



MISA ZIMBABWE COMMENTARY ON THE FREEDOM OF INFORMATION BILL

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1. Introduction

These submissions by MISA Zimbabwe, which is a media freedom, freedom of expression and access to information lobby and advocacy organisation, are made pursuant to the provisions of the Constitution of Zimbabwe that requires consultation of citizens in respect of law making by the Parliament of Zimbabwe.

2. Background

Zimbabwe on 5 July 2019 gazetted the Freedom of Information Bill, (House Bill 6 of 2019) (hereinafter Bill). This is part of government efforts to repeal the Access to Information and Protection of Privacy Act (2001) (hereinafter AIPPA).

Introduction of a revised access to information law is consistent with global, regional practices, and furthers the provisions of the 2013 Constitution of Zimbabwe. The Constitution provides under section 62

(1)-(4) for access to information. The section provides as follows:

(1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability. (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right. (3) Every person has a right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of the government at any level, and which relates to that person.

(4) Legislation must be enacted to give effect to this right but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

The gazetted Bill was developed pursuant to these provisions but more specifically as it relates to Section 62 (4), which mandates the State to come up with subsidiary legislation to **give effect** to the right. It has been accepted and established as both practice and precedent in law, that enjoyment of freedom of expression, freedom of the media and right to receive or impart ideas and communication, or right to participate in the affairs of one's country cannot be enjoyed or fully exercised without the access to information right. Further, Section 194 of the Constitution mandates the provision of timely, accessible, and accurate information to members of the public.

In addition to Section 62 of the Constitution, the Model law on Access to Information for Africa produced by the African Commission on Human and Peoples' Rights (hereinafter the Model Law), provides local and regional standards and best practice on a democratic access to information legislation. The Constitution and the Model Law will therefore, be used as the standard measurement and comparison tools in considering the strengths and weaknesses of the Bill.

3. Existing Laws

AIPPA is patently unconstitutional. AIPPA is generally associated with the Zimbabwe government's closing of media space and punitive regulation of that space. In addition to AIPPA, there are several laws that are relevant to ATI that are sectoral such as for statutory institutions, parastatals, or local authorities that are repeatedly used to deny such information.

This existing legislation on access to information has proven insufficient, and the administrative mechanisms for enabling this right generally unresponsive. Court decisions have in the past interpreted this right narrowly, depriving the public easy access to information.¹

Further, clarification is required in terms of implementation of legislation such as the Official Secrets Act, which though clear in its framing, has potential to be used to deny information requests. Section 4(1) (a) of the Official Secrets Act states:

For the avoidance of doubt, it is declared that subsection (1) shall not apply to the disclosure in accordance with the Access to Information and Protection of Privacy Act [Chapter 10:27] of any document or information by a person who, being the head of a public body as defined in that Act, has lawful access to the document or information².

Despite its title, AIPPA has several clawback provisions that restrict access to information. Ideally, any replacement ATI law must deal with these clawback provisions some of which are outlined below. The first major issue with AIPPA is that it restricts the right to access information to information that is under the control of public bodies.³ This means that individuals cannot rely on AIPPA to compel a private body to provide access to information. However, experiences under AIPPA also demonstrated that even information

¹ See for instance *Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation versus The President of the Republic of Zimbabwe and the Attorney-General*, SC 12/03, *Matabeleland Zambezi Water Trust versus Zimbabwe Newspapers (1980) Limited and The Editor of The Chronicle*, SC3/03,

² Section 3(2) if any other law relating to access to information, protection of privacy and the mass media is in conflict or inconsistent with this Act, this Act shall prevail. ³ Access to Information and Protection of Privacy Act, Section 5(1)

held under public bodies is not easily accessible as public bodies are quick to invoke their statutory and or security provisions.

