The Department of Journalism and Media Studies and the Institute for Multi-Party Democracy hosted a Freedom of Information Conference at Rhodes University earlier in the year. In this special focus, sponsored by the Friedrich Ebert Stiftung, Review highlights the proceedings.

FREEDOM OF INFORMATION MATTERS

GUY BERGER
Head of Department, Journalism & Media Studies

A perverse logic emerged at the Freedom of Information Conference: entirely unexpected arose the refrains: we can't utilise a freedom of info dispensation, so why have it? We can hardly cover the courts or parliament - how do you expect us to use an Open Democracy Act?

There were also those who not merely spurned Thabo Mbeki's gift horse, but - having scrutinised its teeth - proclaimed it to be a Trojan steed! Ken Owen and Nigel Bruce warned that by defining and legislating the exemptions to freedom of information, an Open Democracy Act could produce more - rather than fewer - restrictions on information. A genuine fear, but one which may be allayed by the prospect of a genuine independent appeal mechanism whether exemptions are broadly or narrowly defined.

Other reservations at the conference came from the state security apparatuses. Most explicit here were Correctional Services, who stressed that information about prisons would be supplied, in line with the present constitution, only to those with a need (as opposed to a general right) to the data. This position served to underline a key weakness in the interim constitution, and the need to amend it and bring it into line with the kind of rights proposed for the Open Democracy Act.

Somewhat more forthcoming about information disclosure were the state communication apparatuses: libraries, archives, SA Communication Services, RDP office. Also supporting freedom of information were top people from public broadcasting, Ivy Matsepe-Casaburri and Govan Reddy, as well as academics and lawyers.

But the grouping most in favour was the politicians: Thabo Mbeki, Valli Moosa and Frene Ginwala. Certainly an unusual situation, given the natural penchant of people in power for secrecy and information manipulation.

This reversal of classic roles is clearly the (transient) product of our peculiar history. Whether because of, or despite, such a genesis, there is no doubt that an Open Democracy Act will signify a fundamental change in the balance of power between citizen and state.

This is the "vertical" dimension of freedom of information legislation. There is also the "horizontal" - concerning openness, transparency and privacy between citizen and citizen.

Drawing from both dimensions, South Africa could be in for across the board openness. This is not to forget that – as many at the conference stressed – the real impact of freedom of information depends not on law, but on public awareness, comprehension and use of such a dispensation.

For decades, our state has controlled information in society. Today, the tables are turning: we have the chance to control information in the state. It is a shift of epochal proportions.

Who wants freedom of information? I do.

Thabo Mbeki

Openness is a focal point

THABO MBEKI
Deputy President

The government used to be a closed book that did not want to part with information and, indeed, in some instances was as closed to those outside of government as to those inside the government.

It was inevitable therefore that once we had to deal with replacing an apartheid constitution, openness would become a focal point.

Indeed, even the documents that one gets from government - like our treasurer who circulates a document once a month which lists the telephone calls that have been made from our office - come in a file marked "Secret". It's part of where we come from.

It has also resulted in somewhat of a presumption, which perhaps is correct, that this government - like all other governments - is guilty until proven innocent; that government is in some way inherently evil, liable to corruption, tempted to repression; that there is something about government, about which all of us should be suspicious, and therefore that we need a Freedom of Information Act in order to protect ourselves from violation of our rights by the government and to deal with the abuse of power and corruption and so on.

Yes, indeed, we do need to do all of those things. And it is important that this should be done particularly given our history. But I think we also need to say something else.

We also need to say, certainly from the government side, that we need to build a democratic system which ensures the greatest possible participation of the people. When you say, the people shall govern, you need to empower the people so that they do indeed govern. The opening of government, the ensuring of the accessibility of government information to the citizen, should in the first instance be to empower the public to participate in governing themselves and changing their society.

So if I live in the rural areas of the Eastern Cape and I need water, it should be possible to go to government and say: "Can I have information about water resources in this area - the water underground - how much would it cost if we sank a borehole and laid a pipe and took water to village X?" Access to information means that I, as a citizen of Eastern Cape, can then come to my local authority or to my provincial government and say: "Why are we not doing the following things?". It is very im-portant, very critical, this matter of empowerment of the people to intervene.

My colleague, Cyril Ramaphosa, chairperson of the Constitutional Assembly, addressed a meeting about a fortnight ago on the constitution-making process. He said that it is very important that the general public participate in this constitution-making process, make submissions and write and come and speak. People responded: "We have not been empowered to intervene in this discussion about the constitution. The fact that it is possible, that we must write and so on, is not enough. You should say in more detail, what it is a constitution will take, what it is that you will be discussing".

The empowerment of the people is necessary so that they can participate in the process of changing their lives. Freedom of information by itself - good, solid, acceptable to all the people - does not necessarily solve the problem.

What clearly becomes important is that the government itself, should assume a proactive stance in terms of informing the people. The government itself, seeking as it does the involvement of people in these processes of change, should take the necessary steps to make government information available to the people. A posture, a stance on the part of government, becomes necessary.

SOUND BITE

Look at your press freedom in a global perspective. In 1994, there were over 1 500 attacks on the press in nearly 110 countries. This included 120 journalists killed in 30 countries, close to 30 kidnapped or disappeared, nearly 260 journalists and media employees physically attacked, and over 300 arrested.

Scott Low, President International Federation of Newspaper Publishers

That raises the issue of the role of the media. Once this legislation is passed, it's going to be very important that media informs the public, educates the public about such legislation, gives such information as will enable the ordinary citizens to utilise this legislation. The legislation should not just be a matter which is known to lawyers and editors, but to an ordinary person who may indeed be interested in a file of themselves from the security branch, but also may very well be interested in how to access money for the education of their child in high school.

Clearly government has to use its own structures, its own mechanisms and its own media to ensure that its information becomes available. We also count on the media, apart from anything else that the media does, to assist in that process of communicating to the public. Millions of people in the rural areas have no access to information. Ought we not to be looking at ensuring that we do indeed reach the entirety of our people and not be satisfied that our media, both governmental and non-governmental, in large measure reaches the urban areas? We need to address the issue of people who are badly educated, uneducated, illiterate, because it is probably they who need the greatest possible access to information in the process of empowerment, because they are precisely the most disadvantaged.

There are other issues to discuss:

• One question relates to limitations in terms of access to information. This is something that could be discussed forever. What is this balance that we need to strike between the demands of openness and the needs of good governance? This has no obvious answers, but it is something that we need to grapple with because it is a matter which has to be addressed in this legislation.

It certainly is my view that we should tend towards more openness rather than restrictiveness - that in weighing this particular balance, we should tilt in that particular direction. When one gets used to secrecy, sometimes judgment becomes impaired in terms of understanding what it is that should be secret. If we get into a mood, a certain frame of mind, it becomes possible indeed to classify all manner of things as secret which should not be secret.

• Another question is the constitution. The question arises as to whether you can by legislation move beyond what is contained in the constitution in terms of this openness, in terms of this access to information. The constitution limits the right of access to some people, some individuals, some institutions in terms of access to information. Whether one can in fact extend the rights set out in the constitution is one of the matters to be discussed.

• A further question is the matter of cost. I am not saying that because it's costly, therefore don't do it. Everything costs money - democracy costs money. But there is an actual constraint with regard to public funds and it may very well not be possible with the legislation approved to do certain things that all of us would like to do simply because there is no money.

I'm raising this matter now so that it ought not to arise in future as though government agreed to such legislation, because the constitution required it to pass such legislation, but is dragging its feet on implementation because it never wanted such legislation in the first instance.

Budget constraints affect the capacity of the government to deliver the sorts of changes which our people deserve. Desire is there, capacity does not quite match desire.

The fear of the public, the hiding of the truth of the past, was a function of an oppressive society. It ought to be a natural thing that a democratic society should seek to be open and non-secretive and that we produce legislation which would reinforce that kind of character.

Government must go beyond the past

MOJANKU GUMBI
Legal Advisor to the Deputy President

While we recognise that this freedom of information movement is informed in the first instance by our immediate past, we should go beyond that.

Democracy should not depend on the benign nature of the rulers that we have. We must ensure that there are structures and laws that make sure that this democratic ideal is properly grounded in our society.

These are the principles that drive freedom of information legislation. An informed citizenry is vital to the functioning of a democratic society, and it is needed to check against corruption and to hold the government responsible. But while there is some openness in this government, is there participation? That is one of the major challenges that we identified as the Task Group on FOI legislation. To say: while parliament is open, while the committees are open, while the Constitutional Assembly is open, is there participation by the majority of our people?

