



**Malawi: Submission to the Law Commissioner on Implementing the Constitutional Guarantee to Freedom of Information** **November 1998**

**Introduction**

Malawi is one of the few countries with an explicit constitutional provision guaranteeing access to government-held information. This constitutional right is a pledge to ensure a transparent democratic government after nearly three decades of secrecy and strict control. The value to democracy of government openness and accountability and of citizen participation cannot be underestimated. A multi-party system functions properly only when government is fully accountable to the people.<sup>1</sup> This accountability, in turn, requires the population to have ready access to independent and accurate information about the workings of administration, development issues and other matters of public concern.

The test of Malawi's commitment to this forward-thinking constitutional guarantee and to the right to freedom of information is the extent to which these are translated into practice. The fundamental principles underlying the right must also be embodied in legislation implementing that right by ensuring accountability, openness, participation and development. The example of South Africa is especially relevant to Malawi's situation given its nearly parallel constitutional changes, its attempts to open up once authoritarian bureaucracies and its efforts to embark on a path of reconstruction and development.

Freedom of information legislation is, then, essential in order to translate the constitutional right into concrete action and foster a culture of rights. Legislation should cover dissemination of and access to government-held information as well as public participation in or observance of government meetings.

This document outlines why the early introduction of freedom of information legislation is necessary and how such laws might be implemented in Malawi. Firstly, early introduction of such legislation would help to establish public awareness of the notion of freedom of information and would ensure the active use of this constitutional right. Secondly, freedom of information legislation assists the recognition and practice of other

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<sup>1</sup> *Malawi: Freedom of Expression and the Government Newspaper* (ARTICLE 19: London, December 1996).

constitutional rights, including the rights of political participation, expression and development. Thirdly, specific legislation is essential if the basic overarching principle of the constitutional guarantee of freedom of information is to be effectively implemented in the specific economic, political and social structures of Malawi. Finally, the protection of the right to freedom of information requires continuous political commitment on the part of government to the openness of its own policies and programmes as well as a legal framework which will make it incumbent upon government to disclose information unless it can justify withholding it.

### **Constitutional guarantees**

Malawi guarantees the right of access to government-held information under Article 37 of its 1994 Constitution, promulgated in 1995. Specifically, the Constitution states:

Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

No restrictions or limitations may be placed on the exercise of this right other than those "prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society".<sup>2</sup> Laws prescribing restrictions or limitations cannot negate the "essential content of the right or freedom in question" and must be of general application.<sup>3</sup>

The right of access to government-held information is independent of the right to freedom of expression and freedom of the press. Comprehensive freedom of information, however, requires the recognition of all these rights. For example, the press has the right to report and publish freely and "to be accorded the fullest possible facilities for access to public information".<sup>4</sup> The right to speak and publish freely would be diminished by the absence of a right to acquire information to be published and debated.

The right to freedom of information is underscored by three fundamental constitutional and national principles outlined in the Constitution:

- the state's legal and political authority is derived from the people;
- individuals exercise powers of the state on trust and in accord with their responsibilities to the people;

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<sup>2</sup> Article 44 (2).

<sup>3</sup> Article 44 (3).

<sup>4</sup> Article 36

-- sustained trust for the exercise of power "can only be maintained through open, accountable and transparent Government and informed democratic choice".<sup>5</sup>

Under the subtitle "Public Trust and Good Governance", the Constitution mandates the state actively to promote the welfare and development of the people of Malawi by introducing measures that will "guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions".<sup>6</sup> These measures are closely tied in to the other policies and legislation necessary for the people's welfare and are provided to ensure the protection of other fundamental human rights guaranteed in the Constitution.

However, constitutional guarantees without supporting statutory provisions or jurisprudence do not in themselves ensure freedom of information. Early introduction of access to information legislation in Malawi would demonstrate that the government and its political leaders firmly back the constitutional guarantee and seek to establish it in the consciousness of both the public and the country's administration.

### **International human rights standards and national laws**

Developments at international, regional and national levels show that increasingly governments are seen to have a positive duty to provide information in general as well as the information necessary for the enjoyment of fundamental rights. International human rights laws and standards underpin the right of access to information. In 1946 the UN General Assembly proclaimed that "freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated". Some interpretations consider this proclamation to be limited to the freedom to communicate and impart ideas, but it is generally thought that the General Assembly was pushing for a relaxation of control of state-held information.<sup>7</sup>

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights have similar wording on freedom of expression and provide for the freedom to seek, receive and impart information and ideas of all kinds. Specifically, Article 19 of the ICCPR guarantees to everyone the right to "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". Article 25 of the ICCPR gives citizens the right to participate in the conduct of public affairs and

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<sup>5</sup> Article 12.

