An analysis of Botswana's new Access to Information Bill

August 2024

By Sello Motseta and Anton Harber

Introduction

The Botswana government has tabled a long-awaited draft freedom of information Bill, the **Access to Information Bill (No. 15 of 2024).** This report analyses the draft in relation to international benchmarks for such legislation.

Background

The commitment by member states of the United Nations General Assembly to protect the rights and freedoms of all human beings was captured under Article 19 of the UN Declaration on Human Rights in 1948. This forms the fundamental basis for most developments on Freedom of Information (FOI) laws.

Article 19 contains a clear commitment by UN member states to the right to information. "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."

It was reiterated by the 1966 International Covenant on Civil and Political Rights (ICCPR). This is significant because 52 out of 54 countries in Africa have ratified the ICCPR. It stipulates at Article 19: Everyone shall have the right to hold opinions without interference including the 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

According to Article 19(3) freedom of expression may be subject to certain restrictions, including for the respect of the rights or reputations of others, and for the protection of national security, public order, public health, or morals. But these restrictions must be clearly prescribed by law, necessary to achieve a defined goal, and proportionate.

This UN position is also supported by institutions in Africa with the African Charter on Human and Peoples' Rights (Banjul Charter) adopted June 27, 1981, which was ratified by 54 of the 55 African Union (AU) Member States. Article 9.1 specifically provides: Every individual shall have the right to receive information.

African countries took this commitment a step further and developed a special mechanism for its enforcement with the appointment in 2004 of a Special Rapporteur on Freedom of Expression and Access to Information in Africa. The Special Rapporteur is empowered to issue assessments on media legislation, policy, and practice; undertake missions to countries of concern; and make public statements on violations of the right to free expression and access to information.

Embracing norms on freedom of information legislation is therefore not a Western practice. It is therefore surprising and disconcerting that despite the praise for Botswana's democracy, it has continued to defy international best practice.

The Constitution of Botswana (1966) gives the public the Right To Information (RTI) through Section 12. It stipulates that:

"'Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence."

Section 12(2) of the constitution then waters this down with by allowing for restrictions on freedom of expression in the areas of national defence, public security, public order, public morality, and public health.

There are no specific freedom of informational laws in Botswana, although the country is universally acknowledged as a bastion of multi-party democracy

Tools of analysis

A report by the World Bank, "Freedom of Information Access (FOIA): Key Challenges, Lessons Learned and Strategies for Effective Implementation in Public Agencies,"(Lemieux, V. L:2004), identifies useful instruments to analyse Freedom of Informational laws.

It underlines the importance of the appropriate legal framework, accessibility of Freedom of Information (FOI) processes, institutional capacity, training for stakeholders and independent regulatory oversight to enable punitive action against transgressors. The regulatory framework must be clear with appropriate personnel to implement its execution and that there must be a corresponding desire to empower individuals both in government and public institutions with information about their rights and responsibilities.

The report speaks to importance of clarity in FOI laws in various areas: (1) type of disclosures covered; (2) procedures for accessing information; (3) clarity on exemptions to disclosure requirements; (4) effectiveness of enforcement mechanisms; (5) timelines for release of requested information; (6) sanctions for non-compliance; and (7) importance of building a culture of proactive disclosure.

It therefore follows that Freedom of Information(FOI) laws should be underwritten by five very basic international norms:

i. The right to make oral requests.
ii. An obligation for public bodies to appoint information officers to assist requesters.
iii. An obligation to provide information as soon as possible and, in any case, within a set time limit.
iv. The right to specify the form of access preferred, such as inspection of the document requested, an electronic copy, or a photocopy.
v. The right to written notice, with reasons, for any refusal of access.

These basic norms are consistent with a Model Law on Access to Information for Africa prepared by the African Commission on Human and Peoples' Rights. This Model Law endeavours to reinforce a commonality of approach on access to information in Africa, while at the same time leaving room for States to adapt the Model Law's provisions on the basis of their own legal systems and constitutional frameworks.

It is therefore stipulated that FOI laws in Africa, should be developed along following principles:

(a) Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.

(b) Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.

(c) This Act and any other law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure. Non-disclosure is permitted only in exceptionally justifiable circumstances as set out in this Act.

