

ACCESS TO INFORMATION IN MALAWI: THE JOURNEY TO DATE AND A QUICK SURVEY OF THE ATI BILL¹ OF 2016²

*Mandala Mambulasa*³

Introduction

Goal 16 of the Sustainable Development Goals seeks to ensure public access to information.⁴ In Malawi, the right to access to information is enshrined in the Constitution but no national legislation supports the right's enforcement.⁵

The struggle for access to information (ATI) in Malawi cannot be complete without mentioning the Media Institute for Southern Africa-Malawi Chapter (MISA-Malawi). After the adoption of the new Malawian Republican Constitution of 1994⁶ (Malawi Constitution) a statute was required to give effect to the right of access to public information entrenched in sections 36 and 37. Nearly ten years since the reintroduction of multiparty politics of government,⁷ no legislative measures were taken to concretise the right of access to public information by the people of Malawi.⁸ MISA-Malawi noted this gap and seized the opportunity around 2003 and spearheaded the campaign for the development of ATI legislation.⁹ It was a media professional body therefore that initiated the original ATI Bill.¹⁰ Likely because of this, most people in Malawi, including politicians, had been expressing sentiments that the ATI Bill was for the media.¹¹ It is not. The ATI Bill may be invoked by every person, legal or juristic, in Malawi.¹² The ATI Bill was subsequently passed on to the Malawi Government.

- 1 **Editor's note:** Just before this publication went to print, the Access to Information Bill discussed in this paper was formally passed in the Malawi parliament on 14 December 2016. Many of the recommendations in this paper were incorporated in the amended version of the Bill which was passed. See "Parliament passes ATI Bill" Malawi Nation (15 December 2016) available at <http://mwntation.com/malawi-parliament-passes-ati-bill/> (last accessed: 15 December 2016). At the time of publication the President has not yet assented to the Bill.
- 2 Paper presented at the Judicial Colloquium entitled Working towards Just, Peaceful and Inclusive Societies, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 8 and 9 January 2016.
- 3 LL.B (Hons)(University of Malawi), LL.M (University of Pretoria); Managing Partner at Mambulasa and Co. Advocates.
- 4 Target 16.10 of Goal 16.
- 5 Constitution of Malawi, section 37.
- 6 Act No. 20 of 1994.
- 7 D Posner "Malawi's New Dawn" (1995) 6(1) *Journal of Democracy* 131.
- 8 The expression, "the people of Malawi" is being used advisedly because the rights and freedoms contained in the Constitution of Malawi are supposed to be enjoyed by all persons who are in Malawi's territory lawfully. See Constitution of Malawi, preamble, sections 4 and 8. However, there are other rights which may only be enjoyed or exercised by Malawi citizens. See Constitution of Malawi, sections 51(1)(a), 63(1)(c), and 80(6)(a).
- 9 There have been different versions of the Bill since then.
- 10 AfriMAP and Open Society Initiative for Southern Africa *Malawi Democracy and Political Participation* (2014) 87.
- 11 See "Fury over government's Information Bill Stance" *Sunday Times* (22 November 2015).
- 12 This is unlike Uganda where the ATI legislation is only used, and the right exercised, by citizens. That is the case because of the manner in which article 41 of the Ugandan Constitution was drafted.

The people of Malawi still do not have a one-stop-shop statute that specifically gives effect to or operationalises the right of access to information contained in the Malawi Constitution. Nevertheless, the right of access to information is provided for in other pieces of legislation and policies.¹³

Many statutes in Malawi dating back to colonial times promote government secrecy and withholding of public information, and yet the information properly belongs to the people. Those who work in the government are merely custodians of the information. This is true even though some information should remain classified due to concerns of national security or other justified reasons for State secrecy. Some of the old statutes are now progressively being reviewed by the Law Commission¹⁴ for conformity with the Malawi Constitution and international law.¹⁵ However, the pace at which the reviews are done is not encouraging. This is somewhat related to staffing levels, funding, and inaction by the executive. The executive has not pushed the many reports containing various good recommendations to be enacted into law.¹⁶ Surprisingly, there are also other pieces of legislation passed after the Malawi Constitution was adopted that criminalise outright disclosure of information to any member of the public and in some cases, criminalise disclosure without consent from some authority even if it is in good faith.¹⁷

