

The Draft African Charter on the Values and Principles of Public Service and the Administration in Africa: New opportunity for Access to Information in Africa?

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Nearly a decade after the adoption of the *Charter for the Public Service in Africa*,² a Draft African Charter on the Values and Principles of Public Service and the Administration in Africa (Draft Charter) is set to be considered and adopted as a fully binding treaty by the forthcoming summit of the Assembly of Head of States the African Union.³ This paper argues that the key objectives of the Draft Charter such as efficiency and effectiveness, transparency, improvement of quality and citizen participation in the provision of public services, is best achieved through the existence of an enforceable right to access to information held by the public services in Member States. Drawing inspiration from the access to information regime in South Africa, it argues that the access to information provisions in the Draft Charter must be completely overhauled, to do away with the pervasive culture of secrecy in public services in Africa.

Introduction

The transformation of the Organisation of African Unity (OAU) to the African Union (AU) at the beginning of the 21st Century⁴ brought with it a commitment to ‘promote democratic principles and institutions, popular participation and good governance’.⁵ The need for the realisation of these key democratic principles have since been echoed in subsequently adopted normative frameworks such as the *African Convention on Preventing and Combating Corruption*⁶ as well as the *African Charter on Democracy, Elections and Governance*.⁷ Notably, both instruments include in their principles and objectives, ‘the promotion of transparency, accountability and the effective participation of citizens in public affairs’.⁸

Inherent to the fulfilment of the need for accountability, transparency and popular participation in governance, is the existence of avenues for the free flow of information between public bodies and the people they exist to serve. In essence, one of the hallmarks of a truly democratic society is a culture of openness in which the government places utmost importance in making itself amenable to public scrutiny of its activities at all times, by actively making available information on the functioning of every aspect of its governance machinery.⁹

Information is power: without access to regular, accurate and timely information on the plans, activities and intended endeavours of public bodies, citizens are utterly powerless to influence decisions on the provision of basic services that affect every aspect of their lives. Conversely, information from citizens on the performance of public bodies in the exercise of their duties, better

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² This Charter was adopted by the third Pan-African Conference of Civil Service Ministers, which took place from 5-6 February 2001 in Windhoek, Namibia.

³ The 15th Ordinary Session of the African Union Summit is scheduled to place from 19 to 27 July 2010 in Kampala, Uganda.

⁴ The Constitutive Act of the African Union, which replaced the Charter of the OAU, was adopted in Lome, Togo on 11 July 2000 and entered into force on 26 May 2001. The inaugural meeting of the AU was held in Durban, South Africa in July 2002.

⁵ Article 3(g) Constitutive Act of the African Union.

⁶ Adopted 11 July 2003 and entered into force 5 August 2006.

⁷ Adopted 30 January 2007, but yet to come into force. See in particular

⁸ See articles 2(5) and 3(3) of the Corruption Convention and articles 3(7), 3(8) and 12 (1) of the Democracy Charter.

interestingly, Article 9 of the Corruption Convention obliges States Parties to adopt “legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.”

⁹ Relly, J. E and Sabharwal M. ‘Perceptions of transparency of government policy making: A cross-national Study’ (2009) 26 *Government Information Quarterly*, 148 – 157.

enables them to adjust their plans and policies to suit the specific needs of different sections of the population and prioritise the provision of services to the most vulnerable in society.

Access to information held by public bodies thus allows citizens to go beyond the veil of secrecy which often conceals the decision-making process of public authorities and play a part in ensuring that public officials allocate and use national resources equitably and fairly and to participate in the formulation and implementation of policies which directly affect them.

Access to Information under the Draft Charter

Article 6 of the Draft Charter purportedly provides for access to information in the public service. However, these provisions do not provide a right of access to information, requiring only that States parties:

1. Make available the necessary information on procedures and formalities relating to the provision of public service.
2. Inform citizens of any decision taken concerning them, reasons for such decision and stating the legal remedies open to them to challenge the decision.
3. Establish or strengthen reception and information units for users to assist them in gaining access to services and in recording their views, suggestions and complaints.
4. Ensure documents intended for users are drafted in simple, accessible language.

These provisions appear to be an attempt to merely create the enabling environment to build good relations between public bodies and the people by: creating awareness about the services they render; notification of administrative decisions and processes; encouraging feedback on the adequacy of services rendered and making their operations more user-friendly. No reference whatsoever is made to procedures for citizens to make requests to and actually access information in the possession of public bodies.