(d) Information holders must accede to the authority of the oversight mechanism in all matters relating to access to information.

(e) Any refusal to disclose information is subject to appeal.

(f) Public bodies and relevant private bodies must proactively publish information.

(g) No one is subject to any sanction for releasing information under this Act in good faith.

Botswana's media environment

Botswana's media is for all intents and purposes captured. The media is under the auspices of the Office of the President. There is a state media and no public media. The Government media is not run by an independent board. It is basically quasi-public and heavily subsidized but the private media has managed to ride the storm and remain relevant despite being starved off advertising support. It enjoys public support because it is perceived to be more credible and less susceptible to arbitrary government interference.

The independence of private media is increasingly being tested by businessman and major funder of the ruling Botswana Democratic Party (BDP) Jamali Seyed Abolfazi's refusal to abide with a 2017 Competition Authority decision to divest his 28.73% shares shares in Mmegi Investment Holdings (Pty) Ltd. The authority said the transaction, which was implemented without appropriate regulatory notification, is likely to result in the prevention or substantial lessening of competition in Botswana's fledgling private media environment.

There also longstanding concerns detailed in the UN Human Rights Committee's 2021 Universal Periodic Review for Botswana, which cited provisions in the National Security Act, the Cybercrime and Related Crimes Act,and the Penal Code that may unduly restrict freedom of expression and access to information. For instance, Section 59 of the Penal Code criminalizes the publication of "any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace". Violations may result in a punishment of imprisonment for up to two years, a fine, or both.

The Penal Code also includes criminal penalties for defamation, which can have a disproportionate chilling effect on freedom of expression, especially when punishments include imprisonment. SLAPP (Strategic Litigation Against Public Participation) lawsuits are also increasingly being used to encourage self-censorship and deter criticism of authorities.

Government has long complained about a lack of professionalism in the media, accusing private media of 'butchering facts' and taking sides. It used this argument to promulgate the 2008 Media Practitioners Act which is mandated to register all media workers and outlets - including websites and blogs - with violations punishable by a fine or imprisonment.

This law was broadly rejected by media stakeholders for restricting press freedom and never implemented by the authorities. After years of calls by the media community and civil society to withdraw this law, ruling party lawmakers introduced the 2022 Media Practitioners' Association Act (MPAA), which repeals the 2008 version but shows no distinct differences with its preceding legislation.

The 2022 MPAA establishes the Media Practitioners' Association, the mandate of which is allegedly to protect freedom and independence of the media, to protect and maintain professional journalism standards, and to handle the registration of media and journalists. With no essential difference from its preceding legislation , it is a subtle attempt to pull the wool over eyes of its critics.

It requires the registration of journalists but provides no clear guidance on the criteria that can be used to do so. It posits that journalists are no different from other professions and should have regulatory oversight, taking no account of the need to balance regulation against the right to freedom of the media.

Legislators want to enforce professionalization of journalists, but remain allergic to calls for the professionalism of politicians with minimum academic qualifications and restrictions for those with criminal records. This is despite the fact that legislators have more power than journalists and their offices are more prone to abuse.

Access to Information Bill, No. 15 of 2024

The Bill boldly and unequivocally enables members of the public to have access to information in the possession of public authorities. It states: (*a*) a person has the right to access information held by public authorities without delay and free of charge, except where payment of reproduction is provided for under this Act.

It further stipulates it shall be applied on the basis of the presumption of disclosure, and that non-disclosure is permitted only under the exemptions as set out in this Act or any other law.

The Bill imposes a clear obligation on public authorities to release information and lists categories of information that must be released by all government authorities without request, such as a directory of officers and employees and their remuneration, rules and procedures that cover government functions, details of any government subsidy programmes, all contracts, licences, permits, authorisations and public-private partnerships, or results of surveys, studies or tests.

The law does not apply to the President when acting as Commander-in-Chief, any Presidential commission of inquiry, the Cabinet, or judicial functions. Also exempt is information relating to national security and defence (clause 30), classified information, the Presidency and the Cabinet (clause 34), law enforcement, (clause 39), legally privileged documents (clause 41) or information that infringes on the privacy of a third party. While these are standard areas for exemption in such laws, they are broadly and loosely defined in this Bill, giving quite large scope for refusals on the basis of these exceptions.

