
- 4. Applies to Public Bodies and Private Bodies.** The obligations of ATI shall apply to all public bodies, as well as to private bodies that are owned or controlled by the government, utilise public funds, perform functions or provide services on behalf of public institutions, or have exclusive contracts to exploit natural resources (with regards to said funds, functions, services or resources), or which are in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to the exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

5. **Clear and Unambiguous Process.** The law shall include procedures for the exercise of the right. The process to obtain information should be simple and fast and take advantage of new information and communication technologies where possible. Bodies falling under the scope of the ATI law should provide assistance to requesters in order to ensure that they receive the information they need. The information provided should be provided in a form understandable to the requestor. Information should be disclosed within a clear and reasonable deadline provided for by law. It should be available at low or no cost.
6. **Obligation to Publish Information.** Public and relevant private bodies shall be obliged to proactively release information in a timely manner about their functions, powers, structures, officials, decisions, expenditures, budgets, and other information relating to their activities that is of public interest. The dissemination should use all reasonable means of communications, including ICTs, to maximise access to all communities and sectors of society.
7. **Language and Accessibility.** To the greatest extent possible, information should be available in the language of the person seeking it, in an accessible location, in a format that is as accessible as possible, and, in particular, ensures that it is accessible to those who may be particularly affected by the subject matter of the information.
8. **Limited Exemptions.** The right of access to information shall only be limited by provisions expressly provided for in the law. Those exemptions should be strictly defined and the withholding of information should only be allowed if the body can demonstrate that there would be a significant harm if the information is released and that the public interest in withholding the information is clearly shown to be greater than the public interest in disclosure. Information can only be withheld for the period that the harm would occur. No information relating to human rights abuses or imminent dangers to public health, environment, or safety may be withheld.
9. **Oversight Bodies.** Independent bodies such as an ombudsman or information commissioner should be established to monitor and hold government bodies and relevant private entities to account on their access to information disclosure practices, to receive and decide upon complaints, and generally oversee the implementation of the access to information legislation. The oversight body should be adequately funded.
10. **Right to Personal Data.** All persons have a right to access and correct their personal data held by third parties.
11. **Whistleblower Protection.** To ensure the free flow of information in the public interest, adequate protections against legal, administrative and employment-related sanctions should be provided for those who disclose information on wrong-doing and other information in the public interest.
12. **Right of Appeal.** Everyone has a right to appeal administratively any action that hinders or denies access to information or any failure to proactively disclose information. They have a right to further appeal to an independent body and to finally seek judicial review of all limits of their right of access to information.
13. **Duty to Collect and Manage Information.** Public and relevant private bodies have a duty to collect information on their operations and activities on behalf of their citizens. They also have a duty to respect minimum standards in relation to the management of this information to ensure that it may easily be made accessible to citizens.
14. **Duty to Fully Implement.** Public and relevant private bodies have an obligation to ensure the law is fully implemented. This includes internal procedures and processes and the designation of responsible officials.

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## Application of Principles

These principles are essential to development, democracy, equality, and the provision of public service, and are applicable to, amongst others, the following:

1. **Enabling Environment.** Governments should ensure that the legal frameworks create an enabling environment allowing individuals, civil society organisations including trade unions, media organisations, and private businesses to fully enjoy access to information, thus fostering active participation in socio-economic life by all, in particular people living in poverty and those discriminated against or marginalised.
2. **Elections and Electoral Processes:** Governments and election management bodies have a positive obligation to provide the public with information before, during and after elections, not to interfere with media coverage, to encourage public participation and proactively publish campaign spending and contributions.
3. **Disadvantaged Communities:** Governments have a particular obligation to facilitate access to information by disadvantaged minority groups and minority language speakers,



as well as marginalised groups including women, children, rural people, the poor and persons with disabilities. Information should be available at no costs to these groups. This especially applies to information that contributes to the long-term empowerment of the groups. Governments also have an obligation to ensure equitable and affordable access to ICTs for those with special needs and for other disadvantaged persons and groups.

