BILL WATCH 40/2019

[30th July 2019]

The Freedom of Information Bill

On Friday 5th July the Freedom of Information Bill was published in the *Gazette*; it is available on the Veritas website *[Link]*. It is the first of three Bills the Government intends to present in Parliament to replace the much-criticised Access to Information and Protection of Privacy Act [AIPPA]. In fact the Bill has little to do with freedom of expression and deals almost entirely with access to information, which is guaranteed by section 62 of the Constitution; clause 3 of the Bill even states that its objective is "to give effect to the right of access to information in accordance with the Constitution". It would be more appropriately called the "Access to Information Bill".

What the Constitution has to say on Access to Information

Under section 62 of the Constitution:

Zimbabwean citizens and permanent residents have a right of access to information held by State institutions, in the interests of public accountability (section 62(1))

Everyone has a right of access to information held by anyone else, if the information is needed for the exercise or protection of a right (section 62(2))

These rights of access may be restricted in the interests of defence, public security or professional confidentiality so long as the restriction is fair, reasonable, necessary and justifiable in a free and open democratic society (section 62(4)).

Contents of Bill

Scope of Bill

The Bill is concerned with access to information held by three types of official entity, namely "public entities", "public commercial entities" and "holders of statutory offices". Broadly these comprise government Ministries and Departments, parastatals, State-owned companies, local authorities, and officials such as the Registrar-General *[For convenience, in this Bill Watch we shall refer to these entities collectively as "public bodies"]*.

The Bill does not concern itself with access to information held by non-governmental bodies such as companies and medical aid societies – which may hold a great deal of information about members of the public.

Requests for information

A large part of the Bill – Part III, consisting of 12 clauses – is devoted to requests for information held by public bodies and what those bodies must do when they receive them. Requests will have to be in writing and public bodies will be obliged to respond to them – i.e. to provide or refuse to provide the requested information – "as soon as is reasonably possible" and in any event within 21 days, though requests concerning a person's life or liberty will have to

receive a response within 48 hours. If an applicant receives no response within the requisite period, or any extension of it, the application will be deemed to have been refused applicant can then appeal to the Zimbabwe Media Commission under Part VI of the Bill.

Refusal to provide information

An almost equally large part of the Bill – Part IV – is devoted to grounds on which access to information may be refused. Although the Part is long it is not as restrictive as it may seem at first sight:

First, the grounds listed in Part IV for refusing access to information are generally reasonable: they range from non-disclosure of personal and confidential information about individuals, through non-disclosure of trade secrets and other proprietary commercial information, to non-disclosure of information likely to prejudice defence and State security.

Secondly, clause 20 states that entities cannot refuse to supply information except on the grounds listed in this Part. This is not quite true, because clause 6 will prevent disclosure of Cabinet deliberations and certain court proceedings, while clause 15 will allow public bodies to refuse access to health records; neither of these clauses is contained in Part IV. But at least public entities will not have a general discretion to refuse to supply requested information, which they have under section 9(4)(c) of AIPPA.

Although the Bill is not clear on the point, it seems that a public body will not be able to refuse to supply information on the ground that the applicant does not have a constitutional right to it: for example, that an applicant who seeks information in the interests of public accountability is not a citizen or permanent resident of Zimbabwe. Indeed, the Bill does not require an applicant to establish his or her right to information when requesting access to it. This is a welcome extension of the public's right to be informed, and may help promote a culture of openness in government.

Third parties

Under Part V of the Bill, a public body that receives a request for information about a third party will have to notify the party about the request if the information is such that the request could be refused on a ground set out in Part IV of the Bill. A third party will have seven days to consent to the disclosure of the information or to make representations as to why the request should be refused, and then the public body must pay due regard to their representations when deciding whether to grant or refuse the request.

Appeals

Persons whose requests for information have been refused will have a right of appeal to the Zimbabwe Media Commission, and third parties will have a similar right if public bodies decide to grant requests despite their representations. It is doubtful if the Commission is the right body to hear such appeals because requests for information may, and often will, be made by persons who are not media practitioners. The Commission's decision on an appeal will be final – i.e. there will be no further appeal – though the decision may be reviewed by the

High Court and set aside if it is procedurally flawed.