Even while you open up, people don't usually just come forward because they have not been empowered.

Forum discussion during the conference

When we travel around the country asking for submissions on open democracy most of our people say: "Oh, can you give us that information that you are talking about?".

Most people don't even know what this freedom of information is, and we need first to explain what it is before we can expect them to make submissions on how they want this act to look.

We have said that this freedom of information legislation should encompass four main sections. The first one on Freedom of Information, the second on Privacy, another on Open Meetings and the last one on the Protection of Whistleblowers.

Our proposals go on to suggest very definite pro-active mechanisms. We suggest ways in which our people can have access to information without having to ask the government to provide it.

We have gone further to propose the establishment of an open democracy commission which is going to oversee an education process, and which is also going to act as some kind of, what Americans call, a clearing house.

We know that constitutional bodies that were set up by our new constitution, like the Human Rights Commission, and the Public Protector, are still not up and running. If we propose the establishment of another commission, is this feasible? How soon can it be up and running when those set out by the constitution are not yet up and running?

We also need to look at the role that the South African Communication Services play. What is the future of SACS? Should it play this role of the Open Democracy Commission?

One of the more contentious issues is the scope of this act. Should it include private entities especially in regard to the privacy section? How many institutions hold private data banks on us? There was a recent furore over the SABC sending people TV licence renewal notices, using private data from other sources to send these reminders.

How many times are we required to give our home addresses, home telephones, banks? Do we have any control over that information? When we talk about private institutions, we should look at the role that these private institutions play. While we are not questioning the decision of financial institutions to refuse a person a loan, shouldn't the individual know the factual basis upon which that decision was taken? Shouldn't people know what information an institution holds about them and whether the information is correct or incorrect?

We have proposed the inclusion of whistleblower provisions in this Act. Our document states that the rights of a person to blow-the-whistle are limited. That person is not entitled to go out and just inform the media generally about what is happening. We have proposed that the whistle be blown to specific institutions like the Human Rights' Commission or the Public Protector or some other commissions.

Is it desirable in an open society that we should actually limit the right of officials to blow the whistle? What about those institutions that they are supposed to report to? Are those independent of the government or are they also part of the government?

Can we entrust the duty to them or should it be open to the media?

From the American experience

HARRY HAMMITT
Editor and Publisher of Access Reports USA

Mr Hammit responded via teleconference to questions:

Q: This conference has called unsuccessfully on the police to prove an adherence to transparency by releasing a tape recording. The item reportedly reveals serious racism in the force. Under the US Freedom of Information legislation, would a citizen or a journalist be able to get the police to release such a recording?

A: Our government might consider that an invasion of privacy, but I think that under the circumstances you're explaining to me, there would be a strong public interest in disclosure. We now have a standard in the US that the public interest might outweigh privacy in such cases.

Q: Would you advise South Africans to include a Deliberative Process Exemption or not?

A: I have a very strong opposition to the Deliberative Process Privilege in general. A Deliberative Process Privilege essentially allows for the candid discussion of possible policy options and alternatives - how to strategise on certain issues that may face an agency - and that information comes under this privilege.

We don't want people to have to pull their punches because they are afraid that somebody else may find out what they said and embarrass them some way, or harass them. That, broadly, is what the privilege is designed to protect.

The problem with the privilege that we see in the US is that it is a very highly abused exemption. It is used to withhold any sort of information that an agency doesn't want released because it is embarrassing in nature. Our Supreme Court has said that the core purpose of the Freedom of Information Act is to shed light on government operations and activities. It seems to me that the decision making that goes on in an agency is the core of that sort of process. Our Deliberative Process Exemption allows agencies to withhold much of that information.

The Clinton administration has basically told agencies: "You have to show a demonstrable harm in order to claim something like the Deliberative Process Privilege". This is their way of trying to get agencies to back off of abusing the Deliberative Process Privilege quite so much. My advice would be not to have a deliberative process exemption at all.

Q: What kinds of people in the US are getting access to information under freedom of information legislation?

A: The largest user is the business community. They are looking for information from regulatory agencies on the decisions that they've made that might affect their industry or their company. They are also looking for information about their fellow competitors, but I think it is unfair to characterise the requesters as requesting trade secrets of other companies.

Other than that, a lot of requests in the US come from prisoners, and the rest of them from specific interest groups. The press claims it doesn't use the Freedom of Information Act very much because it takes too long to get a response - they don't find it terribly useful for people who are on a deadline.

Q: How would you have drawn up US legislation if you had a chance now?

A: On the federal level in the US we took the route that we would let our courts be the arbiters of how exemptions would be interpreted. I admire this federal model of having only a few, relatively broad based, exemptions as opposed States that may have dozens of more specific exemptions.

I would always tie release to a harm, and basically require the agency to provide a fairly high standard of proof that shows that this harm is extremely likely. I would not generally allow agencies to get off the hook saying that: 'Well this might happen if we release this information'. Everybody can deal in possibilities, but what you really need is to have something that is a fairly strong probability. Exemptions do need to be tied into some sort of a harm test and an agency has to keep the threshold of that test before they can say we won't disclose the information.

Q: There are said to be so many requests in the US that there are backlogs amounting to more than twenty thousand requests.

SOUND BITE

Look at other countries' norms and standards, at the mistakes that were made, and how - despite legal guarantees - limitations and restrictions have continued in one form or another. Any new Freedom of Information Act should start out as broad as possible.

Scott Low, President International Federation of Newspaper Publishers

A: When Congress amended the Freedom of Information Act, and put a time limit on it of ten working days which is essentially two weeks, they didn't really do very much deep thinking. Over the years it has turned out that the complexity and the volume of requests are significantly greater than Congress anticipated in 1974. It is certainly true that many agencies, including law enforcement, intelligence agencies and the state department can't meet deadlines in the US. They don't have the money and they don't have the staff.

But if you increase the time limit significantly you are just going to see the lag increase that much. When people ask me how long requests take in the US I say a minimum of a month and probably closer to three to six months.

Q: If you were given the opportunity to rewrite the US Freedom of Information legislation what would you write into or out of it?

A: The Act needs updating. Our problem on the federal level is that what constitutes a record is not actually defined in the Act. So we have spent an awful lot of time litigating what constitutes a record and what isn't a record. Some states, New York comes to mind, have taken a very broad, but specific, definition of what a record is, and computer records and other sorts of electronic media are considered, right up front, to be a record.

As far as our Act is concerned, I might have put a more reasonable time limit in to begin with. Perhaps we also need to figure out some fair way to distribute resources in terms of money to agencies to comply with the Freedom of Information Act.

Freedom of Information in the US has not been anywhere near as expensive as people have led us to believe in the past. In addition, our government never quantifies what the savings are from the Freedom of Information Act. If somebody finds out, or asks why, the government has been cheated out of $10-million, then that can be looked at as a ten million dollar savings out of the Freedom of Information Act, if we can recover that money.

The US spent some $80-million dollars responding to freedom of information requests, while at the same time paying for public relations specialists in the agencies something in the order of two billion dollars. The way I translate that is that the government was spending two billion dollars to tell the public what the government wanted the public to know while it was only spending $80 million dollars on letting the public know what it wanted to know.

Q: How much does it cost a citizen to exercise their rights under this legislation?

SOUND BITE

There will be exemptions preventing certain company information from being published, but these have to be defined very narrowly. Firstly, secrecy needs to be in the public interest, rather than the government interest or in the private interest. Secondly, exemptions must not shield companies from providing information to workers on a confidential basis.

Neil Coleman, Spokesperson for COSATU

A: To make a request doesn't cost anything.A lot of the Commonwealth countries charge something like $5 per request. That is not a concept we have in the US. The charges on the federal level in the US can be incurred in having to pay government for the time that it spends for photocopying. So we have the concept of Search-time in which you get two hours of free Search-time and then you have to pay at a certain level per hour. It can be anywhere from about $15 an hour to about $50 or $60 an hour, depending on how high up in the agency the person doing the searching is. You also pay about 10 cents a page if your response takes more than 100 pages.

We have one more concept that applies only to people who are using the Act for commercial purposes, and that is called Review-time. It can be costed out at about the same rate as I described for Search-time and it varies in different professional categories. Review-time involves looking at the records that are relevant to your requests; deciding what should be released and what can't be released. My anecdotal evidence is that Review-time is not used too often in the US. Basically we are charged for Search-time and photocopying. Bills will come in at a couple of hundred of dollars, sometimes in the thousands of dollars if they are asking for an awful lot of documents. Most people probably don't actually pay anything for a typical request.

