

Freedom of Information and Records Management in Ghana

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Abstract

In recent years there has been a drive towards the passage and implementation of freedom of information (FOI) legislations in many countries. Access to information is gaining acceptance as a necessary tool in ensuring the participation of the citizenry in democratic governance. An effective implementation of a freedom of information law is expected to lead to an open, transparent and accountable society. This paper identifies some countries which have passed and implemented the FOI laws and the relevance of the law in the Ghanaian context. Some basic elements of FOI are provided, a summary of the Ghanaian draft bill given and the basic information infrastructure in the country examined. The paper argues that an effective records management system is required to ensure a successful implementation of a freedom of information law and cites from the United Kingdom and India Acts to support this position. Some weaknesses of the bill such as, lack of an impartial internal review procedure, independent implementing and monitoring authorities are identified and suggestion made for solving these problems.

Introduction

Many countries that have introduced freedom of information legislations are seeking to replace the culture of secrecy that prevails within civil service with a culture of openness. All over the world access to information is gaining acceptance as a necessary adjunct to participatory democracy. Freedom of information (FOI) laws are intended to promote accountability and transparency in government by making the process of government decision-making disclosure the rule rather than the exception (Iyer, 2000). According to Mnjama (2000), there is a new realisation that government held information is a public resource-created, assembled and maintained by public servants and paid for by taxpayers. Currently, it is estimated that as many as forty countries provide access to government held information either through discrete legislation or codes of practice.

The rationale for the right to information is rooted simply in the concept of open and transparent government. Access to information legislation provides citizens with a statutory right to know and makes the government more accountable to the people being governed. *The Commonwealth Heads of Government (CHOGM) 2003 Report* in its Executive Summary indicates that studies show that countries with access to information laws are also perceived to be the least corrupt. This is borne out by the 2002 *Transparency International's Annual Corruption Perception Index* in which none of the ten countries perceived to be the worst when it comes to corruption had a functioning access to information regime. On the other hand, about eight out of the ten best countries had an effective legislation. According to Iyer (2000), the legislation facilitates the acquisition

of knowledge, encourages self-fulfilment and acts as a weapon in the fight against corruption and abuse of power by state functionaries.

In some African countries the principles of freedom of expression and free exchange of information are enshrined in their constitutions. In Botswana, Cameroon, Kenya, Lesotho, Sierra Leone and Zambia, their constitutions provide for access to information as part of speech and expression. In Mozambique, Tanzania and Uganda access to information is specifically guaranteed in their constitutions. However, specific freedom of information legislation is required for citizens to exercise these rights. In 1999, media advocacy groups initiated a freedom of information bill in Nigeria (Commonwealth Human Rights Initiative). The bill insists on the right to information for both Nigerians and non-Nigerians and seeks to defend the values of openness in society. It has been passed by the House of Representatives with a modification of the limits of access, but is yet to be considered by the Senate (Abati, 2004).

In Ghana, Article 21 of the 1992 Constitution guarantees freedom of expression and the right to information and envisages that parliament will provide the legislative framework for the exercise of the right to information. South Africa and Malawi are the only two African countries which have specifically passed a legislation to make information accessible to its citizens. A preamble to the South African Act sets out to give effect to the constitutional right of access to any information held by the state and any information that is held by another person and is required for the exercise or protection of any rights (Promotion of Access to Information Act 2000). Zimbabwe has also passed a legislation called the Access to Information and Protection of Privacy Act. However, the Zimbabwean Act has been criticised as "more about control of the media than about creating mechanisms for citizens to access information held by the state" (Dimba, 2002). It is argued that some governments have responded to pressure to adopt freedom of information legislations but limited the right as much as possible, and Zimbabwe is such an example (Mendel, 2003)

Ghana is in the process of legislating for the freedom of information. The Bill, currently in a draft form, is being studied by all stakeholders for eventual passage into law by parliament. The need for a freedom of information legislation in Ghana is a result

of many years of military and quasi-military rule that had led to a culture of silence. For a freedom of information legislation to be practicable and effective there is the need to ensure that the sources of the information are well managed. Relevant and accurate public records are essential to preserving the rule of law and demonstrating fair, equal and consistent treatment of citizens. Without access to records, the public does not have the evidence needed to hold officials accountable or to insist on the prosecution of corruption and fraud. However it is critical when considering access laws to develop an effective records infrastructure to prevent among other things the manipulation, deletion and loss of records (Millar, 2003). All aspects of public service, including health, education, pensions, land and judicial rights, depend upon well-kept and well-managed records.