Evaluation of the Bill

Good points about the Bill

The provisions of the Bill are certainly better than those of AIPPA which the Bill will replace, and will give members of the public greater access to information held by public bodies:

More information will be accessible than is the case with AIPPA: for example parliamentary papers and information in the National Archives are excluded from the provisions of AIPPA but will be accessible under the Bill. The Bill may indeed have gone too far in this regard, as we shall point out later.

Foreigners will be allowed access to information; this is currently denied them by section 5(3) of AIPPA.

The time-limits within which public bodies must respond to requests for information will be shorter under the Bill (30 days as opposed to 60 days under AIPPA) and the Bill emphasises that responses should be given earlier if reasonably possible.

It must also be said in the Bill's favour that it will repeal AIPPA – that is a welcome step in itself – but the repeal may be premature as we shall indicate below.

Problems, limitations and drawbacks

While the Bill is a step in the right direction, it is only a limited step and some of its provisions will need rewording and refining:

The Bill is concerned with access to information rather than with freedom of expression so its title is a bit misleading: as suggested above it should be called "the Access to Information Bill".

It is not clear to what extent the Bill will permit access to information held by private bodies, which may hold a great deal of information of legitimate interest to the public. Part III of the Bill deals only with access to information held by public bodies, not private ones, but clauses 22 and 24 set out circumstances in which private entities can refuse to allow access to their information.

There is no provision requiring public bodies to publish information pro-actively, beyond a vague statement in clause 5 that public bodies must have written "information disclosure policies". Clause 19 says that the Bill will not prevent or discourage public bodies from publishing information, but it does not encourage or compel them to do so. The Bill should put public bodies under an obligation to make information of general public interest automatically available in the interest of transparent and accountable government.

The Bill imposes duties of disclosure on "holders of statutory office" but does not define what that term means. It would certainly cover the Registrar-General, for example, but it may not cover constitutional office-holders such as the Commissioner-General of Police, the Commander of the Defence Forces and the Auditor-General.

While public bodies should not have a general discretion to refuse access to information, as they have under AIPPA, nonetheless the grounds on which the Bill allows access to be refused should be extended – for example:

ZIMSEC should not be obliged to disclose answers to exam questions *[This is covered in the First Schedule to AIPPA]*

There should be no disclosure of information about court proceedings which the court has ordered should not be disclosed *[clause 6(b) makes this provision only in relation to victim-friendly courts]*.

On the other hand, clause 6(a), which allows the non-disclosure of "the deliberations or functions of the Cabinet and its committees" is too wide: the functions of Cabinet and its committees are a matter of legitimate public interest. And even information on the deliberations of Cabinet should be disclosed after the lapse of a certain time.

Public bodies which receive requests for information that they do not have should be required to transfer the requests to another public body which does have the information, and the person requesting the information should be informed accordingly.

Clause 26, which allows public bodies to refuse access to privileged information, seems to have been drafted on the assumption that medical doctors can legally refuse to disclose information about their patients, i.e. that the information is protected by professional privilege. That is not so: under our common law professional privilege covers only lawyers in relation to information given to them by their clients, and a similar privilege has been extended to journalists by section 61(2) of the Constitution.

Clause 8(5) of the Bill states that any information provided under the Bill is "presumed to be true and accurate in every respect". This suggests that public bodies and officials cannot lie or even be mistaken – a startling proposition in Zimbabwe.

The Bill makes no provision for an appeal against decisions of the Zimbabwe Media Commission under the Bill. If the Commission is the right body to hear appeals under the Bill – and that's a big if – then there should be a further appeal to a court, perhaps the Administrative Court. Alternatively the Bill should set up an independent body such as the South African Information Regulator, which is empowered to monitor and enforce compliance by public and private bodies with that country's Promotion of Access to Information Act and Protection of Personal Information Act.

The repeal of AIPPA, while welcome, may be premature because AIPPA deals with more than just access to information: it also regulates the collection of information by public bodies and the protection of that information against misuse. AIPPA should not be repealed before new legislation is enacted to replace those provisions.

Conclusion

The Bill obviously needs a great deal of refinement and further consideration, and hopefully it will receive the necessary consideration as it progresses

through Parliament. In its present form it is a step towards open government, though rather a short one. Open government depends more on the attitude of government officials than it does on legislation, and until there is a change in our official culture of secrecy there will be no real progress towards the goal described in our Constitution, namely: "a democratic society based on openness … and freedom".