Q: We've been warned by the Deputy-President of South Africa, that his government hopes to pass the legislation but they may not have the money to deliver on it. We've been warned by the Press that the legislation might exist but they don't have enough staff to make use of it. We have also been warned that the majority of South Africans are too economically deprived or illiterate, to make use of a Freedom of Information Act. Should we bother, in South Africa, with pushing ahead with this kind of legislation?

A: I don't think that any of those are particularly legitimate rea-

sons for not going ahead. My advice would be to go ahead. Freedom of information legislation is an extremely important part of the whole concept of constitutional rights that we have in the US as far as participatory democracy, and the right of a free press and free speech goes.

If one has no way of finding out anything about the government, or what the government has done, it is very difficult to be able to engage in an informed debate on what's going on. Lack of money and resources is certainly a problem, but that's a problem in implementing any programme.

SOUND BITE

It is very important to start as broad and open as possible – there is no need to put restrictions into the act. Don't worry about it: Acts will follow that will bring the necessary restrictions, wether you put them in or not. But it is better to start out with as broad an Act as possible.

Ali Rahnema Director of the Press Freedom Fund Fiej

10 lessons in the public interest

M. PEARLMAN
Executive Director, Connecticut FOI Commission

The rationale behind Freedom of Information and so-called "Government in the Sunshine" laws is perhaps best expressed in what was to be the preamble to the Connecticut Freedom of Information Act, as first passed in 1975:

"The legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy, that the people have a right to be fully informed of the action taken by public agencies in order that they may retain control over the instruments they have created; that the people do not yield their sovereignty to the agencies which serve them; that the people in delegating authority do not give their public servants the right to decide what is good for them to know and that it is the intent of the law that actions taken by public agencies be taken openly and their deliberations be conducted openly and that the record of all public agencies be open to the public except in those instances where a superior public interest requires confidentiality."

What important lessons can we take from American history that might serve well the people of a new South Africa? Key points that need be stressed are:

1. Knowledge and the accountability of government are essential ingredients to a true democracy. Therefore meaningful Freedom of Information and free press laws must be enacted.

2. For Freedom of Information laws to be meaningful, they must confer broad rights of public access to information; they must contain limited and narrowly drawn exceptions to the rule favouring disclosure; and they must establish an independent and powerful enforcement mechanism. It is highly desirable that such laws be constitutionally predicated.

For example, Section 1-19(a) of the Connecticut General Statutes provides: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to inspect such records promptly ... or to receive a copy of such records."

Similarly, Section 1-21(a) of the same statutes provides: "The meetings of all public agencies, except executive sessions as defined ..., shall be open to the public."

Different north American jurisdictions have different types of independent enforcement offices. Connecticut employs a multi-member, quasi-judicial administrative agency; Ontario has a single information/privacy commissioner with both investigatory and order-issuing powers; and the Canadian national government has opted for separate information and privacy commissioners with ombudsman-like investigatory and reporting powers.

3. Because it is often important to know the reasons behind the adoption or rejection of governmental decisions, Freedom of Information laws must cover the deliberative and meeting processes within government.

4. Freedom of Information laws must cover all levels of government. Most citizen contact with government occurs at the local level. Although regional and national governments are ordinarily more remote from people's everyday lives, they nonetheless often involve higher stakes, such as national security interests or the potential for massive invasions of privacy.

5. It is essential that both Freedom of Information and free press laws broadly cover all police institutions. Such institutions are the greatest threats to a democratic form of government.

6. Because societal values are dynamic rather than static, the basic values at play in Freedom of Information and free press laws must be clearly established.

These laws should strive to achieve an appropriate balance between competing values such as accountability versus national security interests or individual privacy rights.

Notwithstanding the best drafting, however, tensions between competing values will always remain and must be addressed periodically.

7. Governments disseminate information they believe the public ought to know. The duty of government to disseminate information must not be confused with, or take precedence over, the duty of government to disclose information requested by members of the public and news media under Freedom of Information and free press laws.

8. No law should define what the news media are, and the media should not enjoy greater rights under law than ordinary citizens.

9. Freedom of Information laws are not the exclusive province of the news media. They affect the public's right to know - a right the media also serve as the public's surrogate.

10. Constant vigilance is essential to maintaining effective Freedom in Information and free press laws. The very nature of information as a source of power will ensure that public officials and government bureaucracies will always gnaw away at such laws and their implementation.

Periodic scandals would, of course, be helpful in re-establishing the importance of these laws. In the absence of really juicy ones, however, the lessons of history must be taught and re-learned perpetually.

SOUND BITE

Workers believe that they have the right to access to information on strategic decisions such as investment decisions, decisions on new technology and so on which could have a fundamental impact on areas such as job creation and productivity. These demands by trade unions for disclosure of company information are seen as an integral part of democratisation of the workplace.

Neil Coleman, Spokesperson for COSATU

From the African experience

GEOFF NYAROTA
Nordic-Sadc Journalism Centre

South Africa has a long tradition of independent, critical and investigative journalism and a government which appears to be sincerely committed to respecting democratic institutions and freedom of information.

This should go a long way towards saving South Africa's citizens from enduring some of the more traumatic post-independence experiences of their neighbours in the region where one-party authoritarian regimes reduced professional journalism to the systematic regurgitation of ministerial speeches, punctuated by the writing of adulatory and sycophantic editorial comments.

But South Africa's learning process will not be an automatic or natural process. There has to be, of necessity, a conscious and deliberate effort on the part of both the people and their government to undergo that learning process.

I remember Zimbabweans, in the starry-eyed euphoria of independence, expressing similar optimism about their political, economic and social future. The new and popularly-elected government of Mr Robert Mugabe would surely avoid some of the more obvious mistakes made by Dr Kenneth Kaunda of Zambia, Mr Julius Nyerere of Tanzania and the late Mr Samora Machel of Mozambique.

But history was to prove both Zimbabwean and outside political observers wrong. In due course, some Zimbabweans started to question some of governments policies and practices and some of the more blatant excesses. Government turned against them.

In a situation where governments had a monopoly of control over the media it was fairly easy to ruin the reputation of a perceived government adversary.

At the moment the government of Mr Nelson Mandela is riding on a wave of massive popularity and can afford to be very charitable in terms of freedom of information. Political fortunes change, however, and when the same government discerns signs of unpopularity its attitude will change accordingly.

In Zambia the government of Mr Frederick Chiluba's Movement for Multi-party Democracy (MMD) ascended to power largely because of a campaign launched on its behalf by *The Weekly Post*, the first independent publication in Zambia to come out openly and challenge Dr Kaunda and his United National Independence Party (UNIP).

Under the new MMD government *The Post* maintained its strict adherence to fearless, critical and independent journalism. It published allegations of corruption , particularly drug dealing, in the higher echelons of Mr Chiluba's government.

Today Fred M'membe the managing director and editor-in-chief of *The Post* is a haunted man. As he was attending the annual congress of the Media Institute of Southern Africa in Mbabane last November, his office in Lusaka was raided by police agents in broad daylight, thus publicly and effectively signalling the end of the marriage between his paper and the ruling party.

In Malawi the opposite happened. The fall from power of former dictator, Dr Hastings Kamuzu Banda, was to a large extent the outcome of a ruthless campaign mounted against his Malawi Congress Party by the country's fledgling independent press in the run-up to last May's general elections.

The new president, Mr Bakili Muluzi, was extremely grateful to the independent press, thereafter. So indebted does he feel, in fact, that he is virtually killing off the country's once vibrant independent press by his acts of gratitude.

To start with, Mr Al Osman, former publisher and editor of the *Financial Post*, Malawi's first independent newspaper, is now press secretary at Sanjika Palace, the president's official residence in Blantyre. The *Financial Post* is no more.

Mr Precious Stambuli, former publisher and editor of the fiery independent paper, *The Herald*, is now economic adviser to Mr Muluzi and his paper is also now defunct.

Meanwhile, Dr Ken Lipenga, one of Malawi's media luminaries, last month left his position as editor-in-chief of the country's most respected daily newspaper, *The Nation*, and joined what appears to be the great trek to Sanjika.

The implications of all this movement of senior journalists on the democratic right of the citizens of Malawi to freedom of information are obvious. One does not need to be a maths wizard to figure out that their right to freedom of information is being eroded by inverse proportion to the growing number of professional and experienced journalists assuming high office at Sanjika Palace.