<sup>6</sup> Article 13.

<sup>7</sup> Paul Chevigny, "Information, the Executive and the Politics of Information," in *Free Speech and National Security*, Shimon Shetreet, ed. (Martinus Nijhoff: Dordrecht 1991).

to have access to public service in their country. Malawi is party to the ICCPR and as such is bound by it.

For its part, the African Charter on Human and People's Rights, to which Malawi is also party, guarantees similar rights including, under Article 9, the right of every individual to receive information and to express and disseminate his opinions within law and, under Article 13, the right to participate freely in the government. Malawi's Constitution builds on these international human rights standards and goes one step further by specifically including the right of access to government-held information.

Information has an important social and political role in contemporary society. As the UN Special Rapporteur on Freedom of Opinion and Expression has said, the right to seek and have access to information is an essential element of freedom of speech and expression. The right to receive information is not simply the converse of the right to impart information but is an independent right:

Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.<sup>8</sup>

According to a 1994 survey of 45 countries, not including Malawi, 12 provided either implicit or explicit constitutional guarantees of access to government-held information, 14 (three of which also had constitutional guarantees) had legislative provisions stating a presumption of public access to government information and nine countries were considering legislation at the time of the survey.<sup>9</sup> Decisions by national or regional courts have declared the public's right to information to be implicit in the rights of freedom of expression or representative democracy or both. In several countries, such as New Zealand, the presumption is that information should be made available unless a good reason exists to withhold it. The European Court of Human Rights underscored the public's right to know as well as the role of the press as a vital prerequisite for informed political debate when it stated:

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

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<sup>8</sup> Special Rapporteur's report to the UN Commission on Human Rights, E/CN.4/1995/32, para. 35.

<sup>9</sup> Countries with constitutional guarantees, either explicit or formulated in case law, were Austria, Costa Rica, Germany, Guatemala, India, Mexico, Portugal, South Africa, South Korea, Spain, Sweden and the United States. Countries with legislative provisions were Australia, Austria, Canada, Colombia, Denmark, Finland, France, Greece, Hungary, Netherlands, New Zealand, Norway, Sweden and the United States. Draft legislation was under consideration in Belgium, Czech Republic, Hong Kong, Iceland, India, Ireland, Japan, Latvia and the United Kingdom. Gina Scuttrups, *International Freedom of Information Acts*, (Washington, D.C.: The National Security Archive, October 1994).

More generally, freedom of political debate is at the very core of the concept of a democratic society...<sup>10</sup>

The European Union has generally placed great value on the pursuit of an open information policy in the public sector. For example, in 1990, a Council Directive established the Freedom of Access to Information on the Environment, which called on member states to ensure access to environmental information held by public authorities, subject to several exceptions. The European Court of First Instance in 1995 found in favour of a journalist working for a British newspaper, who had challenged the right of the Council of the European Union to conceal minutes of law-making meetings from the public. The Court decided that the Council's policy of withholding information contravened a 1993 code of conduct that guaranteed European citizens "the widest possible access to documents".<sup>11</sup> While the code gave the Council the right to refuse access in certain exceptional circumstances, it did not permit a blanket ban on disclosure. The Final Act of the 1992 Treaty on European Union signed at Maastricht contained a declaration on the right to access to information stating:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration.

One country currently contemplating access to information legislation is India, where more than 20 years ago the Supreme Court addressed the responsibility of government and urged a more open administration, stating:

The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.<sup>12</sup>

### **South Africa and Malawi**

The parallels in political change and constitutional reform in Malawi and South Africa are striking. In 1994, new constitutions emerged in both countries and each incorporated the right of access to information. There are also, however, several notable differences in both the constitutional provisions and subsequent implementation. Firstly, South Africa's access to information provision does not include the limitation that it will be "subject to any Act of Parliament". The provision in South Africa's Constitution states:

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<sup>10</sup> *Lingens v. Austria*, 8 July 1986, Series A no. 103, 8 EHRR 407

<sup>11</sup> Fiona McHugh, "Council may appeal over transparency," *European Voice*, 26 October-1 November 1995; Judgment of the Court of First Instance, 19 October 1995, Case T-194/94, Carvel and Guardian Newspapers Ltd., v. Council of the European Union.