A case in point is that of *Hitschmann v City of Mutare & Anor.*³ The summary facts are: Hitschmann (applicant) applied for certain land to be allocated to him by the City of Mutare (city). The city responded that the land was reserved for the Zimbabwe Republic Police (ZRP). Applicant applied again after hearing that ZRP were no longer exercising their right over the land. The city informed applicant that land was no longer for sale and now classified as open land not subject for sale. The applicant then discovered that the land was sold but had not been informed of the process. The applicant then requested access to information pertaining to the sale, of which the city council failed to respond to the application as provided for under Section 5 (1) of AIPPA. The applicant then approached the High Court for relief as informed by Section 4 (1) of the Administrative Justice Act⁴, which entitles a person who is aggrieved by the failure of an administrative authority to apply to the High Court for relief.

The court held that:

If the courts fail to give effect to these constitutional provisions that promotes transparency and accountability by public bodies, then the ability of citizens to hold public actors to account will be violated. Section 3 (1) (a) of the Administrative Justice Act enjoin an authority as the respondent to act lawfully, reasonably and in a fair manner in taking administrative actions which may affect the rights, interests or legitimate expectations of any persons ...

Zimbabwe has ratified several International and Regional Instruments that provide for the right to access to information. Of importance are the International Covenant on the Civil and Political rights and the African Charter on Human and People's Rights. Article 19 of the ICCPR and Article 9 of the ACHPR are instructive on the right to information. In the current Constitution, the legislature has clearly provided for the right to information even from public bodies.

The court ordered the city to provide:

The applicant with the records and documents showing that they complied with Section 152 (b) of the Urban Councils Act, that is to say, the advertisement and the notice published relating to the sale and alienation of the land.

AIPPA also restricts the right to access information to just citizens and residents of Zimbabwe. Foreignbased organisations including media entities, even local ones that are not registered, do not have a

³ HH-211-16

⁴ Chapter 10:28

right under AIPPA to request for information in Zimbabwe.⁵ These are just some of the problematic areas around access to information provisions in AIPPA.

MISA Zimbabwe, however, notes that the gazetted Bill tries to rectify some of the access to information shortcomings under AIPPA.

4. Analysis of Sections of the Bill

4.1 General Provisions

Section 2 of the Bill defines information to include “...any original or copy of documentary material irrespective of its physical characteristics...” This is wide enough to include tangible and intangible material. This definition is similar to information as defined in the Model Law, and this is welcome. Currently, AIPPA only defines personal information without giving a definition for other, general, nonpersonal data. This is an important development because it will easily cover access to electronic data or information. This is welcome since some public data holders such as the office of the Deeds Registrar are working on digitising their records and processes.⁶

The Bill however, is not the primary law⁷ on access to information. This means any other laws that conflict or are otherwise inconsistent with this Act [Bill] in relation to access to information, those laws, for example, the Official Secrets Act, shall prevail. Based on experience in Zimbabwe and other parts of the continent, laws such as national security and other laws that restrict access to information will be relied on to thwart proposed Freedom of Information law. The South African courts have ruled on this point in the case of *My Votes Count vs. Speaker of National Assembly and Others* and observed:

That there is out there a plethora of other pieces of legislation providing for access to information does not mean all those pieces of legislation are the legislation envisaged in Section 32 (2) of the Constitution⁹.

⁵ (3) Nothing contained in this Act shall confer any rights to information or to a record to— (a) a person who is not a citizen of Zimbabwe, or is not regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [Chapter 4:02], or is not the holder of a temporary employment or residence permit or students permit issued in terms of that Act; (b) any mass media service which is not registered in terms of this Act, or to a broadcaster who is not registered in terms of the Broadcasting Services Act [Chapter 12:06]; and (c) any foreign state or agency thereof.

⁶ Deeds Registry Amendment Act 8 of 2017

⁷ Primacy of the Act, same AIPPA provisions and ACHPR Model law

⁹ 2016 (1) SA 132 (CC) para 149

It is recommended that a primacy provision be included in the Bill to ensure that as Zimbabwe's access to information law, it is supreme on all matters concerning access to information, to the exclusion of laws restricting the right.

The draft Bill also contains definitions that distinguish between statutory bodies, public entities and private entities. Once passed into law, the new Bill would apply to all types of bodies, unlike under AIPPA which only applied to some select public bodies. In terms of Section 62(2) of the Constitution, access to information held and controlled by private entities is only granted in instances where such information is necessary for the protection or exercise of a fundamental right. The Bill however, does not provide for access to information controlled by private entities. This has proved to be restrictive in countries such as South Africa, where it is impossible for requesters to access information held by any private entities.