Frene Ginwala

Going beyond open doors and windows

FRENE GINWALA
South African Parliamentary Speaker

For decades, South Africa has been characterised by formal and informal censorship and the restriction and control of information.

To this day, every communication I receive from the Cabinet office is marked SECRET, notwithstanding that it might deal with such strategic matters as rules on whether an MP's allocation of air tickets which can be used by spouses can also be used for a child.

The constitutional requirement for an open and transparent government, does not mean that no future government will be able to infringe our rights. But in discussion and in framing legislation, the right to freedom of information should not be based on an assumption of a confrontation with the state, nor as some reports of this conference have suggested as a contest between the media and the government.

By focusing on the rights of the citizenry, i.e. the general public, we ensure that all obstacles to the free flow of information are held up for examination as a prelude to being removed.

But also, issues such as concentration of the ownership and control of media in both government and private hands, the advisability of allowing cross ownership of electronic and print media, and the need to open up the air waves have to be considered, if not at this conference, then certainly within the broader debate on freedom of information.

Further, if freedom of information is defined broadly, as necessary for democracy and development and empowering, then one cannot limit access to information that is in the hands of the state alone.

Many private bodies take decisions that have a profound impact on public policy and on people's lives. Such institutions must also be obliged to provide information in the public interest. This would include for example the content of medicines and the likely side effects, the risks in inappropriate disposal of hazardous waste or its transport, the possible harmful effects of certain pesticides and so on.

In Parliament we have looked at freedom of information in the context of its relevance to an open society and to facilitate transparency and accountability.

Documents made available to committees are also made available to the media. On at least one occasion, this was done notwithstanding an objection from those who had provided a briefing to the committee. Following a request, the members attendance register was opened.

Clearly we have not thought of everything, but whenever our attention is drawn or a request made, we try to be open. However, I must assure you that when last week's ANC caucus proceedings were broadcast over the parliamentary monitors, it was not a case of an over-zealous Speaker trying to make even more information available!

In our view all this is not enough and does not constitute access except in the narrowest sense. If the focus is on reaching out to the public - as it is in parliament - then we have to go beyond opening doors and windows.

Section 23 is "seriously flawed"

LENE JOHANNESSEN
Centre for Applied Legal Studies

South Africa has a constitutionally entrenched right of (limited) access to state information in Section 23 of the Interim Constitution.

Section 23 applies to the extent that such information is required for the exercise or protection of one's rights. The scope of this is undoubtedly "vertical", in that it expressly applies to only the state and not to private bodies.

Section 23 is seriously flawed. It puts the onus on a requester to justify the need for such information. This does not comply with the rationales for an Open Democracy Act, and it

leaves too much scope for civil servants to delay and/or refuse disclosure.

However, even if Section 23 is amended, an Open Democracy Act is still required. In order that the courts not be swamped, statutory measures should be taken. These would assist the courts, prosecutors and defence lawyers in limiting and implementing a right of access.

In addition, in order to fully reflect democratic and transparent rationales, an Open Democracy Act should cover information held by all bodies exercising public power and not only organs of state. Open democracy legislation should thus extend the right of access to information slightly beyond the limits of the strictly vertical application of Section 23.

For instance, not only Eskom, but also a private company providing electricity would be under an obligation to disclose plans for which areas it was planning to service first.

The Task Group has provided for a limited "horizontal" application of an Open Democracy Act. This means that a very wide range of bodies, whose activities have implications for the public sphere, should fall under the Act. School boards, hospitals and tribal meetings and many more like these would fall within the act, to the extent that their activities can be considered as a way of exercising public powers.

Information of a private or confidential commercial nature should be exempt from the general right of access. This means that a state-owned or private company which competes commercially would never be compelled to reveal confidential commercial information which would damage their business interests.

Likewise, a hospital or a school board would never be compelled to reveal information regarding an individual patient or pupil, but only that which relates to the general policies of the institution and which has implications for the public.

Law won't alter secrecy culture

CARMEL RICKARD
Journalist,
Sunday Times

Section 23 of the bill of rights makes access to information a qualified right. The problem lies chiefly with the last phrase which says that you are only entitled to information if you need it for a particular purpose.

The Open Democracy Act which the Task Group hopes will follow from their proposals makes your reason for wanting the information no longer decisive or even relevant to whether you will get it or not.

Despite its importance, however, legislation alone cannot change the culture of secrecy and mistrust towards the public and the media so long inculcated in civil servants. Bureaucrats of the old order are still burdened with these instincts. And they have a powerful additional reason to prefer silence despite any changes to the law: they fear their jobs, already under threat by affirmative action, could be lost altogether if they say something their new bosses disapprove of.

The new laws appear to deal mainly with information which requires some research by government before it can be provided. But there are also questions which need immediate answers and from a live person, not a fax machine.

The media would be impossibly hampered if bureaucrats tried to deal with requests for this type of information through the structures set up by the proposed new legislation. A more flexible, informal and faster system of providing information will have to coexist with the proposed new structures under the Open Democracy Act.

Existing media liason or PR staff of some state departments do not operate perfectly, and we are given to unintelligible, faxed, late answers which do not answer the question. There is as much need to improve this channel of access to government information as there is to set up methods of obtaining other kinds of information.

Getting the local evidence

CLIVE PLASKET
Director, Legal Resources Centre, Grahamstown

During 1992 the Grahamstown City Council retrenched four senior officials, gave them handsome payments totalling R2,3-million and then rehired them on five-year contracts.

The scheme was later rescinded, due primarily to it being made public and the outcry that followed. The outcry increased when it was learnt that as 'compensation' for rescinding the scheme, three of the officials were paid R65 000.

The whole saga also drew the attention of the media, resulting in the mayor and all of the councillors instituting claims for defamation against two newspapers and a news agency. These actions were withdrawn shortly before an application, brought by one of the defendants, for access to certain council documents was to be heard.

The controversy still rages and there are plans to appoint a commission of enquiry. At least one individual wants a Supreme Court order to compel the council to recover the R65 000.

Obviously, in all of this, crucial evidence is to be found in minutes of the council.

Every municipality in what was formerly the Cape draws its powers from the Cape Municipal Ordinance 20 of 1974. Section 55(6) gives the public a right to inspect confirmed council minutes. But, under section 55(3)(a), this is not the case with minutes which the council decides should be kept separately.

Under the Interim Constitution's section 23, an applicant could challenge this on the basis of a breach of his or her right to information. The onus would be on the council to prove that section 55(3) is reasonable and 'justifiable in an open and democratic society based on freedom and equality', as the constitution requires.

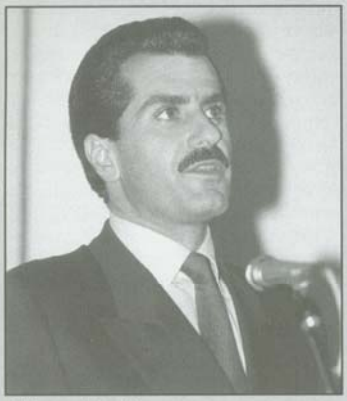
This means proving that the objective which section 55(3) is designed to serve is sufficiently important to override a constitutionally protected right. The council would have to bona fide believe that disclosure would prejudice the municipality. How on earth would disclosure of the retrenchment and rehiring scheme or the R65 000 'compensation' deal be prejudicial to the municipality?

In future, however, if the planned expansion of the right to information is promulgated, a ratepayer would simply have to ask for the information, rather than have to argue for it in terms of the exercise or protection of a right.

SOUND BITE

Many government officials forget their duties and responsibilities to the public. In a lot of cases, they treat the information they hold as their private property, not even that of their department. So even if they are supposed to give it to you they are doing you a favour when they do it.

Ali Rahnema
Director, Press Freedom Fund of Fiej



Gebran Tueni

"Words on a page signify nothing"

GEBRAN TUENI
Publisher,
An-Nahar,Lebanon

The American-style conception of a Freedom of Information Act which you in South African are debating does not exist in Lebanon - in fact, or in concept. For an individual even to try to get information from the government is near impossible.

Unfortunately, the three and a half million Lebanese in Lebanon have very little access to government information. They cannot, for example, waltz into a government agency, or a ministry, and ask for anything, whether it's a cup of water or the minutes of a ministerial meeting.

It has been that way for as long as the state has existed, and it will be that way for many more years to come. However, we do have a free press. It is the freest in the Arab world. And it has consistently opposed the government when public matters of vital interest are discussed behind closed doors.