Records provide a reliable, legally verifiable source of evidence of decisions and actions. They document compliance or non-compliance with laws, rules, and procedures. Records management issues should therefore be addressed by a freedom of information law and ideally improvements implemented prior to its introduction. Mnjama (2003) quotes Bolton (1996) to buttress this position when he noted that "without a substantial and comprehensive records management in place the FOI legislation would not be worth the paper it was written on. Records could neither be identified as existing nor would they be obtainable from their storage". One fact often ignored by governments in the implementation of FOI is that it lays considerable demand on records management personnel. Sound records management principles must be adhered to if governments are to successfully implement the requirements of access laws (Mnjama, 2003). According to Hatang (2005) effective implementation of the South African Act has been hampered by what he terms an environment characterised by a "wild west" approach with few if even any rules that apply. Poor records management practices should not be allowed as an excuse for lengthy replies and sub-standard document searches.

In recognising the importance of an effective records management system in the successful implementation of a FOI, Section 4, Subsection 1 (a) of the Indian Act requires "every public authority to maintain all its records duly catalogued and indexed in a manner and form which facilitates the right to information under the Act and ensure that all records

that are appropriate to be computerised. . . are computerised and connected through a network all over the country on different systems so that access to such records is facilitated" (Right to Information Act 2005). In the case of the United Kingdom and the Northern Ireland, The Lord Chancellor is vested with the responsibility to issue, and from time to time revise, a code of practice providing guidance to relevant authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records (Section 46 of the FOI Act 2000). Mnjama (2000) quotes Snell (1993) who had conducted studies in Tasmania, Australia of being of the opinion that the passage of FOI legislation in Australia as a "mixed bag" and that change in the management of records prior to its implementation had lessened the potential of any significant impact. Although Snell (1993) does not categorically state that FOI is likely to improve records keeping practices in such areas as filing, storage, retrieval and destruction of government records, he does acknowledge that the passing of FOI is likely to lead to improvements and efficiency of these systems.

This paper takes a look at the main elements of a freedom of information legislation and salient points of the Public Records and Archives Administration Department Act (PRAAD) that governs records management in Ghana. The paper also reviews recent developments in the management of records in Ghana and how it would impact on the implementation of a freedom of information legislation. It is assumed in this write up that for Ghana's freedom of information legislation to be effective, records keeping practices will have to be improved upon to make the records accessible to both the creating institutions and requesters.

Basic Principles of Freedom of Information Legislation

Literature reviews show that attempts have been made to draw up lists of principles aimed at guiding the formulation of FOI legislations (Iyer, 2000; Chogn 2003 Report; Mnjama, 2000, 2003; Model FOI Law). However, there are some formidable challenges such as definitional problems, the extent of coverage, costs of administering a FOI regime and questions as to the procedure for access (Mnjama, 2000). Trying to

broaden the coverage can lead to the risk of either being paralysed by its own success or sapping the morale of the administration, however, well intentioned. On the other hand, a minimalist system runs the equally unacceptable risk of proving so ineffective as to lose all credibility with the public. The key to success therefore lies in treading a middle course, which ensures practicality rather than any attachment to doctrine, irrespective of the desired objectives (Iyer, 2000).

Notwithstanding the challenges earlier referred to, certain basic principles are required in functioning freedom of information legislations. These are that:

The objectives of the legislation must be stated as clearly as possible. Having clearly stated objective clauses would help in administrative and judicial interpretation.

The extent of coverage must be defined as widely and as precisely as possible. In this respect, two aspects need to be considered (i) the subject matter, and (ii) institutions. Terms such as record or document should include information contained in correspondence, memoranda, books, plans, maps, drawings, photographs, films and sound recordings, video-tapes and other media. Its coverage of institutions should ensure wide latitude in order to make the legislation meaningful. The following bodies should be covered: public bodies, including quasi non-governmental organisations, state-run commercial enterprises, hospital trusts, local authorities and any institution which performs functions on behalf of the public.