Section 3 sets out the objectives of the Bill. Unlike is the case with AIPPA, the Bill calls for the establishment of voluntary and mandatory mechanisms and procedures that facilitate quick, inexpensive, and simple access to information. The Bill also seeks to promote transparency and accountability on the part of information controllers in a way that assists members of the public exercise their right to access information. Voluntary information disclosures are essential, but this is unlikely in an environment that has been significantly closed.

This can be addressed through proactive disclosure of information which lies at the core of access to information principles, that is, information must be disclosed without the need for a request. The use of the term "voluntary" is therefore, problematic because it implies that the entity controlling the information has a discretion to provide information when it should ideally, be mandatory for public entities and statutory entities that perform public functions or provide public services to proactively disclose information.

Section 5 of the Bill attempts to formalise the duty to disclose information by stating that public entities, public commercial entities, and statutory entities, must have a "written information disclosure policy." This is a positive inclusion, but in its current form, this does not go far enough to ensure meaningful disclosure of information held by public entities.

It is recommended that the duty to disclose information goes beyond just the production of a written information disclosure policy. In terms of Section 7 of the Model Law, entities are expected to proactively disclose the following information:

- particulars of the entity's structure, functions and duties
- policies behind the legislation administered by the entity
- categories of information held by it or under its control

- a directory of its employees including their designation and functions
- a statement of the composition and functions of the boards or other bodies consisting of or constituted as part of or for the purpose of the functions of the public entity;
- detailed budget, revenue, expenditure and liabilities for the current financial year, including all related estimates, plans, projections, reports and audit reports;
- annual reports and any other information required by or in terms of any the law.

Furthermore, it is recommended that public entities must draft policies, manuals and other documentation that detail the handling of information requests and how to resolve complaints about access to information. The manuals must also include advice to members of the public with respect to their rights, privileges or benefits, and with respect to associated obligations.

Section 18 of the Bill places a duty on statutory entities to annually publish and submit reports to the Zimbabwe Media Commission (hereinafter the Commission). These annual reports must state the following:

- (a) requests for access to information received
- (b) requests for access granted in full
- (c) requests for access refused in full or partially and the number of times a specified provision of this Act was relied on to refuse access in full or partially
- (d) cases in which the periods stipulated in Section 8 (1) were extended in terms of Section 9
- (e) the number of times that a request for access was regarded as having been refused in terms of Section 10
- (f) such other matters as may be prescribed.

Given the amount of information they now control and process, there should be a mandate for private entities to publish reports that inform the public about the kind of information they respectively hold and process. Globally, organisations such as *Google*, and *Facebook*, *publish* annual transparency reports that provide statistics about information requests, including requests by government entities that they receive within a specified period.

Section 6 (a) exempts information on deliberations and functions of Cabinet and its committees from being requested by any person or entity in terms of this law. This exemption is in perpetuity, ideally, there should be a declassification clause that sets out the circumstances under which information on Cabinet activities can be declassified.

An example, of such a declassification is illustrated in South African case law. In *Centre for Social*

*Accountability v. Secretary of Parliament*⁸, the parliamentarians concerned had allegedly committed fraud through state-issued travel vouchers. This conduct constituted a substantial contravention of South Africa's Promotion of Access to Information Act (hereinafter PAIA) such that no protection could possibly or reasonably be expected.

The court further observed:

Any conduct by Members of Parliament which on the balance of probability would disclose unlawful or irregular conduct in the exercise of their parliamentary duties, constitutes a threat to South Africa's institutional democratic order and warrants disclosure in the public interest...⁹.