A year ago, mortars were placed in a church organ. They exploded during Sunday service, killing 10 people. The message the terrorists sent was crystal clear. Because the war had been basically sectarian – Muslim against Christian – those who planted the mortars were trying to whip up sectarian tension anew. Everyone saw through this. And the attack on the church was condemned by all the sects within the country.

As reportage increased in the media, the government worried that the murder of church worshippers would result in renewed sectarian tension. A legitimate concern. Their response: they issued a blanket ban of news reporting affecting the audio-visual media. The rationale: what the people don't know won't hurt them.

For half a year, no domestic political reportage was allowed on the airwaves. The government was able to target audio-visual media because all the television and radio stations which had started during the war were technically illegal.

The outcry from journalists in editorials was intense. Daily, we hammered away at the government, reporting what the man on the street thought of the ban, and such intense pressure finally forced the government, with its tail between its legs, to withdraw the ban.

Having won that battle, I should underscore that there are things which we just won't touch. There is clear self-censorship of the media. There is no doubt about that. We set parameters in which we can operate. During the war, it was from illegitimate intimidation by the militias and foreign armies.

Now, after the war, there is de jure freedom, but de facto, things are different. We have to take into consideration that we can be hurt by those who do not like us.

• The first parameter is Israel. A southern slice of Lebanon is still occupied by the Israelis, as it has been since the Israeli invasion of 1982. And we will not, and do not want to, give comfort to the enemy. If the Israelis, for instance, release prisoners from their concentration camp in southern Lebanon as a goodwill gesture, we are not impressed. We will not applaud them violating international law a little less than they were before.

• The second parameter deals with the other foreign army in our country. There are 40,000 Syrian troops in Lebanon. Considering the size of our army is only 35,000, it's a prodigious figure. Syrian soldiers are in the country at the request of the current Lebanese government, but there is hostility in some circles to their presence. The argument being that no country can be truly free if there are foreign forces. It depends on what school of thought you belong to. Was the Japanese government free during the US occupation following World War Two? They were free to develop democratically, but they were not free to rebuild militarily.

The An-Nahar paper, of which I am general manager, takes a centrist view. We do not seek to antagonise the foreign troops because they are in Lebanon at the request of the government. However, we recognise the enormous pressure they exert and are opposed to it in our editorials and in our articles. There's a fine line between being helped by a friendly power and being subservient to it.

The government can be harsh when they are crossed. My father, Ghassan Tueni, for instance, who was general director of the An-Nahar, was put in prison for revealing the decision of an Arab League conference in Algeria. These decisions were secret but they affected the Arab people, and my father felt the Lebanese people had a right to know what their politicians were deciding about their future.

The government then tried to kill us economically by pressuring advertisers not to advertise with us. They told advertisers that they would give them problems at the port when their goods were being processed, or would cause them problems at their place of business. This scared off advertisers, but only publicly. We received donations to keep the paper afloat, not just from them, but from many people who were opposed to what the government was trying to do. In many issues where advertisements appeared, there would be a black white space indicating the advertisers' solidarity with us.

Not only did the government fail in its bid to silence us, but my father in 1975 was brought into a national unity cabinet consisting of six men in an attempt to end the war.

To conclude, in Lebanon, it is the media which is an intermediary between the government and its people. A Freedom of Information Act does not exist. But a free press does. And it is the free press which informs the public of what the government is doing, on one hand, and, on the other hand, we are the mouthpiece of the man on the street.

Most importantly: one can have the best press laws in the world, but if there is no real democracy and no leaders who believe in that democracy and no people who are willing to fight and die for that freedom, then all that one has are words on a page signifying nothing.

SOUND BITE

Freedom of the press is one of the pillars of democracy, and when the right to know is compromised, so is the very fabric of democracy.

Scott Low, President of FIEJ

"Secrecy makes governance more difficult"

VALLI MOOSA
Deputy Minister
Provincial Affairs

There is a view that governments have a natural tendency towards greater secrecy. The present government, however, is generally of the view that unnecessary secrecy makes governance more difficult, rather than easier. It is in the interest of government, especially during this delicate period, to build the maximum national consensus and co-operation around the policies and programme of the government. Such consensus will not be possible without placing information before relevant role-players and the public in general.

In responding to the legitimate denial of teachers for higher salaries, the government decided to put before the teacher organisations details of the education budget. This exercise was aimed at indicating to the teachers that more money for salaries means less money for textbooks or new classrooms or some other aspect of education. So transparency on the part of government is more than just an act of altruism.

As far as the legislative process is concerned, the new parliament is already practising an unprecedented level of openness. All meetings of all parliamentary committees are open to the press and other observers. The Constitutional Assembly has adopted the same practice. Not only are the theme committees and the central negotiating forum, the Constitutional Committee, open to the public, but also the twelve-person management committee of the Constitutional Assembly.

The only complaint nowadays from parliamentary journalists is that at any one time, there are too many meetings which they are entitled to attend.

I would like to take a brief look at relevant provisions in the interim constitution:

Section 15 states: "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media and the freedom of artistic creativity and scientific research."

"All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion."

Section 23: states: "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

Furthermore, Section 33 states:

33(1) "The rights entrenched in this chapter may be limited by law of general application, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable; and (ii) justifiable in an

open and democratic society based on "freedom and equality;"
and subsection - (b) provides that in addition to being reasonable, such limitation shall also be necessary.

In my view section 92 (1) may also be relevant. It states: "A minister shall be accountable individually both to the President and to Parliament for the administration of the portfolio entrusted to him or her..."

The access to information clause (Section 23) is subject to two limitations: it is limited by the general limitations to all rights outlined in Section 33, but in addition, it has a limitation built into the clause itself. This is indeed a double limitation!

For apart from the fact that limitations which are "reasonable" and "justifiable in an open and democratic society" are provided for, citizens only have the right to such information as is required for the exercise or protection of any of his or her rights.

In my view the limitations are excessive, particularly the limitation in Section 23 which places the onus on the individual to prove that information requested is required for the exercise or protection of any of his or her rights.

As a general premise, the law should only protect government information in order to protect the sovereignty of the state and the safety of its citizens, or where the risk of a breach of national security (which itself needs precise definition) is clearly established or where there would be an unjustifiable invasion of an individual's privacy, or where the release of information could impact negatively on the economy as a whole.

For the purpose of good governance, the general limitation provided for in Section 33 (i) is more than sufficient. The limitation in Section 23 narrows the right of access to information to an extent that should be unacceptable to a society trying to become open and democratic.

I therefore hold the view that the existing right confirmed in the interim Bill of Rights needs to be widened when the Constitutional Assembly finalises the new constitution.

The present right applies only vertically between the citizen and the state. A matter which requires consideration is whether, and to what extent, the right of access to information should apply horizontally between citizens and institutions in the civil society.

Surely, a student who has been refused readmission to Rhodes University this year should have a right to know what factors were taken into account by the university authorities in arriving at such a decision. Surely, trade unions should have a right to certain information from companies in order to enable them to participate meaningfully in bargaining processes.

All this is aimed at deepening democracy.

Openness is a burden for us

FOI

MATHATHA TSEDU
Political Editor, The Sowetan

I don't think that the passage of this legislation, if it is ever going to be passed, is necessarily going to change the ethical demands that are made on media workers. The obligations of right of response or right of reply or those kinds of things, have always been there and will continue to be there. I think that, necessarily, the ethical impact is going to be mainly on civil servants to move away from an ethical denial to an ethical openness. As some kind of policy, the instinctive gut response should change from 'no' to 'yes'.

I am spending some of my time now in parliament, trying to acquaint myself with what has suddenly become my government, not their government. Parliament proper has not even started - the constitutional assembly is the only one that is sitting, and it has six theme committees, and the sixth committee has six sub-theme committees, and they sit every day. The *Sowetan* has two people in parliament. Which of these theme committees do they cover? Which ones do they not cover? Which of these things do we go for, and which do we leave out?

The drama that we are involved in as a newspaper, and as activists in the media for more openness, has actually become a big burden for us and the burden has become all the more serious because the media industry has become the recruiting ground for the new civil service. As the new government realises that communication with its own citizens becomes more important, the only people who can man their communication departments are the people who are manning news desks and other departments in newspapers, radio, and television.

So you are faced with the situation where, for example, at the *Sowetan*, over the past two years, we have lost accumulated experience of about 70 years. When Thami Mazwai went off to *Enterprise* the SABC came and took Joe Thloloe, and they came back again and took Barney Mthomboti, and I was saying to Govan Reddy yesterday: "Who is the next one?" because I don't think he is through with us yet.