Furthermore, article 11(4) requires public service employees to ‘respect the confidentiality of documents, information, acts in their possession or to which they were privy by virtue of their duties’. This provision could be used to defend the secrecy laws throughout Africa (highlighted below) which severely restrict provision of access to information by public officers. If left in place, this provision risks reinforcing the culture of secrecy which ought to be corrected by the introduction of a much needed access to information regime in public services across Africa through the Draft Charter.

The Public Service and Access to information in Africa

On 19 June 2009, twelve Council of Europe member states signed the world’s first binding international instrument guaranteeing the right of access to official documents held by public bodies.¹⁰ The Convention *inter alia* affirms that all ‘official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests.’¹¹ Similarly, *The Declaration of Principles on Freedom of Expression in Africa*¹² (‘the Declaration of Principles’) adopted by the African Commission on Human and Peoples’ Rights (ACHPR) in 2003 declares that ‘public bodies hold information not for themselves but as custodians of the public good and everyone has access to this information, subject only to clearly defined rules established by law’.¹³

¹⁰ The full text of the Convention is available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>>.

¹¹ *The Council of Europe Convention on Access to Official Documents* also notably declares that the exercise of a right to access official documents fosters the integrity, efficiency, effectiveness and accountability of public bodies, thereby affirming their legitimacy.

¹² The Declaration which supplements and further elaborates on article 9 of the African Charter, was adopted at the 32nd Ordinary Session of the ACHPR from 17 to 23 October 2003 in Banjul, The Gambia. Full text available at <http://www.achpr.org/english/resolutions/resolution122_en.htm>.

¹³ Principle IV(1).

However, the reality in Africa is that access to information held by public bodies is the exception rather than the norm. In some countries, the swearing of an oath of secrecy by a public officer prior to the assumption of office not to directly or indirectly disclose any information acquired in the exercise of official duties, is a constitutional obligation.¹⁴

The infamous Official Secrets Acts of the British colonial era often remain on statute books in the Commonwealth states, as well as other laws providing for secrecy in matters such as security and defence, in some cases further toughened by post-colonial governments; similar laws remain in place in the civil law countries. These laws often prescribe severe criminal penalties for the unauthorised disclosure of 'secret' or classified' information by public officers.¹⁵ The vague and broad formulation of these laws result in almost all information held by public bodies capable of being regarded by a public official as 'secret' or 'confidential'.¹⁶ Moreover, these laws create a presumption that any disclosure of information by a public official is unauthorised irrespective of the intention behind such disclosure, such that public officials are forced to err on the side of caution by routinely withholding all information, however trivial.¹⁷

In contrast, the Declaration of Principles adopted by the African Commission requires Member States to 'amend secrecy laws as is necessary to comply with access to information'. The Declaration further provides in respect of access to information that:

2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

¹⁴ For example, by Section 286 (7) of the Constitution of Ghana 1992 the President, Vice President, Members of Parliament, Ministers, Head of Ministry or Government Department, Head of Public Corporations must swear the Oath of Secrecy in the second schedule of the Constitution which reads:

I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall come to my knowledge in the discharge of my official duties except as may be required for the discharge of my official duties or as may be specifically permitted by law .

In Nigeria, an Oath of Office with identical wordings are required to be sworn by the President and Vice-President, Governors and Deputy-Governors, Ministers and Special Advisers. See the seventh schedule to the Constitution of Nigeria 1999.

¹⁵ Such laws are predominant in former British Colonies across Southern, East and West Africa. See for example the Nigeria Official Secrets Act 1962, the Ghana Official Secrets Act 1911, The Lesotho Official Secrets Act 1967, the Swaziland Official Secrets Act 19 1968, the Uganda Official Secret Act 1964 and the Kenya Official Secrets Act 1968.

¹⁶ Sections 3 (1) (c) of the Kenya Official Secrets Act 1968 and Section 3(c) the Botswana National Secrets Act 1986 state: Any person who, for any purpose prejudicial to the safety or interests of the Republic obtains, collects, records, publishes or communicates in whatever manner to any other person any code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, shall be guilty of an offence.

¹⁷ Section 16 of the Kenya Official Secrets Act 1968 for examples states that:

For the avoidance of doubt, it is hereby declared proof of lawful, that the burden of proving lawful authority or excuse shall be upon the person alleging it, and accordingly in any proceedings for the prosecution for an offence under this Act, it shall **not** be incumbent on the Prosecution to prove the lack of such authority or excuse.