<sup>12</sup> *State of U.P. v. Raj Narain*, AIR 1975 SC 865, 884; 4 SCC 428.

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.<sup>13</sup>

The right of access to government-held information under South Africa's Constitution is restricted only by a general limitation clause stating that the right may be limited by "a law of general application to the extent that the limitation is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right;..."<sup>14</sup>

By contrast, Malawi's constitutional provision that the right of access to information is "subject to any Act of Parliament" gives Parliament complete authority to pass legislation restricting the constitutional guarantee. Such a clause is inconsistent with international standards and with the Constitution's basic principles, primarily because the limitation undermines the principle of the supremacy of the Constitution over legislated laws and regulatory provisions. The language of the provision provides excessively broad authority to Parliament potentially to undercut the right and to add to the very narrow derogations provided for under Article 44 of the Constitution. While legislation is necessary to give full effect to the constitutionally guaranteed right, such legislation should not be used by Parliament to undermine the right.

Secondly, South Africa's constitutional provision mandates the enactment of national legislation which will "give effect to the right and may provide for reasonable measures to alleviate the administrative and financial burden on the state". South Africa is at the time of writing this document engaged in the development of its Open Democracy Bill. Several revisions of the draft have circulated and numerous commentaries have been written on the Bill's objectives, implementation and potential impact on South Africa and South African society. The mandatory enactment clause in the constitution shows that legislation is the natural progression from a constitutional guarantee of access to government-held information to the implementation of that right.

South Africa's Open Democracy Bill sets out several objectives as steps towards increased access information held by government. These include making information available in order to increase public understanding of government functions, operations and decision-making processes, protecting individuals who disclose violations of the law and corruption and other measures to empower "the public effectively to scrutinise governmental decision-making, to promote open and accountable administration at all levels of government and to empower individuals to participate in governmental decision-making processes that [e]ffect them."<sup>15</sup>

<sup>13</sup> Constitution of the Republic of South Africa 1996, Section 32 (1)

<sup>14</sup> Constitution of the Republic of South Africa 1996, Section 36 (1)

<sup>15</sup> Open Democracy Bill, Revised Draft, Section 2 (g), prepared by the Task Group on Open Democracy.

Individuals are also given the right of access to information about themselves held by governmental and private bodies together with protection against the abuse of such information.

### **Fundamental principles underlying freedom of information legislation**

The foundations common to all freedom of information legislation are an appreciation that a democracy's health and longevity depend upon public trust and confidence in government and that this trust is nourished by open access to information.<sup>16</sup> While these basic principles are overarching, legislation must not lose sight of the specific historical, political, social and economic situation of the country.

The arguments in favour of freedom of information focus on accountability, openness, participation and development. When a country has a history of authoritarian bureaucracy and repression, a new government could choose to continue in a similar vein or to change direction. In South Africa, for example, the new government had the choice either to exclude the people from the process of making decisions on the allocation of limited resources or to involve the people in making informed choices. "Clearly, the latter requires the maximum circulation of information and ideas. Freedom of expression and accountability thus become inseparable."<sup>17</sup> Access to information also goes hand-in-hand with the principles of accountability for past human rights abuses, whether it be in relation to obtaining personal records, organizing truth commissions or bringing cases to trial.

A government is responsible to individuals and communities, who therefore have a right to know what the government is doing on their behalf or in their name. Openness of this kind can contribute to better government decisions, rational policy choices and an enhanced political process. As one commentator concludes,

policy decisions, even in the area of foreign affairs, are not often improved by an excess of secrecy and single-mindedness. ... In every place where it is possible to have open discussion, that discussion ought to be encouraged, not as a grudging concession to a creaking and inefficient democracy, but actually in the interest of more considered policy-making.<sup>18</sup>

Public participation in the decision-making process depends on the existence of open government meetings and access to a range of information which the individual, rather than the state, considers relevant to the issue under discussion. Even if, when a

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<sup>16</sup> Sheryl Walter, "Debating in the Dark? The Need for Public Access to Information in Democratic Cultures," National Security Archive undated paper.

<sup>17</sup> Ibid., p. 45, quoting Albie Sachs.