If you look at our newsroom today, over 70% of the people have less that two years experience. What does a news editor do with that kind of "green horn" squad? And as that happens you have this situation with parliament opening up, and we are saying we need even more from the government - who is going to handle and cope with this thing? We cannot turn around and say that because we don't have staff to do that, the sources must be closed. I think the sources must remain open. We must deal with the problem that faces us - which is a problem of training. It is an area that I think government also, on the basis of the commitment it makes by coming around to agreeing to enact this kind of legislation, should go as far as ensuring that the mechanisms to indeed utilise this openness are in place.

I am going to end by introducing another lament. All the newspapers of this country today, combined, reach less than 5% of the population. If the *Sowetan* is defined as the largest daily of South Africa, and it reaches at most 1,6 million people, and we have about 40 million people, how do we reach the other people? If we say that government must ensure that information is freely available - then how does the information reach the people? I think it is an element that government must also look at.

The stranglehold that Ken Owen's employers and my employers have on the print media is something that the government needs to address very seriously in trying to empower people who are running small publications in obscure areas, but who are ensuring that those communities are also informed about things that matter to them. They are not able to survive on their own because of the monopolies, because of my employer and Ken's employer.

And it is at that level that government needs to make an impact. Because all we will succeed in doing is ensuring that the privileged few who stay in major cities, and towns, and have access to newspapers, and television, are the ones who become even better informed and better equipped, and at the same time will effectively be discriminating against the poor.

SOUND BITE

The civil service will have to become accustomed to supplying information from any department to whoever asks for it. The new freedoms will also increase the workload, pressure on resources and responsibilities of journalists.

Ed Collis, SA Union of Journalists

How does it actually work in practice?

KEN OWEN
Editor,
Sunday Times

I have, unlike most people, had some experience of using a Freedom of Information Act which I did in the United States.

I once forced them to reclassify all their documents on the arms trade with South Africa. What they did was to reclassify them and give me a couple of useless bits of information, and reconfirm the secrecy of the main product. So I'm a little sceptical about how freedom of information legislation actually works in practice.

There are obstacles to the Freedom of Information Act. I want to make just a couple of points which I think are important.

One is that - when discussing the possibilities of a Freedom of Information Act – we are not talking about freedom of expression. We have that already; it is in the constitution. What we are talking about is the appropriate limitations. So I think we must approach it with very, very great care.

The second point I want to make is that we do have to look at resources. And the third one is - I'll just sound a warning - that we must be careful not to create a new playground for lawyers.

Firstly, a Freedom of Information Act legitimates certain kinds of control. The first thing we're saying when we ask for a Freedom of Information Act is: "Well, we recognise certain kinds of secrecy are necessary." We accept national security as a justification, we accept foreign policy, and then I start worrying about the Vietnam war; Angola; and the fact that the Defence Act is still extant. When we start legitimating secrecy, we're actually beginning to deal with inroads on the freedom of speech. All of these provisions actually start out as being one thing and they end up being another. Even the fact that the Freedom of Information Act designates spokesmen. The police are now nice to deal with because policemen are allowed to talk to you, but I don't want them to designate Craig Kotze as "the spokesman" again.

Secondly, Freedom of Information legislation requires immense resources, and it requires them from government. It requires them particularly from news media, or from individuals who want to use it.

I don't think the story of the destructive effect of apartheid on the South African press has yet been properly told. People who haven't worked in South African newspapers in the last decade or two really can't imagine how bruising, how brutal, how difficult an environment it has been.

I went to *Business Day*, some years ago, with a staff of 73. Within the first couple of days I had 14 resignations on my desk, the Australians were flying them out by the plane load.

The whites have suffered a tremendous loss of cultural confidence, and they are very timid reporters, which is the last thing you want.

Information overload is the way that Americans counter Freedom of Information - they just pour information onto you. Their Freedom of Information Act says that if material has been referred to in publications it is deemed to have been published. But you find that where it has been referred to is in some sub clause, of some piece of paper, that is hidden somewhere, in some archive.

Limitations clauses are inescapable. The Americans who have the first amendment that says congress shall make no law abridging freedom of speech, are constantly abridging the freedom of speech - in times of war, the Pentagon Papers, and all sorts of things. That's a fact of life.

Freedom of Information must be balanced with other rights, and I am in favour of strengthening some of those rights and particularly the right of privacy. This is because I think the press, internationally, is earning itself a loathing and a contempt by drifting further away from its social role and more and more into a very, very sleazy profit-making stance. So I accept that you have to have some balance with rights, but there are a lot of problems there.

The constitution, in my view, is defective because it gives a lower level of protection to Sections 23 and 15 in Section 33 than it does to other rights. It does not always require that restrictions on the freedom of the press must be necessary. In law this an important distinction, it requires just that they must be reasonable and appropriate to a democracy.

Why have they given us a lower level of protection than other rights? I think it is because the constitutional court is preparing the way for legislation against hate speech, and I am suspicious of that kind of legislation because it tends to be used, sooner or later, to silence minorities or weak players.

That leads me to my final point which is the legal terrain in which we are trying to operate now. That is the terrain in which the judges, like the public, actually loathe the media and find them embarrassing, bad mannered and rude.

We are in danger, with a Freedom of Information Act, of creating a nightmare of definitions and exceptions and all kinds of legal loopholes in which we can be trapped badly, and I think, maybe, it is a mistake to rush this legislation.

Police may speak to media but...

REG CREWE
Head, Media
Liaison SAPS

The South African Police Service has committed itself to the principles of transparency and accountability. Consequently, the police shall make available to the media (and other public bodies) the maximum information they can. Explanations will be given when they cannot.

A Police/Media policy was formulated and existed until November 16, 1994 when the Standing Order governing police/media relations was rescinded by the Commissioner of the SA Police. The establishment of a Transparency and Communications Programme was announced and a new SAPS Media Policy is currently being investigated. In this process, the police are not acting unilaterally. All relevant role-players have been invited to participate in the SAPS Media Policy Advisory Committee.

Whilst no final policy document has yet been formulated, the Commissioner has been firm on the following principle: in the interests of transparency, any member of the SA Police may speak to the media. However, no member is compelled to do so. Where a member does speak to the media, the following provisos will apply:

the member will identify himself/herself to the media;

the member will be responsible and accountable for what he/she says.

However, there are factors which may

place a restriction on the furnishing of certain information. For example, information which would threaten or breach a person's right to privacy, the interests of justice, legislation etc.

Whilst the police are not averse to furnishing information in principle, it must be accepted that there are certain kinds of information which, for practical and/or logistical purposes, the police either do not keep or research.

Armscor's three steps to transparency

Y ABBA OMAR
General Manager, Communications, Armscor

Armscor is moving from an organisation which was the epitome of secrecy to one committed to transparency. We are implementing three steps to facilitate this move:

1. Training programme managers to communicate.

2. Achieving a Copernican revolution in the classification of information. In the past, if any task was regarded as sensitive, the entire programme was declared secret. The new approach has turned the old practice on its head. If a task is to be classified it has to be motivated, with the provision of a recurrent review process. This does not mean that the rest of the programme will be classified.

3. Introducing an acquisition bulletin. Although several democracies issue a tender bulletin, South Africa is the only one which has every (yes, every) tender available for public scrutiny on an electronic bulletin board.

I would like to echo the sentiments of Allister Sparks: "If we, as the media claim it is our role to serve the democratic process by keeping the citizenry informed, then we must be true to that role, we must exercise it responsibly and competently."

I don't wish to dwell on the crass reporting we have had over the Helderberg issue. I don't even wish to reflect on the countless other inaccuracies journalists commit about Armscor's business.

Because of this Armscor has become so cautious when it briefs the media, that it virtually spoonfeeds them with information. For example, when announcing the acquisition of a chemicals testing plant recently, not only did we provide detailed verbal presentations, we had notes made for the media. The new plant is vital for SA's observance of the chemical warfare convention (CWC). Its manager explained that they produce minute samples of mustard gas and other toxic agents to help in the non-proliferation of dangerous chemicals.

After the briefing, we returned to our offices thinking the media could not mess this one up. But we were disappointed. A radio news station was the first one to break the story: "Armscor confirms it produced mustard gas."

SOUND BITE

"Will the Freedom of Information Act be the tool of a minority interest if blacks continue to be grossly underrepresented in decision-making positions in the Press? In the exchange of information between Government and the people in this epoch, we want to hear new voices.