However, as the Declaration is not binding, Member States have largely ignored these provisions. Uganda,¹⁸ Zimbabwe,¹⁹ Ethiopia²⁰ and Angola²¹ have enacted legislation complying in varying degrees. Others like Nigeria,²² Ghana²³ and Tanzania²⁴ remain engaged in drawn out and as yet unsuccessful battles to adopt such laws; and some, like Sierra Leone²⁵ and Rwanda,²⁶ have draft laws at various stages of the legislative process. In the midst of this, South Africa remains the shining light in terms of the strength of its access to information legislation.²⁷

The Promotion of Access to Information Act of South Africa

The ushering in of democracy in South Africa in 1994, brought with it the adoption of a Constitution widely believed to be one of the most progressive in the world. The Constitution of South Africa guarantees the right of access to information not merely as a corollary to the right of freedom of expression as is the case with most Constitutions in Africa,²⁸ but as a right in itself and the required that Parliament enact a law to give effect to this right within three years of its coming into force.²⁹

Considered to be one of the most progressive access to information legislations in the world, the *Promotion of Access to Information Act (PAIA)*³⁰ *inter alia* aims to promote transparency, accountability and effective governance of all private and public bodies, by allowing everyone to effectively scrutinise, and participate in, decision-making by public bodies that affect their rights.³¹ Key features of the PAIA which comply with the Declaration and are recommended for inclusion in access to information in the Draft Charter are as follows:

¹⁸ The Zimbabwe Access to Information and Protection of Privacy Act 2002 and the Angola Access to Administrative Documents

¹⁹ The Access to Information Act 2005.

²⁰ The Mass Media and Freedom of Information Proclamation 2008.

²¹ The Angola Access to Administrative Documents Act 2003.

²² The Ghanaian Freedom of Information Bill was drafted in 2002 and remained pending in parliament until 2010 when it was re-introduced to Parliament.

²³ The Nigerian Freedom of Information Bill was first introduced to the lower house of Parliament in 1999 and then re-introduced to the same house in 2003 following legislative elections. Following its adoption by both houses of Parliament, the then President, Olusegun Obasanjo failed to sign it into law.

²⁴ The Tanzania Freedom of Information Act 2006 was to the public for comment in October 2006. However, there seems to have been no substantial progress towards its adoption almost four years later.

²⁵ The Sierra Leone Right to Access Information Bill was drafted by civil society organisation and forwarded to the Parliament for consideration in 2008.

²⁶ The Rwandan Draft Access to Information Bill 2009 was published for public comment last year and due to be presented before Parliament.

²⁷ This however not to suggest that the legislation is without any flaws whatsoever or that its implementation has been without major obstacles. It is merely an indication that generally, its provisions uphold the basic principles in relation to access to information. For criticism and problems of implementation of the PAIA, generally, See Dale McKinley, *The State of Access to Information in South Africa*, 2003, < www.csvr.org.za/wits/papers/papmckin.htm >; 'Justice Initiative Access to Information Monitoring Tool: Report from a Five Country Pilot Study' 2003, September 2004, p.18; 'Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries', September 2006, Available at < http://www.soros.org/initiatives/justice/focus/foi/articles_publications/publications/transparency_20060928/transparency_20060928.pdf > and *South Africa: Political Participation and Democracy*, AfriMAP and Open Society Foundation for South Africa, 2006, pp.68-71. Available at < http://www.afriMAP.org/english/images/report/AfriMAP_SAPolPart_Full.pdf >

²⁸ The exceptions are Constitution of Malawi (section 37) and Constitution of Uganda (Section 41) which provide the right to access information from public bodies as a separate right from freedom of expression. Section 29 (5) of the Constitution of Ethiopia also provides for 'access to information of public interest'. Section 52 of the Harmonised Draft Constitution of Kenya 2009 also provides for the access to information.

²⁹ Section 32 of the South African Constitution provides:

- (1) everyone has the right of access to –
 - (a) any information held by the State; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation may be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State.

³⁰ Enacted in February 2000 and came into force in March 2001.

³¹ Section 9 (e) (iii) of the PAIA.

- (a) The Act applies to information held by both public³² and private bodies. However, to be applicable to private bodies, the information must be specifically required for the exercise or protection of any right.

The definition of public bodies is broad enough to make the PAIA applicable to any institution whatsoever, as long as it performs any public functions. This is significant, as there is a tendency for institutions created by virtue of the Constitution or legislation (i.e. not directly by the executive arm of government) to often assume an air of independence and in so doing, operate under the erroneous belief that they unlike the government and its departments are not directly accountable to the people.