4. **Women:** Governments, civil society and the media have an obligation to facilitate women's equal access to information, so that they can defend their rights and participate in public life. Civil society organisations should be encouraged to make the best use of access to information mechanisms to monitor governments' fulfilment of commitments to further gender equality, to demand the enhanced delivery of services targeted at women and to ensure that the public funds they are entitled to actually reach them. The collection, management and release of information should be gender disaggregated.
5. **Children and Youth:** Governments have an obligation to encourage the mass media to disseminate information and material of social and cultural benefit to children and the youth. Governments are further encouraged to facilitate the exchange and dissemination of such information and material from a diversity of cultural, national and international sources as well as the production and dissemination of information specifically for children and youth and wherever reasonably possible facilitate and encourage access to such information by children and youth.
6. **Environmental Information:** Governments and inter-governmental organisations should increase their efforts in implementing Principle 10 of the 1992 Rio Declaration on the Environment and Development on the right of access to information, public participation and access to justice on environmental issues. Governments should adopt appropriate legislation and regulations to promote access and proactive release of environmental information, guarantee openness, fight secrecy in institutional practices, and repeal that which hinders public availability of environmental information. Governments' capacity to supply environmental information and civil society organisations' demand for such information, as well as engagement in decision-making processes and the ability to hold governments and other actors accountable for actions affecting the environment should be strengthened.
7. **Education:** Taking into account the close connection between the right of access to information and the right to education, governments have the duty to make publicly available information about educational policies and assessments of their impacts, school performance data, and budgets for education at all government levels. Governments also have a positive obligation to provide information for each school, in particular, schools' admission policies and admission lists, information on management practices, school governance, and other relevant aspects.
8. **Health:** Governments have a duty to provide access to information with a view to ensuring and improving access to health care services and enhancing accountability regarding their provision. Civil society actors should be encouraged to implement actions to expand the reach of this type of information to all sectors in society, promote the exercise of the right to information to advance the right to health and counter its violations, undertake advocacy and monitoring actions and directly involve individuals in them. Enhanced access to health-related information shall not preclude the protection of individuals' right to privacy.
9. **The Fight Against Corruption:** By contributing to openness and accountability, access to information can be a useful tool in anti-corruption efforts. Besides ensuring that access to information legislation is effectively implemented, governments have a duty to guarantee a broader legal and institutional framework conducive to preventing and combatting corruption. Civil society organisations and plural media independent of powerful political and commercial interests are critical actors in unveiling and fighting corrupt practices, and their use of access to information laws and other mechanisms enhancing transparency should be encouraged.
10. **Aid Transparency.** Governments, donors and recipients have a duty to make all information relating to development assistance including grants, loans and transfers to public and private bodies, and assessments on the use and effects of such assistance fully public in a proactive manner based on the principles of the International Aid Transparency Initiative.
11. **Natural Resources Transparency.** Governments should proactively publish all information including policies, impact assessments, agreements, subsidies, licenses, permits and revenues relating to the exploitation of natural resources including the extractive industries, water, fisheries, and forests. Private bodies which are exploiting natural resources should be required to publicly disclose the terms of such agreements and payments made to governments based on the principles developed by the Extractive Industries Transparency Initiative (EITI).
12. **Media and Information Literacy.** Governments, civil society, education institutions, and the media have an obligation

to promote media and information literacy, to assist individuals and communities to ensure that all members of society can understand and take advantage of new technologies, and to be able to participate intelligently and actively in public matters, and enforce their right of access to information. Citizens should be empowered to be able to consume information critically and express their views on such information, as well as be enabled to seek corrections where applicable.