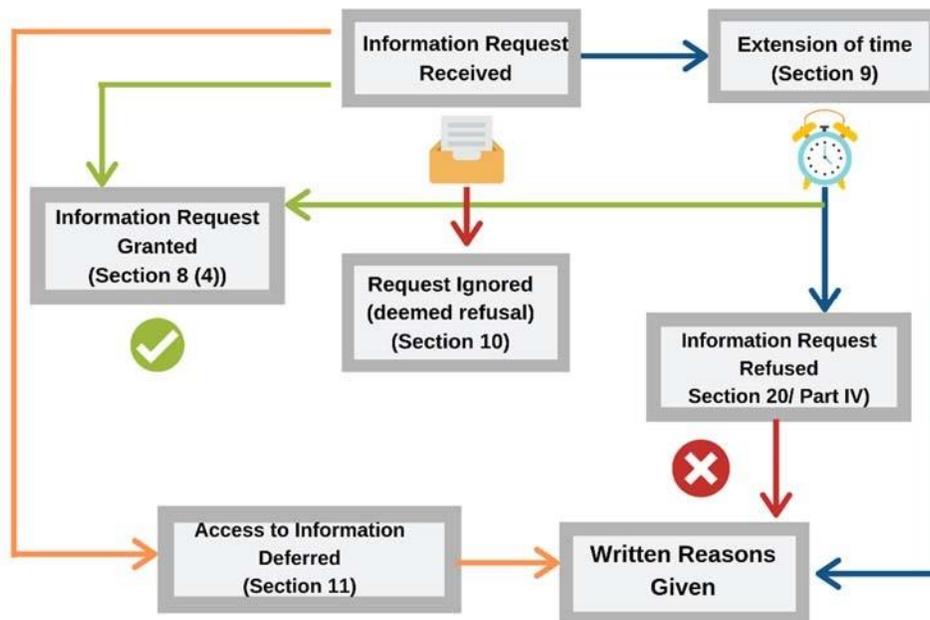
Meanwhile, the Bill compels all entities to have an information officer. Organisational heads of entities must designate or appoint an information officer who will be responsible for receiving, handling or overseeing information requests directed to the entity. Where a head of entity fails to appoint or designate an information officer, that same organisational head shall be the information officer for purposes of this Act. The information officer has a statutory duty to assist people who require information. This duty extends to assisting information seekers in the process of requesting information¹⁰.

⁸ 2011 4 All SA 181 (ECG) paras 89-90

⁹ Ibid para 106

¹⁰ Section 3(3)(c)(ii)

Information Requests Infographic



The request mechanism is set out in Section 7 of the Bill. As stated before in these submissions, the Bill only allows for the request of information from public entities. This contradicts the constitutional provision set out in Section 62(2) that allows information requests to private entities for information that is essential to exercise or protect one’s right. No reason need be given when making a request for information from a public entity.

One of the major hindrances posed by AIPPA is the requirement that requests for information must be in writing and delivered to a public body – oral requests are not possible. The Bill maintains this unjustifiable position by stating in Section 7(1) that requests must be in writing and submitted to the information officer.

The ability to submit requests for information orally promotes information requests from people that have low literacy and proficiency levels in written languages as well as people with visual challenges. In instances where requests for information are made verbally, the information officer would be able to reduce such requests to writing. It is not enough to set up systems through which information requests are made; such systems must be accessible to people with differing levels of literacy, language skills, and visual handicaps.

The processing times for a request depend on the nature of the requested information. Information requests relating to a person’s life or liberty must be finalised within 48 hours from the time the request is submitted.

All other information requests must be finalised within 21 days from the date of the request. AIPPA does not differentiate between urgent and non-urgent information requests. The reduction in the number of days within which information requests have to be dealt with is welcome and the timelines are similar to the timelines found in the Model Law¹¹.

Section 8 of the Bill requires that responses for information requests should be in writing and the response must state whether the request is granted or denied. Where the request is granted, the information officer must furnish the information in the requested format. Where an information request is denied, adequate reasons must be furnished stating reasons for the denial. The response should also cite legislation upon which the denial is based and lastly, the applicant must be informed of their right to appeal the refusal.

Section 9 gives information officers the ability to extend the period within which they respond to information requests. These requests are, however, only possible under the following strict conditions:

- (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the original time limit would unduly interfere with the operations of the entity concerned; or (b) consultations that cannot reasonably be completed within 21 days are necessary to comply with the request¹².