Access to information should be made as nearly universal as possible. No unreasonable conditions should be imposed on access to information. Citizenship should not be made the basis for access since it can deny information to large sections of legally-resident population in the country.

Narrow definition of exemptions and exclusions. There are legitimate exemptions to the FOI provisions; however, the categories of exemptions should be defined as narrowly as possible to avoid preserving secrecy. Some of the most frequently used grounds for exempting disclosure are:

- national security
- law enforcement and the prevention and investigation of crime
- public safety
- records relating to the formulation of policy
- personal information (unless related to the person making the request)
- conduct of international relations
- confidential and commercially sensitive information
- confidentiality of ongoing research
- confidentiality of information contained in electoral rolls
- public health, i.e. patient records.

As a safeguard to lessen the rigours of exemptions, some laws have overridden provisions while others have time limits on the secrecy permitted. These laws the:

Disclosure should be made the rule and non-disclosure the exception. Where a request has been denied, the onus should be on the authority concerned to show that the information being withheld falls within one or more of exempted categories rather than for the requester to prove that it does not.

Culture of openness/Educating citizens. The government needs to meet certain obligations that will ensure a culture of openness and facilitate access. These include a duty to publish and disseminate as widely as possible documents of significant public interest. Such publications can be on issues relating to their structure, functions and operations, classes of records held for the body, arrangements for access and names and contact details of officers designated to deal with FOI requests.

The procedural arrangements for access to information should not be unduly burdensome. A key test of the credibility of FOI legislation would be the ease, inexpensiveness and promptness with which those seeking information are able to obtain it. There are certain very important elements under this principle that need to be provided for to make it more credible. It would be desirable that the law permits applicants to inspect, read, view or listen to official records as well as ask for photocopies,

transcripts, summaries or computer printouts of them. Applicants may also be allowed to obtain oral information about the contents of documents. It is important that in a country with more than one official language, the law should require the authorities to comply with requests for translations in any of the recognised languages.

The right of appeal against a withholding decision is one of the most important provisions of a FOI protecting against undue secrecy by providing a mechanism for the scrutiny of decisions. Laws usually require agencies when denying requests to notify requesters of their rights of appeal and the procedure to be followed. Without this, the effectiveness of FOI would be minimised. There should be an independent and impartial arbiter to decide any disputes that may arise in the interpretation of the law. Providing for an independent and impartial arbiter to resolve disputes is in particular one of the most valuable safeguards against administrative lethargy, indifference or intransigence. Some laws have information commissioners, ombudsmen, information tribunals and the courts.

Importance of a Freedom of Information Legislation to Ghana

Good government requires the participation of citizens. For citizens to participate effectively the electorate must be well informed, and this means access to the facts about government business and activities. In Ghana, every citizen has a constitutional right to information, yet there is no legislation to clarify these rights. Besides, the public lacks awareness about how to obtain information, particularly from government. Part of the problem is that many public servants find it difficult to know which information is confidential and therefore whether to allow access to it or not. Institutional mechanisms often serve to restrict access to information rather than facilitate it.

The lack of direction as to what information to provide on request to the public has created a syndrome where public servants find it safer to refuse access to information even when such information is in the public domain. The World Bank in April 2000 commissioned the Centre for Democracy and Development (CDD) to carry out a diagnostic survey on corruption in Ghana. Information was sought from the Value Added Tax (VAT) Secretariat on VAT

registered firms in Accra to be added to a list of firms obtained from sources such as the Chamber of Commerce and other business directories. The response from the VAT Secretariat to the request was that the information requested was confidential and had been passed on to the Minister of Finance for authorisation. Subsequently, the Minister denied the request even though the information, which had been declared confidential, was at least partially in the public domain. In late 1999, the Secretariat having published the list in all the major newspapers the CDD wanted an updated version (Gyimah-Boadi, 2000).

Contributing to a debate on the merits of the Bill, Boadu-Ayebofoh (2003) intimated that even though it was the responsibility of the media to inform the public, this must be done with circumspection. He explained that where information was distorted or where people were either misinformed or malinformed the consequence could be disastrous. The role of the mass media in informing the public is very important in ensuring democracy. However, it is expected that this should be done within the provisions of the laws of the land. (Daily Graphic, 14 February 2003).