However, Section 31 says that these exemptions shall not apply, and the authority has an obligation to grant access to information, where it reveals evidence of corruption, an imminent and serious public health, safety or environmental risk, mismanagement of public funds, abuse of public office or where the information demonstrably outweighs" any harm to the interest protected by the reason to refuse it.

Interestingly, it also protects government officers who release information under this provision. Information officers cannot be punished for releasing information in the public interest.

It is also interesting to observe how it will relate to the Public Service Code which encourages secrecy. It appears provisions within this Bill will override any commitments by civil servants to conceal information as is historically standard practice. Section 48 (1) stipulates: "An information officer or any officer of a public authority shall not be penalised or subjected to any disciplinary proceedings in relation to the officer having made or attempted to make a disclosure of information which the officer obtained in confidence in the course of exercising or performing his or her powers or functions, if the disclosure is in the public interest."

On the other hand, the Bill threatens anyone who alters or destroys information. Section 56 stipulates that anyone who destroys, damages or alters information that is required to be accessed under this Act is guilty of

an offence and is liable to a fine not exceeding P100 000 or imprisonment for a term not exceeding five years, or to both.

The Information and Data Protection Commission is provided with oversight to ensure the effective application of and compliance with this Act. It is not clear whether this institution is sufficiently capacitated to give effect to an effective operationalization of FOI laws. Existing institutions like the Botswana Government Communication Information System (BGCIS) do similar work. It is also not clear how independent the Commission is from government as the President appoints both the Commissioner and the Deputy Commissioner.

A positive development is the obligations in the Bill for each public authority to appoint an information officer who will be responsible for the implementation of the provisions of this Act, including receiving and processing requests for access to information. It is not clear whether information officers and public relations officers are the same entities. The Botswana Government has Public Relations Officers (PRO) who act as a conduit for the release of information. Standard practice requires authorisation from the Permanent Secretary for PROs to speak to the media. They are not decision makers. If they are identified as information officers, it will be telling.

The new law embraces a commitment to cater for disadvantaged communities like the disabled. Section 15 says: Where a person with a disability wishes to make a request for access to information, the public authority shall —(*a*) take all necessary steps to assist the person.

Section 17 (5) says that a public authority should give an "immediate response" to a request for information and if the information is not readily available, acknowledge receipt of the request. If they refuse the request, they are obliged to provide the reason. The authority must make a decision within 21 days unless the information is necessary "to safeguard the life or liberty of a person", in which case they must respond within 48 hours.

Section 22 (1) says a public authority shall be deemed to have refused a request for access to information where the public authority fails to determine a request for information within 14 days after the request is received by the public authority. The time period can be extended by 14 days if it is a large volume of information, ha to be gathered from more than one source or requires consultation with an outside person.

Whilst this Bill 224 conforms with international best practice because it calls for the appointment of information officers, it is not clear how they will operationalise their functions. The only clarity is that the appointed Information Officers will be encouraged to release information and refusals to provide information should be properly communicated. It says very little about how it intends to deal with spontaneous oral requests.

There is a deliberate codified effort to ensure that access to information is not made an issue of economics. It will not be hampered by access to financial resources. At section 27 (1) A public authority shall not charge any fee for —
(*a*) lodging a request for access to information;
(*b*) time spent by the public authority searching for the information requested; or
(*c*) time spent examining the information to determine whether it contains exempt information or deleting exempt information from a document.

Conclusion

If enacted in this form, the Bill will go a long way to opening up public and media access to information held by government. Although there are a number of broad exemptions – such as for the Presidency, Cabinet, defence

and security – this is countered by the clause that overrides such exemptions if the information would reveal corruption, mismanagement, abuse of public funds or overriding public interest. The Bill proscribes clear timelines for the release of information as well as a list of categories of information that must be published without request. It also offers protection to officials who release information in the public interest and threatens punishment against those who alter or destroy information covered by thus law.

The Bill therefore promises to provide a strong tool to open up government. To carry it into effect though, will depend on the willingness of the Information and Data Protection Commissioner to ensure its implementation, the courts to enforce it, and the government to create a new culture and practice of openness.