There are almost insurmountable hurdles for those persons who try to use the Malawi Constitution or other pieces of legislation to try and access information held by the government. The acts that do provide for some protection of the right to access information do not contain clear procedures on how information may be accessed, what to do in the event of refusal to grant you access by the public body, or the timeframe within which the information holder should provide the information. In addition, they also lack clearly defined oversight mechanisms. These challenges highlight the need for a one-stop-shop statute that comprehensively deals with all these shortfalls. All persons in Malawi should have their fundamental right of access to information protected. Any person who is unable to exercise any right or rights as a result of a refusal can seek the assistance of the courts, the office of the Ombudsman and indeed the Human Rights Commission for the promotion, protection and enforcement of their rights generally.¹⁸

Thirteen years have passed since the start of the campaign for ATI legislation. Questions remain on why there is still no law in place in Malawi. The reasons for this state of affairs are many and varied, but one reason for the delay was the lack of an ATI Policy. Although policy is not required for the

13 See section 52(1) of the Environmental Management Act, Cap.60:02 of the Laws of Malawi. Similarly, in the context of elections, under section 109(f) of the Parliamentary and Presidential Elections Act, No. 31 of 1993, observers have the right to have access to information transmitted by or to the Commission or its officers. See also section 50 of the Monuments and Relics Act, Cap.29:01 of the Laws of Malawi. The Malawi Government also adopted an ATI Policy in 2014 as well as the National Anti-Corruption Strategy in 2008. In its action plan, it clearly provided that Malawi needed to pass the Access to Information legislation if it was going to deal with corruption in the country (section 4.2.1). Nine years later, Malawi has not followed its own recommendation for ATI legislation.

14 The Law Commission is a constitutional body established under Chapter XII, section 132 of the Malawi Constitution as well as the Law Commission Act, Cap. 3:09 of the Laws of Malawi.

15 Section 6(a)(i) of the Law Commission Act, Cap. 3:09 of the Laws of Malawi.

16 For example, there has been no debate or legislation based on the nine year old recommendations of the *Report of the Law Commission on the Review of the Constitution (2007)*.

17 See section 143 of the Police Act (12 of 2010).

18 Constitution of Malawi, section 15(2).

passage of a bill into law and sometimes comes subsequent to the legislation,¹⁹ it was said that the Malawi Government could not even consider tabling the ATI Bill in the National Assembly for debate because there was no policy in place. This argument was not strongly challenged, instead, MISA-Malawi engaged a consultant to develop an ATI Policy.²⁰ Following the consultancy, the Joyce Banda administration adopted the ATI Policy in January of 2014. The long absence of the ATI Policy is one of the reasons why Malawi has a confusing legislative landscape with regards to the right of access to information. Presently, Malawi has some pieces of legislation that hinder the access to information while others support it. With the adoption of the ATI Policy in January 2014, policy direction is now clearly defined and hopefully new legislation in Malawi will better respect the right of access to information.²¹ This would be in line with Goal 16 of the new Sustainable Development Goals (SDGs) as well as the processes of the African Peer Review Mechanism.²² Access to information legislation enhances inclusiveness, participation by the people in their governance, accountability, transparency and openness. It arguably therefore plays a critical role in the creation and recreation of just societies for all.

The Malawi Government finally gazetted the Access to Information Bill on 19 February 2016. The Bill is pending debate in the National Assembly. The aim of this paper is to identify gaps and weaknesses in the 2016 Bill and to make recommendations on how it can be improved before being passed into law.