- 13. Access to Information and Communications Technologies.** Governments have an obligation to (i) use ICTs and other media to ensure maximum disclosure and dissemination of information; (ii) promote and facilitate unhindered public access to such technologies for all citizens and especially for disadvantaged minority groups and minority language speakers, as well as marginalised people such as women, children, rural people, the poor and persons with disabilities.
- 14. Apply in Other Spheres.** The principles stated above on the right of access to information also apply to various spheres that have not been listed.

- The African Commission on Human and People’s Rights to adopt a resolution authorising the Special Rapporteur on Freedom of Expression and Access to Information to expand Article IV of the Declaration of Principles on Freedom of Expression in Africa to incorporate the principles of this Declaration.
- The African Commission on Human and Peoples’ Rights to complete and approve the proposed Africa Model Law for AU Member States on Access to Information;
- The African Union Commission to take forward this Declaration by (1) proposing to the next AU summit in January 2012 to adopt 28 September as African “Right to Information Day”; and (2) initiate an Experts Group to develop further instruments on access to information;
- The Pan-African Parliament (PAP) to endorse this Declaration;
- All African Union bodies to promote the respect of the principles in this Declaration by national governments and provide assistance in implementing them;
- The New Partnership for African Development (NEPAD) to adopt the revised African Peer Review Mechanism (APRM), which includes transparency and access to information;
- The African Union should develop and implement internal policies on access to information held by AU bodies based on this Declaration.

## Call to Action

In light of the above, the Conference calls on:

### UNESCO to:

- Endorse, through its General Conference, the “African Platform on Access to Information” and the proclamation of 28 September as International Right to Information Day, also recommending the endorsement of this International Day by the United Nations General Assembly, as a date to raise awareness about the importance of the right of access to information throughout the world;
- Develop and implement internal policies facilitating access to information held by UNESCO in line with this Declaration, and to encourage the adoption of similar policies by other UN agencies.

### UN Economic Commission for Africa:

- Develop as part of the RIO +20 Earth Summit a regional convention on access to environmental information, public participation and access to justice based on Principle 10 of the 1992 Rio Declaration and the UNEP Bali Guidelines.

### The African Union, its Organs and Institutions:

- The African Commission on Human and Peoples’ Rights to promote 28 September as African Right to Information Day;

### Other African Regional Organizations and Institutions:

- All Regional Economic Communities (RECs) should develop internal policies on access to information held by those bodies based on this Declaration;
- ECOWAS to review and adopt the Supplementary Act for a Uniform Legal Framework on Freedom of Expression and Right to Information in West Africa;
- The Southern African Development Community (SADC) to revise the Protocol on Culture, Information and Sport to include principles on access to information;
- Inter-governmental Agency on Development (IGAD) to develop and adopt a Protocol on access to information based on this Declaration;
- The East African Community (EAC) to develop and adopt a Protocol on access to information based on this Declaration;
- The African Development Bank (ADB) to adopt a revised public access policy based on the Transparency Charter for International Financial Institutions.

### National Governments of AU member states to:

- Adopt or revise existing comprehensive laws on access to information in line with the principles in this Declaration and the proposed AU Model Law, and fully implement them;
- Harmonise legal frameworks to ensure access to information including repealing or revising antiquated laws which

restrict access and ensuring that new laws are compatible with the ATI principles;

- Engage with civil society and other stakeholders to ensure widespread information demand and effective implementation of laws and policies to advance access to information by all persons, especially marginalised groups.
- Join and implement multi-stakeholder efforts including the Extractive Industries Transparency Initiative (EITI), the Construction Sector Transparency Initiative (CoST) and the Medicines Transparency Alliance (MeTA) to further transparency;
- Promote availability of public domain information through ICTs and public access to ICTs;
- Support AU efforts to adopt an instrument on access to information;
- Officially recognise 28 September as International and African “Right to Information Day”;
- Adopt and effectively implement legislation and policies ensuring whistleblower-protection.