In addition, the extension of the scope of application of the Act to private bodies, is an acknowledgement of present realities that public bodies often contract the provision of basic services to private bodies. It is therefore an attempt to ensure that in such situations, private bodies are likewise directly subject to the requirement of transparency and accountability to those communities or persons.

- (b) The PAIA designates the head of national or provincial department, municipality or other public body as its Information officer, who is responsible for the implementation of the provisions of the Act and mandates the further designation of as many deputy information officers 'as are necessary to render the public body as accessible as reasonably possible for requesters of its records'.³³ Such a provision is to be preferred to the arbitrary creation of information units which only obtain information from citizens without allowing them access to specific information that may be critical to their enjoyment of services.
- (c) The PAIA encourages proactive disclosure of information by requiring public bodies through their information officers to submit periodically or at least once a year, a list of the categories of information routinely available for public disclosure to the relevant Minister. The Minister is then required to publish such list in the government gazette.³⁴ This provision rightly seeks to make proactive disclosure of information to the public the rule and the need to request for access to information by the public, the exception.
- (d) While the Act contains several categories of information that are exempted from disclosure,³⁵ these exemptions are not absolute, as an information officer must allow access to requested information where it would reveal a substantial contravention of a law or Imminent and serious public safety or environmental risk. Most importantly, all exemptions are subject to the 'public interest test' i.e. access is mandatory where the public interest in the providing access outweighs the harm contemplated by the exemption in question.³⁶ Thus, the mere fact that any information falls within one of the above exemptions to the application of the Act does not automatically trump a request for such information, in that a public body which

³² A public body is defined as

- (a) Any department of State or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) Any other functionary or institution when-
- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation

³³ Section 17 of the PAIA..

³⁴ Section 15 of the PAIA.

³⁵ See sections 34 to 40. The exemptions include the protection of: privacy of a third party who is a natural person, commercial information of a third party, confidential information of a third party, safety of individuals and the protection of property, law enforcement and legal proceedings, privileged records in legal proceedings, defence, security and international relations and the economic interests and financial welfare of the State and the commercial activities of public bodies

³⁶ Section 46 of the PAIA.

rejects a request for information on grounds that it is exempted, will be compelled to disprove the existence of a public interest override that may be alleged.

- (d) Refusal of access to requested information by an information officer is not final. The refusal is subject first to an internal appeal³⁷ and then to an appeal to a court of law.³⁸
- (e) Where a person who by reason of being illiterate or with disability is unable to request for access to information in the prescribed form, the request can be made orally, which must then be reduced into writing by the information officer.³⁹

Conclusion

While the inclusion of a section on access to information in the Draft Charter is a welcome development, the provisions contained therein bear no semblance to the core principles of access to information i.e. transparency, accountability and popular participation in the decision-making process, which are indispensable elements of a public service that is responsive to the needs of the people.

Recognising however, that the progressive provisions of the South African PAIA highlighted above may prove too drastic a proposition, giving the pervasive and long-standing culture of secrecy in public service in Africa and thus unacceptable to most Member States, the following provisions below are suggested as a replacement for Article 6 of the Draft Charter.

1. The administration shall adopt legislative and other measures guaranteeing the rights of citizens and users, to access information held by the public service subject only to clearly defined exemptions established by law which serve a legitimate interest and are necessary in a democratic society;
2. The administration shall ensure that any refusal of access to information by the public service shall be subject to appeal to an independent body and/or the courts;
3. The administration shall amend any laws authorising secrecy within the public service, where they exist, to encourage the proactive disclosure of information of significant public interest by the public service, even in the absence of a request by citizens or users;
4. No public service employee shall be subject to any sanction for releasing in good faith information on wrongdoing capable of undermining transparency and accountability in the provision of public services and overall socio-economic development or that which would disclose a serious threat to public health, public safety or the environment;
5. Nothing in these provisions shall affect any laws already in force in any Member State that are more conducive to the realisation of the right to access information held by the public service in that Member State.

Thus, it is hoped that a reframing of the access to information provisions of the Draft Charter in line with the Declaration of Principles on Freedom of Expression and best practices on the continent and beyond, will improve access to information held by public bodies in Member States. For without this, no meaningful progress can be made towards the attainment of the African Union's stated commitment to transparency, accountability and citizen participation in public affairs and the overall improvement of public services on the continent.

³⁷ Sections 74 to 77.

³⁸ Section 78 to 82.

³⁹ Section 18.