<sup>18</sup> Ibid., p. 138.

government decision is made, particular narrowly defined grounds are accepted for withholding certain information, subsequent analyses of the decision, its consequences and possible alternatives are critical to improving the decision-making process and ensuring the legitimacy of the government. Such examination requires the availability of relevant information at a later date.

Freedom of information is also critical in development. Freedom of information legislation must not be seen as an obstacle to improved economic and social conditions, but as an asset. In reviewing the need for both an Open Democracy Act and for development, South Africans have concluded that:

Open debate and transparency in government and society are crucial elements of reconstruction and development. This requires an information policy that guarantees active exchange of information and opinion among all members of society.<sup>19</sup>

Such a policy includes allowing for the formation of independent human rights groups and other non-governmental organizations and encouraging their active participation. In addition, free and open debate of policy alternatives on, for instance, the creation of jobs and provision for other social needs is essential to ensure that democratic principles are not set aside in favour of development, even though development of course remains a central and valid aim of government policy.

In two studies in the 1980s, the United Nations considered the factors that have an impact on development. These included the free choice by all people of the model for development, full participation in the definition and application of development policy and the existence of effective safeguards against arbitrary government action and in favour of respect for human rights.<sup>20</sup> One of the reports stated that the "exercise of the various rights to participate may be as crucial in ensuring satisfaction of the right to food as of the right to take part in public affairs".<sup>21</sup> The United Nations specified several rights considered particularly important to participation, including freedom of expression, freedom of information and participation in the conduct of public affairs.<sup>22</sup>

Adequate standards of living and education help to increase both individual participation in the decision-making process and general understanding of issues in public debate. It is not, however, valid to claim that, because a country has not yet achieved full economic improvement, access to information is not also a priority. This argument is flawed

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<sup>19</sup> The Reconstruction and Development Programme: A Policy Framework, Johannesburg, African National Congress 1994, section 5.14.1, quoted by Lene Johannessen, Jonathan Klaaren and Justine White, "A Motivation for Legislation on Access to Information," *The South African Law Journal*, Vol. 112, Part 1, February 1995, 45, 48.

<sup>20</sup> E/CN.4/1421 and E/CN.4/1488.

<sup>21</sup> E/CN.4/1488 para. 98.

<sup>22</sup> See also ARTICLE 19, Submissions and Briefings to the 52nd session of the UN Commission on Human Rights, March 1996.



because the issues are interconnected: access to information begets change, which begets development and so on. Following this line of reasoning, those involved in South Africa's efforts to establish an Open Democracy Act have said that freedom of information legislation can encourage community-based initiatives and can ensure that government decisions are based on the best possible information.

### **Economic and political considerations for access to information legislation in Malawi**

While the experience of South Africa and of countries with older constitutional and regulatory access to information provisions provide important potential models for freedom of information legislation, they must be examined in the context of the specific economic and political situation in Malawi. Only access to information legislation specifically designed for Malawi can be truly effective.

Malawi is Africa's third most densely populated state and has an estimated population of about 10 million people, approximately 90 per cent of whom live in rural areas. Chichewa is the national language, the first language of approximately half of the population and understood by three-quarters of Malawians. Official government decisions are, however, provided in English. Less than half the adult population is literate. Women are usually educated to a lower level than men and few hold senior positions in government or business. Acute demographic and economic imbalances have been exacerbated by the policies of the former President, Hastings Kamuzu Banda, and access to news distribution systems is limited. According to one survey of access to information, Malawians in remote areas said that they received much of their information from the radio but that often they could not afford to buy batteries.<sup>23</sup>

### **Guidelines for the creation of freedom of information legislation**

Within this portion of the document, ARTICLE 19 sets out the basic principles underlying freedom of information legislation together with specific recommendations for the creation of such a law. This document sets out to raise the issues and attempts to answer them within the context of Malawi. For the legislation to be comprehensive it must address four primary areas: access to information, open meetings, protection of personal data and privacy and the protection of so-called "whistleblowers", individuals who release government information in response to corruption, malpractice or other alleged illegal activities. This document summarizes the principles on which legislation should be based, including the presumption in favour of access, acceptable grounds for withholding information, cost and administrative practicalities, protection of privacy and enforcement mechanisms.

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<sup>23</sup> National Democratic Institute, "Can you call yourself a farmer if you don't go to the gardener," Report of focus group surveys conducted, 27 August-13 September 1996, throughout Malawi in collaboration with a research team from the University of Malawi. The focus groups were conducted in villages in six districts and in urban townships in Lilongwe and Blantyre.