The information officer must furnish adequate reasons for extending the time to process a request. These reasons must be provided to the applicant in written form. This notice must also include the period of the extension. One of the major criticisms of the current request mechanism under AIPPA is that there is possibility to continuously prolong the processing time for requests. It is therefore welcome that the Bill does limit the grounds upon which requests can be extended. Where only part of the requested data can only be provided after the initial 21-day period, the information officer must provide the information that s/he can within the 21-day period.

In terms of Section 12 of AIPPA, the head of a public body may transfer a received request for information to another public entity better positioned to respond to a request for information. This transfer must be made within 10 days of receiving the original request for information. The entity that the request for information is transferred to has to respond to the request within 30 days of receiving it.

The gazetted Bill does not contain a provision that permits the transfer of requests from one entity to another. The Bill's current form means that an applicant who submits a request for information to a wrong or less relevant entity would have to personally investigate or enquire as to the correct or more suitable entity and

¹¹ Sections 15 and 16 of the Model Law on Access to Information for Africa

¹² Section 9(1)(a) and (b)

then resubmit their information request to that other entity or entities. This goes against the information officer's duty to assist the requester of information.

MISA Zimbabwe recommends that the Bill should permit an information officer in one entity to redirect a received request for information to another entity that has the requested information or that is more closely connected to the requested information.

Such transfers must be made within five (5) days of receiving a request for information. When such a transfer is made, the applicant must be notified of the transfer and furnished with reasons on why the transfer has been made. This notification must be in writing. The transfer will not affect the 21-day limit, as the day when the request was received by the transferring entity marks the start of the processing period or timeline under Section 7(1). This is the position in terms of Section 17 of the Model Law.

Section 10 of the Bill refers to what are referred to as "deemed refusals." Any request for information not dealt with and finalised within the 21-day limit set out in Section 8, is considered to have been denied, if there has been no request for an extension in terms of Section 9. The section does not specifically require that reason be given in such circumstances, but it is recommended that reasons be furnished for deemed refusals.

An information officer may in terms of Section 18, defer the release of requested information on grounds that it will for example, be released at a parliamentary presentation or the information forms part of a report that will be presented to a public entity or public officer. This section considers the different reporting or access to information provisions of Acts.

For instance, if the requests entail the reports that the Zimbabwe Human Rights Commission (ZHRC) is going to present to Parliament in terms of the Constitution and the ZHRC Act, the request can be deferred on that basis.

There is no provision on what happens in instances where information was scheduled for presentation but was ultimately not presented as planned. The indefinite delay in presenting information to a public body such as Parliament causes an indefinite embargo on accessing such information. MISA Zimbabwe recommends that there be a fixed period within which such information must be turned over to a requester even if it is never presented to Parliament or any other similar body.

Information requests are sometimes met with responses that such information does not exist or cannot be found. Section 12 of the Bill provides for such an eventuality. The fact that a record cannot be found might be a confirmation that such record was or is in the public body's possession. The section, however, does not treat this as a denied request. This section can be reworded, to insert provision that, that this decision

is equal to rejection of access to information. This allows the applicant to approach courts for a decision on the reasonableness of the steps taken to get the record.

To prevent information officers and entities from abusing this provision, it is recommended that Section 20 of the Model Law offer guidance on how missing and non-existent records are dealt with. The section states that the notice given to a requester in cases of missing and non-existent records must include an affidavit or affirmation, signed by the information officer stating the substantive details of all steps taken to find the information or to determine whether the information exists. The affidavit must include the following information:

- a) details of all locations searched for the information and the person or persons that conducted those searches
- b) details of any communications with any person that the information officer contacted in searching for the information or attempting to establish the existence of the information
- c) any evidence relating to the existence of the information including; - (i) any evidence that the information was destroyed; and (ii) the location in which the information was last known to be held¹³.

Another way of improving accessibility to information is to provide it in a way that is accessible and convenient to the person who requested it. This is another improvement from the current position contained in AIPPA, where information is only released in written/ printed format in English.

Section 16 of the Bill states that the information must be provided to an applicant in the officially recognised language as the applicant requests. This means that information officers must, where so requested by the applicant, provide information in another official language that is not necessarily English. The entity may even translate the information into the requested language and recover the reasonable translation costs from the applicant¹⁴.