The Conceptual and Analytical Framework

International Covenant on Civil and Political Rights

The right to access information held by public bodies or authorities is a fundamental human right recognised and protected by international law.²³ Malawi is a State Party to the International Covenant on Civil and Political Rights (ICCPR).²⁴ In 2011 the Human Rights Committee interpreted article 19 as follows:

“Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”²⁵

19 A good example is the Non-Governmental Organisations Act, Cap. 5:05 of the Laws of Malawi. It was enacted without a policy. The NGO policy is currently being developed.

20 This initiative was supported by Open Society Initiative for Southern Africa (OSISA) and other partners.

21 See sections 27 and 32 of the Political Parties Bill (2015).

22 See M Hansungule “Malawi and the African Peer Review Mechanism: A Bold Step towards Good Governance?” (2008) 2 (1) *Malawi Law Journal* 3.

23 See Universal Declaration of Human Rights, article 19; International Covenant on Civil and Political Rights, article 19(2).

24 Malawi ratified the ICCPR on 22 December 1993.

25 Human Rights Committee, General Comment No. 34 (2011) para. 18.

Model Law on Access to Information for Africa

Malawi is also party to the African Charter on Human and Peoples' Rights (ACHPR) which protects the right to access information in article 9.²⁶ The African Commission on Human and Peoples' Rights formulated the Model Law on Access to Information for Africa²⁷ (the Model Law) as a guide for the development, adoption or review of access to information legislation by African States. Even though the Model Law is not a legally binding document, and each State Party is allowed to adapt it to suit its Constitution and the structure of its legal system, the document concludes that States should "ensure that in the process of adopting or reviewing national legislation on access to information, **the principles and objectives of the Model Law are observed to the utmost.**"²⁸

The Model Law gives seven general principles. These principles are internationally recognised and they form the bedrock of modern legislation on the right of access to information:

- a) "Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.
- b) Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.
- c) This Act and any other law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure. Non-disclosure is permitted only in exceptionally justifiable circumstances as set out in this Act.
- d) Information holders must accede to the authority of the oversight mechanism in all matters relating to access to information.
- e) Any refusal to disclose information is subject to appeal.
- f) Public bodies and relevant private bodies must proactively publish information.
- g) No one is subject to any sanction for releasing information under this Act in good faith."²⁹

The Model Law has four objectives. It seeks to:

- a) "Give effect to the right of access to information as guaranteed by the African Charter on Human and Peoples' Rights, to
 - (i) any information held by a public body or relevant private body; and
 - (ii) any information held by a private body that may assist in the exercise or protection of any right;
- b) voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to accurate information of information holders as swiftly, inexpensively and effortlessly as is reasonably possible;
- c) Ensure that in keeping with the duty to promote access to information, information holders create, keep, organise and maintain information in a form and manner that facilitates the right of access to information;
- d) Promote transparency, accountability, good governance and development by educating people about their rights under the legislation."³⁰

²⁶ Malawi ratified the ACHPR on 17 November 1989.

²⁷ Published in 2013.

²⁸ P Tlakula "Preface" *African Commission on Human and Peoples' Rights: Model Law on Access to Information for Africa* (2013) 12 (emphasis added).

²⁹ African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* (2013) 17.

³⁰ *Id* 18.

The Malawi Constitution

The Malawi Constitution has two provisions on access to information, namely sections 36 and 37:

“36. Freedom of the press

The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

37. Access to information

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 of his or her rights.”