**Principle 1: Freedom of information legislation must be based on the presumption of access**

The underlying basis of freedom of information legislation is the right to the provision of information in general or of specific information on request. The goal is that governments should release more information on their own initiative and agencies should have to justify the withholding of any information. The ideal is maximum disclosure. There should be a presumption that freedom of information legislation extends to all government organs and agencies unless there are specific reasons for exemptions.

Furthermore, legislation need not require an individual to show an interest or demonstrate a right before that individual can make a request for information. The inherent obstacle of having to request the information formally, together with any fee structure, would provide enough of a threshold to prevent casual requests. An individual should not be required to justify a particular request or explain his need for the information because they cannot know the specific content of the material they request. The government is better placed to provide justification for withholding the information and the onus should therefore be on government.

While the constitutional right of access to information does not extend to institutions outside the government, freedom of information legislation in Malawi should consider at least including bodies that exercise quasi-governmental roles or that have collected information on individuals. Such measures would be natural extensions of the constitutional right.

**Principle 2: Individuals must be informed of their right to freedom of information**

Legal protection of the right to freedom of information is meaningless if individuals do not know what that right entails and how to exercise it. The process of instilling this knowledge could begin at school, but efforts must also be made to inform the adult population in a way that takes account of the low literacy rate in Malawi.

Rather than a process driven only by requests for information, there must be provision for increasing the government's duty to provide information without a specific request being made. This is important for transparency. It is also an essential pre-requisite for a viable request-driven system that the population be aware of what information is already available. Freedom of information legislation should oblige the government to broadcast and distribute information about how the government functions, what information it holds and how the public can have access to that material.

The public must know that the information is available, how to obtain the material which has been published and how to request other information to which it is entitled. One step towards this would be for government to publish an index of the information available and guides to requesting information, but the act of publication alone does not in itself make the information either accessible or useful to the public. Therefore, creative alternatives should be explored, including town meetings to inform the public about available information and about how it might obtain additional material.

**Principle 3: Freedom of information entails an obligation on governments to open its meetings to the public**

One element of freedom of information is the public's right to know what the government is doing on its behalf and to be able to participate in the decision-making process. Again, the presumption is that all meetings of governing bodies are open, and notice must be given of them. Such meetings can be closed only in accordance with particular procedures and under narrowly defined exemptions, and the reasons for such closure must be made known to the public. Grounds for closure could include the need to ensure personal privacy, to avoid disclosure of information that could jeopardize law enforcement operations or to protect information about the defence and security of the country.

**Principle 4: Reasons for the denial of access must be specified and narrowly defined**

Limitations on the basic presumption of freedom of information cannot be so broad as to do away with the right. According to the Johannesburg Principles,

No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.<sup>24</sup>

The principles define a "legitimate national interest" as an interest whose genuine purpose and demonstrable effect is to protect a country's existence or territorial integrity against the use or threat of force, or to protect its capability to respond to the use or threat of force, whether from an external or internal source. Importantly, the example given of the use or threat of force by an internal source is "incitement to violent overthrow of the government". The restriction cannot be imposed to protect governments from

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<sup>24</sup> ARTICLE 19, *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, Media Law and Practice in Southern Africa, No. 3, November 1996. The Johannesburg Principles were adopted in October 1995 by a group of experts in international law, national security and human rights, convened by ARTICLE 19, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand in Johannesburg. They are based on international and regional law and standards, evolving state practice and universally recognized general principles of law.

embarrassment or exposure of wrongdoing or to conceal information about public institutions.

A comparative study of the legislation of other countries reveals a number of approaches to exemptions from the principle of freedom of information, ranging from national security and cabinet confidentiality to personal privacy. In the United States, for example, the Freedom of Information Act applies only to records maintained by agencies within the executive branch of the federal government. Records are defined as documents created or obtained by such an agency and under the agency's control at the time of the request. The basis of the act is openness. Therefore, the legislation provides a "presumptive right of access to documents and files to anyone", and a requester of information does not need to demonstrate a specific interest in a matter to view the relevant documents.<sup>25</sup> When information is denied, the requester may appeal through a specified procedure. Incorporated into the US act are nine exemptions that include information about national defence or foreign policy.