The ability to recover translation costs from the applicant will no doubt prohibit requesters of information from asking for information translated into their languages. This therefore, becomes a clawback provision that eventually prohibits people from exercising their constitutional right to request information in one of Zimbabwe's official languages as listed in Section 6(1) of the Constitution.

This Bill does not prioritise accessibility of the information supplied in response to a request for information. Section 21(6) of the Model Law requires that the requested information must be made available in a form

¹³ Section 20(2) of the Model Law

¹⁴ Section 16(2) of the Bill

in which it is capable of being read, viewed or heard by the requester. This position is recommended for Zimbabwe's Freedom of Information Bill and law. Accessibility is important for the realisation of the State's duty to ensure that people living with disabilities do not suffer any prejudice as a result of their disability.

4.2 Grounds of refusal

Part IV of the Bill discusses protected information that may not be disclosed in response to an information request. The grounds for refusal of access to information recognised by this Bill are as follows:

- Protection of personal information of a third party who is a natural person (Section 21)
- Protection of commercial information of third party and private entity (Section 22)
- Protection of certain other confidential information of third party (Section 23)
- Protection of safety of individuals and property (Section 24)
- Protection of information in bail proceedings, law enforcement and other legal proceedings (Section 25)
- Protection of legally privileged information (Section 26)
- Protection of defence, security and international relations of the State (Section 27)
- Protection of economic interests and financial welfare of the State and commercial interests of public entities (Section 28)
- Protection of research information of third party or public entity (Section 29)
- Operations of public entities (Section 30)
- Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources (Section 31)

Section 25 of the Model Law deals with exemptions (such as the ones listed above) that form part of national ATI laws such as the Bill under consideration. The Model Law states that:

Notwithstanding any of the exemptions (in the ATI law), an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information, demonstrably outweighs the public interest in the release of the information.

In addition to the position in the Model Law, courts have observed that the interpretation of the exclusionary grounds "must be read as narrowly as possible, consistent with their purpose of protecting specific rights or

compellingly important interests. Access to information is the norm and refusal to disclose information the exception.”¹⁵

In other words, entities must grant a request for access to information if the disclosure of that information is in the public interest, even if the requested information falls under one of the listed categories of exemptions. There should not be automatic denials of access to requested information simply because such information is listed under one of the Bill’s exemptions. There must be a value judgment in each instance of requested information in which the public interest value of the requested information is weighed.

Section 28 of AIPPA lists information that must be mandatorily disclosed in the public interest. For example, information about the risk of significant harm to the health or safety of members of the public; or the risk of significant harm to the environment; or any matter that is in the interest of public security or public order, including any threat to public security or public order.

Section 28(1)(b) states that this information must be disclosed even if no request for it has been made.

The Bill does not have any provision of information availed in the public interest. This is a negative development and it is recommended that this position is revised and ideally, brought into line with Section 25 of the Model Law.

Some information such as personal information belonging to third parties must be protected. However, some categories of information cannot be justifiably protected from disclosure, for example information on government borrowing as listed in Section 28(2)(b)(iv). The Zimbabwean government has a history of passing on debts to the public as evidenced by the nationalisation of debts accrued by public bodies such as the Reserve Bank of Zimbabwe (RBZ), and the Zimbabwe Iron and Steel Company (ZISCO). Further, the Constitution provides that:

Within sixty days after the Government has concluded a loan agreement or guarantee, the Minister responsible for finance must cause its terms to be published in the Gazette.¹⁸

Other exemptions such as the protection of certain other confidential information of third party¹⁶ are superfluous while others such as the protection of research information of third party or public entity¹⁷ are unreasonable. Some exemptions such as the blanket ban exemption on the combined grounds of protection

¹⁵ Van Der Mere v. National Lotteries Board 2014 JDR 0844 (GP) para 21

¹⁶ Section 23 of the Bill

¹⁷ Section 29 of the Bill

of defence, security and international relations of the State¹⁸, are wide, far-reaching, and unjustifiable in an open and democratic society.