Section 37 seems to assume that every person who will be making a request to access information will be able to link it to the exercise of a particular right. As Chirwa observes, this requirement seems to have been borrowed from the interim Constitution of South Africa.³¹ However, South Africa dropped this requirement in its final Constitution in relation to information held by the State as it was deemed that it was going to render the right of access to information worthless. The term, ‘required’ is generally understood to mean ‘necessary’, ‘essential’ or ‘relevant’. A consensus has now emerged that to show that the information is essential or necessary to the exercise of one’s right would impose too onerous a burden on the right holder because it is not easy to all requesters to know what specific rights may be implicated by the information they have not yet seen. In *Reyes and Others v Chile*³² the Inter-American Court of Human Rights (IACHR) stated that:

“Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it...**The information should be provided without the need to prove direct interest or personal involvement in order to obtain it**”.³³

The other difficulty with linking the exercise of the right of access to information with the exercise of another right is that it is not clear which rights a requester can invoke. Is it rights contained in the Bill of Rights of the Malawi Constitution only? Would legal rights contained in legislation suffice? How about rights in international human rights instruments to which Malawi is a party and has ratified; would a requester invoke these as well? Many people in Malawi are still not aware of their rights. Because of these difficulties, a consensus has emerged that requesters should not need to prove direct interest or personal involvement or justification in order to have access to information.

National Access to Information Policy, 2014

The National Access to Information Policy, 2014 (NAIP) has three objectives. These are:

- “3.3.1. To facilitate provision of public information by Government and other institutions;
- 3.3.2. To ensure statutory and regulatory compliance of the relevant sections of the Constitution;

31 DM Chirwa *Human Rights under the Malawian Constitution* (2011) 366.

32 Series C. No. 51 (2006).

33 *Id* at para. 77 (emphasis added).

and

3.3.3. To provide a framework for developing the Access to Information Legislation.”³⁴

There is no doubt that a policy is not a legally binding document. However, at a minimum, the Malawi Government is obliged to follow its own policies when developing legislation.

Analysis and Assessment of the Bill

The first principle in the Model Law is clearly reflected in the Bill. Section 5(1) provides that:

“A person shall have the right to access information, in so far as that information is required for the exercise of his rights, which is in the custody of, or under the control of a public body or a relevant private body to which this Act applies, in an expeditious and inexpensive manner.”

The above section does not contain limitations based on when information is generated or created; it is open-ended. This is significant because a requester can make a request for information dating back to any time. This is in line with General Comment No. 34 which propounded that a requester must be given access to information regardless of the “date of production”.³⁵ The Bill however takes cognisance of the fact that information being requested may not be available; may not be found or may not exist. In that case, the Bill imposes an obligation on the information holder to notify the requester, and give a statement of the details of all steps taken to find the information, or determine whether the information actually exists and if it is later found, determine whether to grant access, notify the applicant of the decision in writing, fees payable if any or indeed grant the applicant access to information.³⁶

Furthermore, section 18(2) of the Bill states that the fees payable by an applicant under this Act shall be limited to reasonable, standard charges for document duplication, translation or transcription, where necessary. This provision buttresses the inexpensive manner of accessing information.

The second principle in the Model Law is also reflected in the Bill. Section 2 of the Bill defines “private body” to mean a person or organisation, not being a public body, who or which carries out any business in relation to public interest, or to rights and freedoms of people. Again, section 5(2) states as follows:

“A private body shall on request, make available information in its custody or control, which it holds on a person who submits a request for that information pursuant to this Act.”

Section 37 of the Malawi Constitution only protects the right of access to information held by the State or any of its organs at any level of Government. Therefore, section 5(2) of the Bill offers expanded protection of the right of access to information by including private bodies holding personal information of the requester. This is in line with the dictates of the Model Law. Interestingly, section 5(1) of the Bill includes the phrase “inexpensive manner”. Does this mean the private body can afford to charge expensive fees? The answer should clearly be an emphatic no. Section 18(2), referred to above, applies even to private bodies; they are obliged to charge reasonable, standard

³⁴ Malawian Ministry of Information and Civic Education National Access to Information Policy (2014) 8.

³⁵ Human Rights Committee, General Comment No. 34 (2011) para. 18.

³⁶ Access to Information Bill (2016) section 20.

fees for document duplication, translation or transcription, where necessary.

The third principle in the Model Law has two limbs: a presumption of non-disclosure, and permission of non-disclosure only in exceptional circumstances. The Bill has complied with the first branch through sections 9 and 10 which require information holders to disclose certain information on their own relating to various matters such as manuals, policies, procedures, rules, the names, designations and other particulars of information officers, particulars of its organisation, functions and duties.