Under the US act, exemptions must be narrowly defined and reasons must be given if the government refuses to provide information. Blanket exemptions would defeat the spirit of any access to information law. Therefore statutes that provide for the specific exemption of material must be framed in such a way that they cannot be abused by internal security apparatus to justify wholesale closure of areas of the government on the grounds of national security and public order. Documents should not be classified in order to conceal inefficiency or avoid embarrassing government officials.<sup>26</sup>

Countries with cabinets within their executive branch may also have specific exemptions either for all cabinet documents or for information that could reveal the substance of cabinet deliberations. The exact definition of such exemptions and the provision of mechanisms for appeal vary from country to country. The most important principle here is that such restrictions should be based on the content rather than on the type of document concerned. A general clause within the constitution covering all such limitations specifies that any such restrictions must be "reasonable, recognized by international human rights standards and necessary in an open and democratic society"<sup>27</sup> and that they should not negate the essential content of the right or freedom in question.

### **Principle 5: Existing laws or policies that restrict freedom of information must be repealed**

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<sup>25</sup> Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal*. (Butterworths: London 1996) Second edition, p. 51.

<sup>26</sup> Paul Chevigny, "Information, the Executive and the Politics of Information." in *Free Speech and National Security*, Shimon Shetreet, p. 133.

<sup>27</sup> Article 44 (2).

The constitutional guarantee and any future freedom of information legislation cannot be honestly enforced if Malawi maintains laws or policies that restrict freedom of information. Malawi must therefore repeal such legislation, including the Official Secrets Act. Repeal of the Official Secrets Act would help to change the culture of secrecy in which official obstacles have been created to hinder the release of information to the public and government officials have been shielded from allegations made against them.

**Principle 6: Freedom of information schemes should be easy to use and administer, and cost effective by way of long-term benefits**

Questions are often raised as to the administrative and other associated costs of implementing access to information legislation. Some observers have claimed that the hardest part of transition to democracy for Malawi would be overcoming the country's impoverishment, low literacy rate and underdevelopment, and that all of the country's limited financial resources would be needed to deal with pressing national problems such as improving the country's roads, buying medicine for hospitals and building new schools.

However, the actual costs of implementing freedom of information legislation may be comparatively low when set against the benefits of greater transparency and greater involvement of the people in the process of government. In a study in 1996, groups of Malawians indicated that they had little or no understanding of major political institutions or current political events. They appeared increasingly dissatisfied with the performance of their members of Parliament and did not feel that they had adequate access to their elected representatives.<sup>28</sup>

Two recommendations of this study focused on the need to improve the level of information available to rural Malawians on the country's democratic institutions and current political debates, and on the need for more interaction between rural Malawians and national civic institutions and non-governmental organizations. There is also the need in Malawi to open up what is seen by many as a bureaucracy entrenched in authoritarian ways. Access to information legislation would bring to the bureaucracy a greater degree of public access and transparency than has ever before been possible in Malawi. Furthermore, greater openness could work to ensure other long-term benefits, preventing corruption or malpractice.

It is difficult to calculate the financial and administrative costs of the requirements of access to information legislation for several reasons. Firstly, it is possible either that a system for answering the public's queries could be largely incorporated into existing government structures or that any adjustments required by such a system might in fact

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<sup>28</sup> National Democratic Institute, "Can you call yourself a farmer if you don't go to the gardener."

have been necessary anyway to produce a more efficient and open administration of government. Secondly, more adequate record-keeping and organization of information may help government departments to improve their own work, regardless of any access to information legislation. Thirdly, access to information legislation may help traditional authorities and non-governmental organizations to play a more constructive role in Malawi's civil and political structures, thereby further developing these bodies and the public involvement in government, with long term benefits to the country as a whole. Finally, public scrutiny of government is an important mechanism for promoting effectiveness and cost-efficiency.

In addition, there is some evidence that the costs have been lower than predicted in countries which have implemented freedom of information legislation. In a small country like New Zealand the marginal costs of the legislation proved to be relatively low. In Australia more than 600 new posts were approved to deal with freedom of information work but it later proved possible to reduce that number.

**Principle 7: The right to obtain information from the government should apply regardless of the form in which the material is held**

The administrative and practical considerations outlined above are universal. There are additional considerations in a predominantly rural poor society. However, such considerations need not stand in the way of the exercise of a constitutionally guaranteed right of access to information. South Africa, for instance, has taken up a number of these issues and attempted to provide answers. Its draft Open Democracy Bill provides for a request to be made either orally or in writing to designated government officials.