According to Kumado (2000) by far the most important strategy in the Constitution for promoting access to information is the requirement contained in Article 21, which envisages that Parliament will provide the necessary framework for the exercise of the right to information. However, the existing law is flawed in relation to the 1992 Constitution because it was not designed to promote but rather to deny access to information. This is because Parliament has still not performed its important function of passing a legislation that will provide a framework for access to information.

The Draft of Right to Information Bill 2003

The 1992 Constitution of Ghana has made provision for the enactment of a law by parliament to make information accessible to Ghanaians. It has been argued that access to information can lead to making governments open, accountable and available to the people. Thirteen years into constitutional rule in Ghana, parliament is in the process of performing its responsibility of passing legislation that will provide a framework for access to information. This is contained in The Right to Information Bill, 2003, which is being debated by the public before its passage into law.

The Act seeks to provide for the right of access to information held by a government agency or private body subject to such exemptions as are necessary and consistent with the protection of the public interest and the operation of a democratic society. The Act also seeks to provide for the right of access by an individual to personal information held by a government agency or a private body which relates to that individual, to protect from disclosure personal information held by a government agency or a private body to the extent consistent with the preservation of personal privacy. It also seeks to provide for internal review by the high court, decisions of ministers and private bodies and to provide for the right of appeal in relation to matters under the Act.

The Bill is divided into eight parts and summed up according to the sections under the parts.

Part I- Access to information in custody or under control of government agencies; responsibility to inform. The first two sections deal with the right of access to official information and the responsibility of government to provide information on governance.

Part II- Exempt information. This is made up of sections 3 to 17. Some of the issues dealt with are information from the President and Vice President's Office, information relating to Cabinet, law enforcement, public safety and national security, international relations, defence, economic and third parties, tax and internal information of agencies. Others are information that relates to parliamentary privilege, fair trial and contempt of court, information subject to medical professional privilege, frivolous or vexatious application and disclosure of personal matters.

Part III- Compilation and publication of information of an agency. These are Sections 18 and 19 dealing with the responsibility of sector ministers in respect of access and provision of manual of guidelines.

Part IV- Procedure for access. Sections 20 to 30 cover application for access to information held by an agency, the person to deal with application, transfer of application, deferred access, decision on application and information that cannot be found or is not in existence. Others are when agencies may

require advance deposit, extension of time to deal with an application, the right of an agency to refuse process for failure to pay deposit, refusal of access and the manner of access.

Part V- *The right to apply for amendment of personal records in a document in the custody of an agency.* This part, made up of Sections 31 to 38, covers the amendment of personal records, the method of application for an amendment of information contained in agency records, dealing with an application to amend records, incomplete applications, determination of applications, refusal to amend records, notice of determination and notations to be added to records.

Part VI- *Internal reviews and appeals.* This is made up of Sections 39 to 46 and deals with internal review by the relevant minister, action by the minister, decision of minister on review, application to the high court for judicial review, application to Supreme Court for judicial review in respect of access to exempt information, power of the Supreme Court, ruling of the Supreme Court and the right to a lawyer or other expert.

Part VII- *Access to information of private bodies.* Sections 47 to 71 make provision for accessing records of private bodies. The sections define a private body, the right of access, manuals of particulars of a private body, fees, refusal of request, form of access, access to information that relates to health, protection of the privacy of a third party, protection of commercial information of third party etc.

Part VIII- *General and miscellaneous provisions.* The last part is made up of Sections 72 to 91 and deals with general and miscellaneous issues such as the burden of proof, appointment of information officers, protection in respect of actions for defamation or breach of confidence, protection in respect of certain criminal actions, fees and charges, waiver of fee on the basis of financial hardship, annual reports by agencies and report by the Attorney-General and Minister for Justice for the Act, and limitation of period for exempt information. Others are information held by the national archives, museums and libraries, application of Act to existing and future information and offence of disclosure of

exempt information.