The second limb of the above principle would also appear to have been addressed; non-disclosure is permitted only in exceptionally justifiable circumstances set out in the Bill. Part V deals with “information exempt from disclosure” and covers issues of demonstrable harm;³⁷ protection of personal information;³⁸ protection of information that preserves national security or defence; crime prevention or investigation of criminal or other unlawful acts;³⁹ commercial and confidential information;⁴⁰ protection of life, health and safety of a person;⁴¹ protection of information on Malawi’s international relations;⁴² protection of legally privileged information;⁴³ protection of information on ongoing academic or professional examinations and recruitment processes;⁴⁴ and manifestly malicious, frivolous or vexatious requests.⁴⁵ All of these have been lifted from the Model Law. Furthermore, third parties are to be notified of disclosure of exempted information of public interest.⁴⁶

The Bill however has a curious provision. Section 3(2) provides that it shall not apply to the following information:

- “(a) Cabinet records and those of its committees;
- (b) Court records prior to conclusion of a matter;
- (c) Information excluded from publication under the Official Secrets Act; and
- (d) Personal information.”

It is generally agreed that Cabinet records and those of its committees are information which is privileged from disclosure.⁴⁷ The question however is, should they remain so forever? For instance, why should a person not have access to Cabinet records of 1964 when Malawi had just received her independence from Britain? What harm would that kind of information cause to Malawi now if it was disclosed to some person who may require it to exercise the right to education in terms of research to understand say, the true reasons for the Cabinet crisis of 1964? One must quickly mention that section 22(2) has given powers to the Minister to declassify information exempt from disclosure.

37 *Id* section 32(b).

38 *Id* section 23.

39 *Id* section 24.

40 *Id* section 29.

41 *Id* section 25.

42 *Id* section 28.

43 *Id* section 26.

44 *Id* section 27.

45 *Id* section 30.

46 *Id* section 31.

47 See Australia Freedom of Information Act (3 of 1982) section 34 (Cabinet documents and those of a committee of the Cabinet are exempt documents); see also Uganda Access to Information Act (6 of 2005) section 2(2)(a).

While this power has been given to the Minister, section 3(2)(a) states that the Act does not apply to information relating to Cabinet records and those of its committees, which means, it can never be declassified.

The other curious provision relates to court records prior to the conclusion of a matter. It appears that this provision has been borrowed from Uganda.⁴⁸ Why should the would-be Act not apply to court records prior to the conclusion of a case say in a purely criminal or commercial case for example? Does the public not have the right to know and the media the right to report and publish freely within Malawi including on on-going cases? Are court records not public documents?⁴⁹ Why does the law require that proceedings be heard in open court where references are made to documents filed by the parties?⁵⁰ One would understand if the court record related to a child, for instance. Even in that case, it is not necessary to deal with that matter in the Bill because such issues are either addressed in policies, child-related legislation, or rules and practices of the court. Even in cases where parties do not want the public to attend hearings, there are specific provisions that are invoked for the proceedings to be heard in camera.⁵¹ It is contended that the Malawi Government has gone a little overboard here. The courts have enough tools to deal with the matter of access to court records in the interest of justice or propriety.⁵² Unlike the Cabinet records, there is an assumption that court records are universally accessible after the conclusion of the case. However, that is not true in all types of cases. Often, the case file of juvenile cases are sealed on the completion of the trial and certain personal information concerning the parties in adult cases may not be accessible by the public.