The information can be accessed in a variety of ways that are reasonable but allow for individuals to obtain the material in a manner that is understandable to them. The primary focus for the legislation, however, is on the ability of individuals to scrutinize the workings of government, to obtain information held by authorities generally and about themselves in particular and to promote an open, accountable administration of the country.

Other practical considerations which need to be addressed by a freedom of information law include a definition of "information", determination of a reasonable time scale for complying with requests for information, establishment of the fee structure if there is to be one and the creation of a mechanism for appeal if a request is rejected.

**Principle 8: The type of information accessible to the public must be broad and inclusive**

The types of information which the public might seek could include material concerning resources, agriculture and the environment. Legislation could require government

agencies to publish information collected in the course of their work in these areas and to report on official inspections and activities of monitoring agencies. The need for usable information in this area is critical because of the complexity of the issues and the low level of knowledge among the general public. "There is a strong case for improving the supply of environmental information that is independent, accessible and presented in terms that people without technical expertise can understand."<sup>29</sup> For a rural society there are particular information needs related to agriculture and other economic activities, health care and sanitation.<sup>30</sup>

In the arena of public safety and health, for example, in the United States, there are Emergency Planning and Community Right to Know acts which require industry to be pro-active in informing the public of the identity, location and chemical properties of hazardous substances in communities and to notify them of the annual level of release of certain chemicals into the environment in their area. Information must also be provided on measures taken to prevent and remedy accidents involving hazardous materials. Through provision of such information, government, industry and community can participate together to eliminate or minimize damage to life, health, property, environment and other resources.

There are still obstacles in Malawi to obtaining information on reproductive health although the government has shown a willingness since the multi-party elections in 1994 to improve access.<sup>31</sup> Problem areas include inadequate funding for projects which provide information about reproductive rights and health, a lack of trained personnel, the position of women in society and the strength of rural traditions. In rural areas the distribution networks for written materials are inadequate and there is also a low level of literacy among the population - only 29 per cent of women and 48 per cent of men in Malawi can read. Information can therefore be most effectively communicated by the spoken word. Increased provision of reproductive health information in Malawi is important in order to show the changing attitude of society and government to access to information.

**Principle 9: Individuals should have free access to personal information compiled on them, and such information should be protected against general dissemination**

The right of access to information entails access to information which government has compiled about individuals and their activities. By extension this includes access to personal information held by private bodies. One study undertaken in the late 1980s

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<sup>29</sup> Jane Steele, "Information for Citizens," *Policy Studies*, Autumn 1991, Volume 12, Number 3, p. 47, 50.

<sup>30</sup> Paul Sturges and George Chimseu, "The Chain of Information Provision in the Villages of Malawi: A Rapid Rural Appraisal," *International Information and Library Review* (1996), 28, p. 135.

<sup>31</sup> ARTICLE 19, *The Right to Know: Human rights and access to reproductive health information*, (London: ARTICLE 19, 1995), p. 207-230.

found that 80 to 90 per cent of all requests for information in Australia and Canada were for access to personal files, with a majority of the requests directed towards five specific government departments. Generally cases involved requests by public servants to see their personnel records or by individuals who sought information on the benefits to which they were entitled.<sup>32</sup>

The question of fees is often raised in the context of administering freedom of information legislation. It is generally accepted that in some cases fees are a useful way of recovering at least part of the cost of administering the scheme. At the same time, the imposition of exorbitant fees would infringe an individual's right to government-held information. In many countries with freedom of information legislation, fees are levied only when extensive photocopying or searching of archives is required. Perhaps one of the easiest and fairest distinctions in the fee structure can be made between individuals seeking general information on particular issues and individuals seeking information regarding themselves. Where an individual seeks information about himself, there should be a presumption of free access.

Protection of privacy is also dealt with within this principle because the government has a duty on the grounds of privacy to protect such personal information from general dissemination and not to disclose it to a third party. Personal information held by the government or private bodies must not be released without the individual's consent. The only limited exceptions could be, for example, if it is released in accordance with a law that specifically authorizes its disclosure. Under these provisions on personal information and privacy, an individual must have the right to ensure the accuracy of information held about him and to correct it if necessary.