An Assessment of the Bill

A critique of the draft Bill is the lack of a preamble that will explicitly espouse the principle of "maximum disclosure" and state that the objective of the Act is to "foster a culture of transparency and accountability". Such objective clauses set the tone for the rest of the Act and provide a good guide to officers interpreting provisions of the Act. The Indian Act also has similar objectives in the introduction to the Act.

Part III of the Bill deals with the compilation and publication of a manual on information of an agency. Section 18 (1) enjoins every minister responsible for a ministry to ensure the compilation and publication of an up-to-date official information in the form of a manual listing all government agencies under the ministry. Subsection 2(b) demands the compilation of a list of the various classes of information which are prepared by or in the custody or under the control of each agency. The use of "information" instead of "records" or "documents" is likely to create problems in the compilation. Section 8, subsection 1 (iii) of the Australian Act requires the minister responsible for an agency to cause to be published, as soon as practicable after the commencement of the Act in an approved manner a statement of the categories of documents that are maintained in the possession of the agency.

While the Indian Act in Section 4, Sub-section 1 (a) and the United Kingdom Act in Section 46 make provision for the management of records, there is no such provision in the draft Bill. This shows that the drafters of the Bill have failed to recognise the importance of records in the successful implementation of the legislation. It is necessary that a provision be made for agencies to ensure effective management of both public and private records to facilitate easy and fast access.

Making a sector minister responsible for the review, as provided for in the draft Bill, could discourage applicants and even keep ordinary people away. There is the possibility of delays, as the minister will have other responsibilities that may slow down the review process. There is the fear also that being an appointee of the government, the minister will not be fair. In Japan, members of the appeals body, the Information Disclosure Review Board, are appointed by the Prime Minister after approval of both houses of the legislature and this prevents control of the

process by any single political party (Mendel, 2003). The Australian Act in Section 55 makes provision for an Administrative Appeals Tribunal to carry out internal review of appeals. The Commission for Human Rights and Administrative Justice (CHRAJ), which is already in existence, could be empowered to perform this review function.

The Attorney General and the Minister of Justice has been vested with ministerial responsibility for the full implementation of the Act in Section 79 and may for that purpose issue written guidelines to agencies, ministries and private bodies. The Minister's functions include conducting public education programmes and information for implementing the Act. In view of the fact that the Bill makes certain demands on government, it is feared that it may promote the culture of secrecy. There is the need for an independent monitoring authority to oversee the working of the laws such as the Human Rights Commission (HRC) in Section 83 of the South African Act. Among the duties of the HRC is to prepare a guide informing the people on how to use the Act, to submit reports to the National Assembly, monitor the working of the Act, and recommend amendments to develop and improve the Act and train information officers. There is the need to include an effective whistleblower protection in the legislation. This would follow the South African lead.

Provision of the Required Information Infrastructure

As part of the Civil Service reform programme began in the early part of the 1990's in Ghana, the Overseas Development Administration (ODA), now the Department for International Development (DFID) contracted the services of the Overseas Records Management Trust (ORMT) now the International Records Management Trust (IRMT), to advise the government of Ghana in 1992 on records management. Workshops were organised on the management of semi-current and non-current records (Anim-Asante, 1997). These workshops brought to light, the problems that had inhibited a coherent records management system in Ghana. The problems identified were a breakdown of registry practices, the lack of storage facilities for semi-current records and the lack of trained staff. The studies carried out resulted in the British government financing a three-year project designed to establish efficient systems

for the management of public records in Ghana. Some of the objectives of the project were:

- i) Restructuring the National Archives to a national records administration.
- ii) Developing a new Records Class for the whole Civil Service with an associated scheme of service and job descriptions for staff serving the class.
- iii) Restructuring registries and records services in ministry headquarters in Accra.
- iv) Establishing a records centre for semi-current records and establishing retention schedules for common categories of records.
- v) Developing training schemes locally and overseas to prepare staff at the necessary levels to provide efficient records services. (Overseas Records Management Trust, 1992).

The reforms in the Civil Service and the re-organisation of the National Archives resulted in the passage of a new law, the Public Records and Archives Administration Department Act of 1997, Act 535 to establish the Public Records and Archives Administration Department (PRAAD). Until 1997, the principal legislation for records management in Ghana was provided by: (a) the Public Archives Ordinance 1955; and (b) the Public Archives Regulation, 1958. The Act was therefore to address the obvious deficiencies of the existing legislation on records management and to emphasise the need for a new legislation that ensures a holistic approach to the management of records through their entire life cycle.