The Bill also excludes from disclosure information under the Official Secrets Act.⁵³ This is an old, but important piece of legislation dating back to 1913 dealing with the security and defence of Malawi. Its inclusion in the exemption clause tracks the legal system of some developed countries whose access to information legislation specifically excludes from disclosure information under official secrecy legislation.⁵⁴

The fourth principle envisaged in the Model Law is that of independent and impartial commissioners for the purposes of promotion, monitoring, and protection of the right of access to information.⁵⁵ This principle is not upheld up in the current draft ATI legislation. An Independent Information Commissioner (IIC) was to be established under part VII of the original ATI Bill which was submitted to the Malawi Government in 2003. Later, the IIC was replaced by the Human Rights Commission (HRC) in the version of the Bill which the Cabinet rejected on 17 November 2015. The HRC was a better alternative because it met many of the criteria recommended in the Model Law on issues

48 Uganda Access to Information Act, (6 of 2005) section 2(2)(b).

49 See Authentication of Documents Act, Cap.4:06 of the Laws of Malawi, section 2 (definition of "public document").

50 Courts Act, Cap. 3:02 of the Laws of Malawi, section 60.

51 *Id.*

52 In *Republic v Kumwembe and Two Others* (High Court of Malawi) (Lilongwe District Registry) (Unreported) for the first time ever, the Court allowed its judgment to be televised live on *Times Television*.

53 Cap. 14:01 of the Laws of Malawi.

54 See Australia Freedom of Information Act (3 of 1982) section 38(1)(a) and (b).

55 African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* (2013), 43-61.

such as independence,⁵⁶ holding office for a stipulated term,⁵⁷ and being accountable to the National Assembly.⁵⁸ This principle has been breached in the 2016 iteration of the Bill, as the entire oversight mechanism has been removed. In this respect, the Malawi Government has also breached its own National ATI Policy which envisaged the establishment of an IIC, without any amendment.

The fifth principle is that “any refusal to disclose information is subject to appeal”.⁵⁹ This principle in the Model Law is based on the assumption that the requester will already have sought a review of the decision by the information holder to the head of the information holder known as internal review. This concept is incorporated by the Bill in section 21(2) which provides that any refusal by an information holder to disclose information requested by an applicant under the Act shall be subject to review.

In the 2003 Bill which was submitted to the Malawi Government, one of the functions of the IIC was to sit as appellate body against the decision of the head of the information holder. With the removal of the IIC and HRC from the current version, any refusal to disclose information under the Bill will not be subject to appeal at an independent body. Once an internal review mechanism has been exhausted, the only other remedy available to a requester will be to apply to Court for review of a decision of an information holder.⁶⁰ The Bill defines ‘Court’ to mean the High Court of Malawi. The disadvantages of using the High Court system in Malawi are well documented.⁶¹ Both the IIC or the HRC would have dispensed justice more quickly and at a lower cost than forcing the requesters to bring a case in the High Court. Most people will not be able to contest the final decision of the head of an information holder once she decides to uphold a refusal to disclose information. In an appropriate case, where a requester has resources to pursue the matter in Court and the Court determines that information was wrongfully denied, then the officer or institution responsible shall be liable to a fine of two hundred and fifty thousand Kwacha (MWK250,000).⁶² Persons who are granted access to information and use it “(a) for unlawful purpose; (b) for reasons other than those for which a request for information was made, without the authority of an information holder; or (c) in such a manner so as to be detrimental to the interests of public officers, information holders or the public interest, commits an offence, and shall on conviction be liable to a fine of two million kwacha (MWK2,000,000) and imprisonment for two years”.⁶³ The disparity between the fines in sections 40 and 41 is very large. Although an offence under section 41 may affect more people than one under section 40, this does not justify the disparity. The Malawi Government is sending the message that wrongfully denying people information is a less onerous offence than the misuse of information, and deserves only a small fine. There is an urgent need to rationalise these fines.

The sixth principle in the Model Law is somewhat similar to the third one. Part III of the Bill covers

56 Human Rights Commission Act, Cap.3:08 of the Laws of Malawi, section 11.

57 *Id* section 5(1).

58 *Id* section 37.