Mandla Tyala,,Office of the State President

Prisons unlock information doors

CHRIS OLCKERS
Director, Correctional Services

Section 23 of the Constitution states clearly that every person shall have the right of access to all information held by the State in so far as such information is required for the exercise or protection of his/her rights.

The onus should be on the applicant to indicate the reason/motive for the disclosure of the information, whereafter the onus shifts to the State to indicate why such information should not be disclosed (if need be).

The fact is that the community is entitled to know what is going on in prisons.

In 1992, Section 44 (1)(F) of the Correctional Services Act (Act 8 1959) which prohibited the media from reporting false information on correctional matters was repealed. This, alongside a policy decision to make prisons more accessible to the media and the public, paved the way for ensuring that the public is well informed on prison matters.

During 1994 for instance, the media visited various prisons on 203 occasions while members of the public and other interested groups visited prisons on 603 occasions. In considerating of requests to visit such prisons, the prisoners' rights to privacy are taken into account. In terms of security there will have to be control of access to prisons.

During visits by the media, journalists are allowed to talk to prisoners and report on what prisoners have to say as far as their incarceration conditions and treatment is concerned. Interviews with high-profile criminals for the sake of sensation are not allowed.

The principle of freedom of information is in the interest of healthy administration, accountability and transparency. The impact or magnitude of such an arrangement whereby information may be disclosed should, however, not be so time-consuming that it becomes disruptive.

Furthermore, although personal details of a prisoner's conviction and sentence should be public knowledge, more intimate details such as a prisoner's response to treatment programmes, particulars of his private visitors, etc., should not be disclosed without proper justification and the prisoner's consent.

A prisoner must have access to certain aspects pertaining to his file, for example, parole and/or release profiles.

Persons with vested interests in certain information should have a redress in case of refusals. The idea of a totally independent ombudsman/tribunal to deal with such matters is supported.

SOUND BITE

State information officials and media people should decide for themselves, in a sound ethical way - rather than having an act prescribing for them in detail - what information they will distribute and what form that information will take.

Professor Arrie de Beer, Potchefstroom University

The military leans toward the light but...

GN OPPERMAN
General, SANDF

The SANDF adheres to a principle of minimum required security classification, with a leaning towards rather declassifying than unnecessarily upgrading security classifications.

The military could in due course negotiate with the media the creation of a form of military correspondent system, but in a different form to the one that used to exist in the past. The main function of the proposed system, which will have to be sorted out in consultation with all parties concerned, will be to provide greater continuity and smooth the relationship between the military and the media, by providing a freer flow of information to the public via the media.

If information can safely be released without any detriment to the SANDF, that information should not be denied to a person. The SANDF, however, reserves for itself the right to if necessary request a limitation of these fundamental rights, in terms of Chapter 3, Section 33 of the Constitution.

The right of access to information must be counterbalanced with the right of the State to withhold sensitive information. If divulgence of information would be detrimental to the interests of the State, a limitation should be regarded as justified. A balance must be found between protection and transparency.

It should be emphasized that operational information appears not to be well protected in the Constitution or any other relevant new Act that has been passed. This matter should be more accurately defined and rectified in the coming debate on the Freedom of Information and other relevant Acts. It should thereafter be included as specific exclusions in the Constitution and the revised Defence Act.

Regardless of the formulation of the envisaged Freedom of Information Act, there are other laws still protecting information, like the Archives Act, 1962, and the Protection of Information Act, 1982, which are still in force and prohibit unauthorised access to certain classified information.

The SANDF is willing and tries to be more transparent, but not to the detriment of State security and the defence of the country and its people. A Freedom of Information Act, with the required exclusions stipulated, could well serve to regulate this matter.

This is only a tentative, non-binding point of departure. The SANDF will, in due course, submit its definitive reaction to the Minister of Defence.

SOUND BITE

It has been proposed that freedom of information should extend to the private sector. Certain exemptions have been proposed which relate to a business' operations which impact upon the manner in which it can compete. The South African Chamber of Business (SACOB) would fully support such exemptions.

V W Lacey, Senior Economist, South African Chamber of Business

"A nation uninformed is a nation doomed"

ADRIAAN NORTJE
Deputy Director, SACS

The envisaged Open Democracy Commission (ODC) should utilise the infrastructure and personnel resources of the SACS to assist in administering and managing the Act. The proposed Information Officers could be appointed to the staff of the SACS and then seconded to individual government departments and other relevant bodies.

The Open Democracy Act should be supported by a code of conduct to which all organs of state and office bearers should be bound. This code should form part of a National Information Policy, drafted by the ODC and the SACS after intensive consultation.

PE WESTRA
Director, South African Library, Cape Town

There are 3000 library service points, many linked to computer networks. So the potential of libraries to make available information generated by the government cannot be over-emphasized.

But government departments, agencies and institutions on all levels are often not properly geared to distribute and market their material effectively. Perhaps all government institutions should be required by law to publish regular lists of newly available material and also make provision for their efficient distribution.

MARIE OLIVIER
Acting Director, State Archives

The Archives Act, 1962, stipulates that all records of government departments and local authorities, as well as private collections, in state archives dating up to 31 December 1960 are accessible to the public free of charge.

Archives become automatically accessible in five-yearly cycles. As from 1 January 1996, access will be extended to 31 December 1965. The closed period could possibly be shortened to twenty years, and access could be extended on an annual basis.

Section 9 of the Archives Act provides for the Minister to withhold access to archives on the grounds of public policy.

Removal of a time clause could be extremely costly. Access during a closed period could be applied for by researchers and other users, and automatically be assessed in terms of the provisions and exemptions of freedom of information and privacy pro-

KHULU SIBIYA
Editor, City Press

A sage once said : `A nation uninformed is a nation doomed,' or words to such effect. Nothing could be truer than this. A world uninformed would be a dead world indeed.

Today an epoch-making event taking place in Japan can be made available to millions of people in the world by merely touching a button. Again the democratisation phenomenon sweeping the rest of the world, from the former Soviet Union and her satellites, throughout Asia and Africa is in the main a legacy of access to information.

We in South Africa are painfully aware how tyrants behave in trying to suppress information. In the worst of times, access to information was a criminal act punishable by imprisonment. A plethora of laws such as the Police Act, Prisons Act, Official Secrets Act, Publications Control Act, and many more were cooked up with the main purpose of keeping the overwhelming majority of the population of this country uninformed.

The question today is how can people be empowered to access information, and how can information empower people? These things must be done urgently.

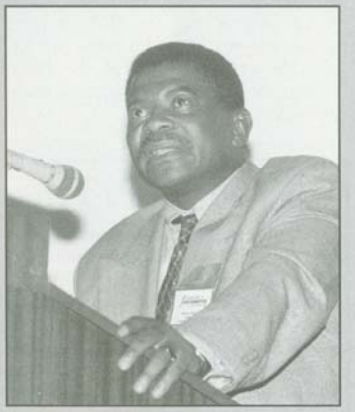
In the first instance, co-operation between government sectors, (major custodians of information), and the public has got to be built. For generations, the culture has been cultivated by officialdom denying access to information by members of the public.

For example, the average South African is not aware that he/she could walk into a courtroom and ask to see the charge sheet. It is a public document, and even in the days of apartheid regimes, it was still defined as such – at least legally.

However, opening up the courts and police stations for the public to peruse the files could bring with it untold logistical problems - much as it is undesirable to legislate against it.

A more effective approach would be to rather encourage a spirit of co-operation between custodians of information (policemen, magistrates, prosecutors, librarians, politicians) and the media.

However, an even more effective approach would be to make it an offence for a custodian of public information to deliberately withhold it from a bona fide representative of the media (and by extension, the public, whose right it is to access information).



Khulu Sibiya

Various organs of civil society need to get more involved in the dissemination of information. They must also guard jealously their right to be informed and put on the pressure when these freedoms are being threatened.

The present structure of the SABC needs to be looked at. The SABC has the potential to be the most effective way of informing the nation. The tragedy for this country would be for the SABC to pander to sectional interests.

Publishers and editors need to look beyond the profit motive and do more groundwork to establish a foundation of the free flow of information they waxed so lyrical about when it was barely legal even to refer to the matter.

Workshops have to be arranged, as a matter of urgency, between the publishers and custodians of information, at a significantly senior level, to map out the way forward – with the ultimate aim being legislation that will ensure an informed nation in which access to information is a right, not a privilege.