#### **Principle 10: Enforcement mechanisms are necessary to ensure an effective right of access**

An appeals process must make the right of access effective and provide an enforcement mechanism. Such an appeals process should be set up within existing Malawian agencies in order to build links between the government and the people and to keep costs low. The appeals process for the denial of freedom of information requests should provide for the right to know the reasons why an agency decided to withhold information and the right to appeal both to an independent mediator and to a judicial authority. Procedures must be established to deal efficiently with requests for information and to respond within a reasonable period of time either providing the material requested or giving explicit reasons for denial based on narrowly defined exemptions as mentioned above. The reasons for denial would then be subject to appeal on two levels, as is the case in New Zealand for example. In either situation, internal disciplinary measures could be taken where the decision to deny information is shown to have been arbitrary or

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<sup>32</sup> Robert Hazell, "Freedom of Information: Lessons from Canada, Australia and New Zealand," *Policy Studies*, Autumn 1991, Volume 12, Number 3, p. 38.



capricious. The legislation could also, as in South Africa, provide for annual review of the administration of the act and make it an offence to destroy material willfully.

In a two-level system, the first, administrative level could include an independent mediator with quasi-judicial power. Malawi already has within its constitution the provision for an ombudsman. This office could be used to provide one level of review as it has been in other countries, such as Sweden, which has one of the oldest regimes of this kind. In Malawi, it is within the ombudsman's functions and powers to investigate any cases where allegations of injustice arise and where it does not appear that there are remedies "reasonably available" through the courts.<sup>33</sup> The ombudsman has full investigative powers including the power to require the immediate disclosure of information and the production of documents of any kind by any public body. The ombudsman, then, is the first and most cost-effective point of appeal in any attempt to resolve a dispute over whether information must be released, whether as a matter of course or on request. The ombudsman's investigative powers and decision-making authority combine to provide an effective means of ensuring freedom of information.

Judicial review would be available if still necessary after the intervention of the ombudsman, with the burden of proof on the agency denying the request. The legislation could determine whether the court case would entail a complete re-hearing. In the United States, for example, courts may require the government to itemize the documents in question and provide a detailed justification for the refusal and claimed exemptions. The court could then review and inspect the documents *in camera*. The judiciary's role could also involve interpretation of the implementation of any freedom of information legislation.

### **Principle 11: Individuals who release information to expose wrongdoing must be protected**

In order to strengthen the government's accountability to the public, freedom of information legislation should include the protection of individuals who release material in an effort to expose corruption, malpractice and other alleged illegal activities. The whistleblower should be not liable to civil, criminal or disciplinary actions where he has acted in good faith and had reason to believe that he was disclosing evidence of illegal activities or other corruption in connection with government duties or offices.

### **Conclusion**

Freedom of information means that more information is released by government both on its own initiative and when the public asks for specific material. Traditional mechanisms for this include publication of official acts in gazettes or journals, oversight by external bodies and public access to sessions of parliament, local government meetings and court

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<sup>33</sup> Articles 120-128, Malawi Constitution.

hearings. The introduction of freedom of information legislation in Malawi could create the impetus for government voluntarily to provide the public with material about the workings of government and with information which people need to participate in the running of the country and improve their standard of living.

Basic access to information should be accorded to members of the public who are parties in lawsuits or criminal proceedings, who wish to consult files containing personal data or who are seeking information held by public authorities, regardless of whether the individuals or companies requesting the material have specific interests or are involved in lawsuits. Protection must be accorded to individuals who reveal corruption or malpractice in government through the publication of information.

Without provisions reinforcing and implementing the constitutional guarantee in Malawi, gains in freedom of access to information will be limited or even prevented because each time an individual seeks the public disclosure of information, state authorities can obstruct such disclosure through claims of broad privilege and through court cases that could take years to resolve. The right to freedom of information should be honoured as a matter of course by state and local authorities and this should be implemented in the least time-consuming and least expensive fashion.

Malawi's constitutional guarantee of the right of access to government-held information carries little weight if there is no legislative framework to ensure the lively use of that right. Such use will provide for greater openness within a society and within a government bureaucracy that for nearly 30 years was marked by closure and repression. Early introduction of freedom of information legislation would begin to establish the notion of openness and accountability. As government provides more information, both voluntarily and at the request of individuals, there will be an increase in the participation of individuals and organizations and an increase in consultation with government. Where once the government might have shied away from releasing information, it will become a matter of routine to provide information rather than to seek to withhold the material.