Another unjustifiable exemption is that found in Section 31 that deals with manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources. This is a broad provision that is open to abuse. The Model Law only refers to vexatious requests. In such cases, the Model Law requires an information officer to sign an affidavit stating the reasons why the information officer considers the request vexatious¹⁹. It is also worth pointing out the very low thresholds that trigger the rejection of requests for information that is listed under the grounds for refusal. For example, the Bill mostly speaks of ‘information likely to cause,’ or ‘constitutes’ or ‘reasonably expected to.’ This is different from the Model Law that uses varying, but absolute references such as information that causes ‘substantial prejudice’ or ‘substantial harm to ...’ The language used in the current Bill means that an information officer may easily deny a request for information based on untested and unreliable suspicions that may or may not happen.

4.3 Appeal Mechanism

The Memorandum of the Bill makes mention of an internal appeals procedure. An internal appeal is understood as an appeal initiated by a requester of information and heard internally within the entity that has refused to grant access to requested information. The preliminary summary/ description of Section 38 also makes reference to internal appeal procedures, but the actual body of the Bill, including Section 38, does not mention any internal appeal procedures. Instead, Sections 35 and 38 imply that appeals are directed to the Zimbabwe Media Commission. It is not clear whether the Bill’s silence on internal appeal procedures is intentional or is the result of an omission or a drafting error.

The preliminary part of the Bill refers to the ability to appeal against decisions made by the Commission at the High Court. According to Section 38 (5) (b) of the Bill, when refusing to grant access to information, the Commission must give notice which informs the applicant or the third party that they may appeal to the High Court against the (Commission’s) decision on appeal within 30 days of the date of the decision and the procedure for lodging the appeal.

There is no further information in the Bill about whether appeals to the High Court are of a civil or criminal nature. There is no additional information about what powers the High Court will have when handling such appeals. It is recommended that the issues relating to internal appeals and the involvement of the High Court

¹⁸ Section 27 of the Bill

¹⁹ Section 37(2) of the Model Law

in deciding appeals be clarified and better drafted to minimise confusion about the extent of the appeal procedure.

MISA Zimbabwe recommends that the appeal procedure start as an internal process. Internal appeal procedures are cheaper on the applicant and will likely be handled at a faster pace than procedures sent to either the Commission or the High Court. The Commission and the High Court must also be involved in the appeals process. The Commission will provide oversight on how entities handle information requests. Decisions of the High Court in appeals against denial of access to requested information are likely to enrich the understanding on the right to access to information, as well as how that right is exercised in Zimbabwe.

Another confusing aspect of this Bill is the reference to the Zimbabwe Human Rights Commission in the Memorandum of the Bill. Reference is also made in the preliminary part of the Bill to the Zimbabwe Human Rights Commission receiving annual reports from public entities setting out the number of information requests received and dealt with.

However, the definitions part of the Bill states that the word ‘Commission’ refers to the Zimbabwe Media Commission, including for purposes of hearing appeals against the refusal of information requests and overseeing the enjoyment and protection of the right to access information in terms of this law.

An applicant, whose request for information is refused may lodge an appeal with the Secretary of the Zimbabwe Media Commission in terms of Section 35 of the Bill. This appeal must be sent or delivered to the Commission within 30 days of receiving notice that the request for information was denied. The Secretary of the Commission has a discretion to condone appeals submitted more than 30 days after the notice of a denial is received. If the Secretary does not accept late submissions, the Secretary must give notice of this refusal.

A third party may also lodge an appeal with the Commission in relation to information relating to the third party. The appeal must identify the subject of the appeal and state the reasons for the appeal and may include any other relevant information known to the appellant and if, in addition to a written response, the appellant wishes to be informed of the decision on the appeal in any other manner, provide the necessary details to that effect. An application for appeal is only considered complete upon payment of a prescribed appeal fee – a ruling on the appeal may be deferred until full payment of the prescribed fee²⁰.

Within 10 working days, the information officer who gave the decision appealed against must supply reasons for the decision being challenged to the head of entity responsible for deciding the appeal.