Sub-section (2) of Section 1 of the Act defines the responsibilities of the PRAAD as, to:

- a) Ensure that public offices, institutions and individuals who create and maintain public records follow good record keeping practices.
- b) Establish and implement procedures for the timely disposal of public records.
- c) Advise on best practices and establish national standards in records keeping in the public services.
- d) Establish and implement procedures for the transfer of public records of permanent value for preservation in the National Archives or other archival repository as may be designated by the

Act.

The Director of PRAAD is required under Sections 7 and 8 to ensure the management and keeping of current public records, accept custody of semi-current records which have been scheduled for further retention and maintain them within a records centre. Section 9 enjoins the head of every public institution where public records are created and kept to establish good records keeping practices within the registry for the management of public records in accordance with standards directed by the Department. Furthermore, in Sections 10, 11 and 12, the Act outlines the responsibilities of heads of public institutions at the regional and district levels in the management of public records.

Under the new legislation the Director of PRAAD has been authorised to extend the services of the department to cover private institutions on request and payment for services rendered. In this respect the Department is planning to rent out space in the National Records Centre to private institutions for the storage of their records for a fee.

To ensure that the new law on records management achieves the purposes for which it was passed, parliament has passed a legislation to create a records class in the civil service. This second legislation is to ensure professional management of public records from creation in offices through their maintenance and use at records centres to their ultimate transfer to the archives or destruction. In line with this integrated approach to records management a modern records centre with a capacity to store eighty thousand records centre boxes has been built in Accra on the premises of PRAAD.

Besides the PRAAD offices in Accra, there are eight regional offices as well. These are in Kumasi (Ashanti Region), Sunyani (Brong Ahafo Region), Koforidua (Eastern Region), Ho (Volta Region), Cape Coast (Central Region), Sekondi (Western Region) and Tamale which serve the Northern, Upper East and Upper West Regions. However, PRAAD has no district offices. Records centres have been established in all the regional offices to cater for semi-current records generated in the regions. It is expected that this background provides a fairly good basis to support the operation of the FOI law. The assertion by Mnjama (2000) that archivists and records managers, as official custodians of government information holdings, should be involved

at every stage during the formulation and development of FOI legislation is very relevant. The Bill makes provision for the appointment of information officers in every agency and private body and it is expected that the records officers in these institutions will perform this function. Thus, the records staff will need to be resourced and trained to be able to perform.

Conclusion and Recommendations

As part of measures to ensure effective administration of the country and the participation of the people in governance, Ghana has been divided into one hundred and thirty-eight administrative units called district assemblies to ensure the decentralisation of the process. Each assembly has a registry that manages its records, being public agencies, it was expected that PRAAD would ensure effective management of their records, but evidence on the ground shows the contrary. There is no link between PRAAD and the district assemblies in the management of their records. Newly appointed clerical staffs are usually assigned the responsibility of managing their registries (Nsiah-Asare, 2003). In view of the fact that these assemblies are the administrative units closest to the people, it is vital that their records be managed well in order to provide the needed information infrastructure for the implementation of the FOI legislation. The Institute of Local Government Studies (ILGS) has attempted to fill this gap by organising training programmes in records management for registry staff from some selected district assemblies; but this can be done more effectively by PRAAD (ILGS Annual Report, 2003).

In regard to the draft freedom of information legislation 2003, it is important that the provision under Part VI dealing with the internal review and appeals is given a second look. In most countries an independent body such as an ombudsman, information commissioner or information tribunal carries out the review. Such bodies are seen as more independent and their decisions are respected. Independent oversight is essential where public officials refuse to disclose information, especially if they are hiding corruption or other wrongdoing. While individuals may have the right to appeal to the courts, it is often inaccessible and the process excessively time consuming. The Draft Bill also makes provision for access to information held by a private body.

However, even though efforts have been made to improve upon the management of public records, no efforts have been made to improve upon those of the private institutions. It will be necessary to educate the private bodies on the need to ensure effective management of their records and to seek for advice from PRAAD to ensure a successful implementation of the Act.

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