Grassroots publications which seem to be dying since the demise of apartheid need to flourish again. There is also a need to look at other – less expensive – ways of informing people. Examples of news dissemination in places like Mozambique need to be considered.

In the South African situation all is not doom and gloom. The Bill of Rights in our interim constitution is a step in the right direction towards making information accessible to the general public unfettered by officialdom. The Bill enshrines freedom of speech and free media. That is well and good. But in its present form it is ill-defined and subject to various limitations.

We also know from experience elsewhere in the world, even in the leading democracies, that politicians as a rule claim to support the freedom of the press. The reality is something else. At best they pay lip service to this.

Against this background, media people must campaign aggressively in conjunction with other organs of civil society to make sure that our constitution is clear and unambiguous on access to information. We have seen recently how a well-meaning government like that of President Mandela can easily infringe upon the rights of people and try to deny them information they are entitled to.

There are no easy answers or easy routes to achieve the objective of making information accessible and empowering to the majority. There are many vested interests that will try to thwart the efforts of those trying to establish networks to make this feasible.

In spite of all these difficulties, if this world is to be a better place for humanity, we will need to have better informed people. We owe it to humanity and its survival.

DR M SCHUTTE
Assistant to the Ombudsman

The Public Protector already has all the powers necessary to effectively serve as an independent forum to try and solve freedom of information complaints.

However, the perception of impartiality will suffer if the Public Protector is perceived to argue against the State in a court, or generally acts like a legal representative will act in the interests of his client. This is not the domain of the classical Ombudsman and could detract from the effectiveness of the Office.

Should the Public Protector be subject to freedom of information legislation? Considerations of personal privacy and the possibility that the proper functioning of the Public Protector could be impeded, should be weighed against the benefit of freedom of information.

The potentially negative results should be very carefully considered before making freedom of information legislation applicable to the Office of the Public Protector.

SOUND BITE

A bill before Congress allows FOIA users to request information in electronic form, via telecommunications, CD-ROM or on disk.

Dr Wendy Simmons,US Information Service

"If the government was a bank, I'd keep my money in a sock"

JEANETTE MINNIE
Freedom of Expression Institute

Civil society should be on the Task Force drawing up the legislation - people who represent rural people, or landless people, or underdeveloped people. These are the kind of people who, if you say, as the Task Force is proposing, they can use the Public Protector's office, will say whether it's workable.

Constituencies who have different interests in this Act are not actually talking to each other. So, for instance, the media and the security constituency are not coming together and thrashing out their concerns. There's no debate and there's no balancing of rights taking place between these constituencies.

SOUND BITE

The battle for transparency and access to information is not for journalists and editors alone to fight. It's a battle which should be waged by the entire civil society together with those in the new government committed to the same values.

Neil Coleman, Spokesperson for COSATU

ALLISTER SPARKS
Institute for the Advancement of Journalism

We journalists claim the right to information on behalf of the pubic. That carries with it a reciprocal obligation for responsible reporting. It is really no secret that our reporting standards are stretched and are declining to perhaps the lowest point I have seen in my 44 years as a journalist.

The newsrooms are very understaffed. They are becoming more and more junior - while the challenges and demands on them are becoming greater and greater all the time.

We are not making adequate use of the courts. Reporters are not getting out into the countryside. Huge areas like Botshabelo with nearly a million people in it, or the old homeland of Qwaqwa with possibly two and a half million people, go uncovered. Northern Transvaal, Eastern Transvaal, North West. Who is covering the parliament of Northern Cape? These are cosmic black holes.

We are demanding access, but we can't even handle what we have. There are serious structural problems within the media that need to be looked at urgently as we demand and claim that we have this public duty to perform in a new democracy.

TIM MODISE
Radio Metro/SABC

What is Abba Omar of Armscor doing at a conference on FOI when a senior Armscor representative spent much of this week telling the Cameron Commission of Inquiry into alleged illegal arm deals that he would like to answer their questions, but he might incriminate himself?

Basically the media are in a similar position to Armscor in that business issues outweigh FOI issues. Advertisers would pull out if, instead of constantly reassuring them that we serve up to them an affluent market, we said no, in the interests of FOI we've expanded into Botshabelo shackland in the OFS and not Sandton because they can get it on 702.

Freedom of information is a concern related to class and comfort. If you are hungry, homeless, without a job, traumatised by political violence, and so on, FOI is an elitist card game.

I would like to see FOI being marketed as a consumer issue. We pay for government, those who work in government are intended to be the servants of the people, and yet what do we get for our investment?

The callers to my show don't know where to register for the October local government elections. Craig Kotze basically barred Minister of Safety and Security Sydney Mufamadi from answering callers' queries for months. Gauteng MEC for Safety and Security, Jessie Duarte, will give information to a group of policemen 24 hours before giving it to the press.

Commissioner George Fivaz secrets away tapes of police broadcasts which were paid for by my taxes. If the government was a bank, I would be keeping my money in a sock under the bed by now. But these are media complaints. Most ordinary people are in a far worse position. They don't have the resources to spend a day tracking down a shifty public official the way the press can.

I'm not sure how much difference FOI laws would make to the media world. A lot of Newsline producers, for example, would be horrified if FOI laws meant that they could tackle a controversial subject, one that would rock the boat. Many journalists would rather hit the canteen for a coffee or the bar for a beer and a chance to moan about obstructive government functionaries than do anything about it.

If we want to fight for FOI, it must be because we believe that it will benefit society, even if society yawns and says "who's got the entertainment pages?". And if we decide to fight for FOI, we must not make the mistake of assuming that beyond a certain level, we can sit back and relax.

An FOI act is useless if:
a) you don't know it exists,
b) you don't know how to use it,
c) you don't know how to make a government official respond to it, or
d) you need a lawyer to use it.

Other changes need to take place before FOI can jump from the paper it's drafted on, to the general political consciousness. RDP is needed - houses, clean water, sewerage, jobs - because people need their material concerns sorted out before worrying about their second-generation or third-generation rights.

Political intolerance and intolerant politicians need to have a stroke and retire to the Wilderness. FOI can't exist in a place like Khumalo Street, Thokoza, where the ANC side take taxis from one end and the Inkatha side don't go through Phola Park, they go through the Natalspruit Hospital.

RAYMOND LOUW
Freedom of Expression Institute

I am distressed that so many journalists and editors are so negative about the proposed Act. One has suggested that its introduction should be postponed; another that it should be dropped.

While I am as concerned as they are about a law defining what portions of state information should be secret, this Act is an advance - and a big advance - on the present position where the state has the power to declare what it likes an "official secret" - and does.

It is up to all of us to ensure that the restrictions in the Act are reduced to the absolute minimum.

The fact that newsrooms are deficient in staffing and skills is no reason to reject a Freedom of Information Act. The answer is to improve the staff skills.

The media are being singularly careless of their freedoms. We are going through a period of "benign" authority now, but it will not last forever.

In the Freedom of Information Act we have an opportunity to grasp the rights that we have aspired to for so long. And we will not readily have another opportunity. Where are the editors of the country's newspapers?

DENE SMUTS
MP,
Democratic Party

The most compelling example of monitoring, lobbying and empowerment around freedom of information occurred on behalf of victims in the public hearings on the Truth Commission Bill.

The Centre for the Study of Violence and Reconciliation gave notice that it would mount a constitutional challenge to the "closed doors" provision on three grounds.

Section 23, the Right to Information, is the first. Not only this section is argued to render secrecy constitutionally suspect, but also 22, access to court; 24, administrative justice and the application and interpretation clauses of the Chapter on Rights.

There is a growing conviction that it cannot be correct or constitutional that a victim should find out after the fact that someone has received political amnesty which they may have wished to contest.

The fact is that it is a distasteful business, letting perpetrators go free. The fact is that it is a terrible thing to extinguish the legal rights of the victims.

It is around the constitutional rights of individual victims, ranged against the political forces who constitute or control the State, that the drama of the right to information is unfolding.

CLIVE EMDON
Director
IMDT

The development of a whole new sector of hundreds of independent and community newspapers, magazines and radio and TV stations is the key way to monitor and network and lobby for free flow of information.

The two media worlds, that of the A & B income reader catered for by the national and provincial press and that of the independent and community press wanting to serve urban and rural people who have little disposable income but a great need for information, need to come together in a coherent plan to develop the new sector of media.

SOUND BITE

The right to access to information should by no means be a privilege of the press alone, but a right granted and guaranteed equally to every citizen.

Scott Low, President, International Federation of Newspaper Publishers