²⁰ Section 36(3) of the Bill

Where the appeal involves information relating to a third party, the head of appeal must give notice and allow for representations from the affected third parties in terms of Section 37 of the Bill. This notice must be given within 10 working days of receiving the appeal from the applicant.

The Commission must make a final decision within 30 days of the lodging of the appeal²¹. The Commission may confirm the decision being appealed against or substitute a new decision for it. If the appeal decision is to grant a request for access, the notice shall state that access shall be granted after the expiry of 30 days of the date of the notice if no appeal is lodged against such decision within that period²².

This effectively means that an appeal process can prolong access to information by a period of 60 days.

Where the appeal is against refusal to access information necessary to safeguard the life or liberty of a person, the Commission must come up with expedited procedures for hearing and finalising such appeals. This is in terms of Section 36(5) of the Bill.

In terms of Section 38 (6) of the Bill, if the Commission fails to give notice of the decision on an appeal to the appellant within 30 days of receiving the appeal, it shall be deemed to have determined the appeal in favour of the appellant.

The ZMC is tasked with the promotion of the access to information principles embodied in this law. This responsibility includes monitoring the implementation of this law and ways in which entities can improve their access to information regimes. Additionally, the ZMC must include statistics on information requests in its annual reports to Parliament.

4.4 Offences under this Act

The Bill, unlike is the case with the Model Law, fails to establish any offences. Section 39 of the Bill states that no criminal or civil liability shall attach to any person with respect to anything done or omitted to be done in good faith and without gross negligence in the exercise or performance or purported exercise or performance of any function in terms of this law.

On the other hand, the Model Law contains the following offences: refusal to accept a request; failure to respond to request within stipulated time frame; vexatious denial of request; giving incorrect, incomplete

²¹ Section 38(3)(a) of the Bill

²² Section 38(5)(d) of the Bill

or misleading information; and obstructing the release of information. These are important provisions that ensure that there is no abuse of office and minimise the arbitrary denial of requested information.

5. Recommendations

The Bill makes marginal improvements to the current access to information regime under AIPPA and other various sectoral laws. However, a lot of work still needs to be done before the Bill matches the standards set in Section 62 of the Zimbabwe Constitution as well as in the Model Law. A few areas might require consideration to improve on the quality of the Bill and its enforcement.

The Bill has no specific provisions in terms of the minimum requirements for information officers. While this might be governed by each public or private entity in respect of the skills set, it might be prudent to have some very generic minimums that such individuals should possess.

The fact that the Zimbabwe Media Commission has a duty to “ensure that the people of Zimbabwe have fair and wide access to information,” does not justify making this Commission the guardian of the right to access information in Zimbabwe. The Bill’s Memorandum rightly states the Zimbabwe Human Rights Commission as the guardian of human rights in Zimbabwe, including the right to access information. Therefore, the ZHRC should be the Commission that is responsible for the monitoring and enforcement of this Bill.

Sections 243(1) (a) – (d) of the Constitution sets out the functions and duties of the ZHRC. These duties are already wide enough to cater for the protection and promotion of the right to access information as set out in this Bill. There will therefore, be no need to amend the Zimbabwe Human Rights Commission Act or grant any extra duties to the ZHRC in order for it to monitor the promotion and enjoyment of the right to access information in terms of this law.

It will only be necessary to ensure that the ZHRC is well resourced in terms of funding and is equipped for this work through the appointment of commissioners that have knowledge on access to information laws and processes.

Voluntary disclosure has over the years not worked with public bodies, let alone private bodies. There is need to reconsider this approach and put in place mechanisms that promote proactive disclosure of information from public bodies.

The discretionary powers of information officers must be prescribed and guided according to the constitutional principles on the right to access information. The period of deferment under Section 11 (2)

(c) needs to be specified or at least to be consistent with the timelines for responses to information request. The information officer is currently given power to determine that period, which might create arbitrage.

MISA Zimbabwe recommends that the Bill only repeal those parts of AIPPA that relate to access to information. As it stands, Section 41 of the Bill seeks to repeal AIPPA in its entirety; this will mean that there will be gaps in terms of legislation that regulates the protection of personal information and privacy in Zimbabwe.