**Civil Society to:**

- Engage with governments in developing, enhancing and implementing ATI laws;
- Monitor progress on the implementation of ATI laws including sectoral laws;
- Create awareness on ATI and provide assistance to facilitate information access by the general public as well as by specific audiences (including women, minority groups and minority language speakers, children, rural communities, individuals with disabilities or living in poverty);
- Ensure transparency in their own activities;
- Promote September 28 as African and International Right to Information Day and, in particular, carry out activities on that date every year to advance the recognition, awareness and enjoyment of the right of access to information by all sectors of society.

**Media to:**

- Respect editorial independence, professional ethics and journalism standards in their provision of information;
- Recognise the need for transparency and accountability with regard to their own output and institutions, while safeguarding the principal of protecting sources;
- Respect and promote equality, and provide equitable representation within their information output;
- Promote the widest possible access to their information output;
- Enhance mechanisms for audience participation and response;
- Recognise and be responsive to gender differences in regard to audience and market research;

- Popularise the importance of, and issues around, access to information.
- Make optimum use of ATI laws to access information for the public interest.

**Business Sector Companies and Corporations to:**

- Join multi-stakeholder initiatives promoting transparency including EITI, CoST and MeTA;
- Adopt corporate and social responsibility (CSR) policies that promote transparency and accountability, including access to information and protection of whistleblowers;
- Proactively disclose information of public interest including on pollution releases and other environmental issues;
- Support government and CSO efforts to improve access to information in society.

**Public and Private Donors to:**

- Ensure that all information relating to the use of development assistance and its effects are made public;
- Ensure that all information relating to development assistance is made available in conformity with the International Aid Transparency Initiative (IATI) standards;
- Encourage and support governments in the adoption and full implementation of access to information laws and policies;
- Support civil society and governments’ efforts to promote access to information.

Adopted in Cape Town, South Africa, on this 19th Day of September 2011 upon a motion for adoption moved by Advocate Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights, and seconded by Hon. Norris Tweah, Deputy Minister of Information of the Republic of Liberia.

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## About the Author

**Karen Mohan** heads the ‘Media Law Policy and Advocacy’ programme at the Regional Secretariat of the Media Institute of Southern Africa (MISA). She also coordinates the African Platform on Access to Information campaign, which saw the adoption of the first Regional declaration on Access to Information in September 2011.

Karen completed an International B.A. in law and English literature from the National University of Ireland, Galway in 2006, and a post graduate LL. B. in Law in 2008. During her time at NUIG, she pursued various human rights courses, and spent a year at the Rijks University, Groningen, in the Netherlands studying master’s courses in humanitarian law and refugee and asylum law. While studying in Galway, she also took part in a ‘business and human rights’ project with NUIG’s legal department, looking at the retail industry’s compliance with international and regional human rights instruments. Upon completion of her B.A. she spent a year working with the Media in the Middle East and Africa, where she was mainly based in Abu Dhabi, Dubai, Namibia and South Africa.

In 2010, Karen graduated with a Masters in International Human Rights law from the Raoul Wallenberg Institute at Lund University where she specialized in International Criminal and Humanitarian law. During her time at Lund, Karen sat as a board member of the Swedish Non-Governmental Organisation, Jus Humanis. She also worked as freelance legal researcher, as well as carrying out extensive research on issues relating to Gender and HIV for the Aids and Rights Alliance of Southern Africa (ARASA).

Karen currently runs a number of regional projects at the Media Institute of Southern Africa in areas that affect the media policy environment in Southern Africa, including projects focusing on Access to Information and the repeal of laws that criminalize Free Speech in the Region. She also dedicates much of her time assisting national campaigns around Access to Information in Southern Africa.

This paper has been produced in collaboration with the Law Reform and Development Commission with the intention of serving as a briefing paper for future discussions and consultation on future policy and legal reform.

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## About the IPPR

The Institute for Public Policy Research (IPPR) is a not-for-profit organisation with a mission to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia. The IPPR has been established in the belief that development is best promoted through free and critical debate informed by quality research.



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