59 African Commission on Human and Peoples’ Rights *Model Law on Access to Information for Africa* (2013).

60 ATI Bill at section 38(1).

61 See FE Kanyongolo *Malawi Justice Sector and the Rule of Law Report* (2006).

62 ATI Bill at section 40. MWK250 000 (Malawian Kwacha) was equivalent to \$347 on 27 September 2016.

63 ATI Bill at section 41. MWK2 000 000 (Malawian Kwacha) was equivalent to \$2 773 on 27 September 2016.

proactive publishing of information. Section 6(2) of the Bill also imposes a similar obligation to every information officer.

The seventh principle espoused by the Model Law is generally recognised in the Bill. Section 4(e) provides that one of the objects of the Act is to provide for the protection of persons who release information of public interest in good faith, however, there is no substantive provision effecting this object in the Bill. This is unfortunate. As the Bill stands now, whistle-blowers are not protected. It is difficult to deal with fraud, corruption, or other dishonest or criminal conduct in public bodies or relevant private bodies if persons who bring out such information in the public interest in good faith are not specifically protected by a substantive provision in the Bill. This development is also unfortunate because it contradicts the general policy of the Malawi Government on access to information and its role in the fight against corruption as it appears in the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act which specifically protects whistle-blowers.⁶⁴ In this regard, the Bill has gone against the constitutional principles of accountability and transparency and the spirit of the much-talked about public sector reforms. It is recommended that a public interest disclosure based on wrongdoing such as fraud, corruption, miscarriage of justice, etc. be included in the Bill in addition to section 31 as is the case in other jurisdictions such as Uganda.⁶⁵ Section 31 of the Bill states that where an information holder has claimed an exemption to be of public interest, the information holder shall notify an affected third party in writing that the information shall be disclosed after the expiry of fifteen working days from receipt of the notice; and “inform the third party of (i) that party’s right to have the decision reviewed; (ii) the authority to which an application for review should be lodged; and (iii) the period within which the application for review may be lodged”.⁶⁶

Moving on to the objectives, the first one is similar to the first and second principles. The discussion on these two principles applies with equal force to this objective. The Bill reflects the first objective.

The second objective finds expression in section 4(c) of the Bill and Part II of the Bill on “compliance with access to information obligations” which deal exhaustively with voluntary and mandatory mechanisms, processes or procedures to give effect to the right of access to information and effective compliance and implementation of the Act.

The third objective is reflected in Part II of the Bill generally and section 7 in particular. Furthermore, section 9(3)(c) requires every public body to publish information relating to its processes and procedures for creating, keeping, organising, maintaining, preserving and providing information, documents or records.

The fourth and last objective also finds expression in section 4(b) and 4(d) of the Bill, albeit inadequate. The requirement on submission of annual reports on the levels of compliance with

64 Public Officers (Declaration of Assets, Liabilities and Business Interests) Act (2013) sections 20, 21 and 22.

65 Section 3(c) of the Access to Information Act of Uganda states that one of the purposes of that legislation is to protect persons disclosing evidence of contravention of the law, maladministration or corruption in Government bodies. This is followed by a substantive provision in section 34(a)(i) which is to the effect that, notwithstanding any other provision in that Part, an information officer shall grant a request for access to a record of the public body otherwise prohibited under that Part, if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with the law; the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.

66 ATI Bill at section 31(b).

the provisions of the Act by information holders have been totally watered down in the Bill. There is now no sanction for failure by any information holder to which the Act applies, to submit its annual compliance report to the Minister. In the original Bill, such failure attracted a minimum penalty of one million Malawi kwacha (MWK1,000,000) and any additional sanctions as may have been determined by the IIC.⁶⁷ Secondly, in the original Bill, the annual compliance report was also supposed to be simultaneously made available publicly, as information holders reported to the IIC and failure to do so was also actionable in the High Court.⁶⁸ These provisions helped to ensure the highest levels of public accountability and transparency by public bodies and relevant private bodies. It is now very doubtful whether information holders will take their responsibilities under the Act seriously in their absence.

Conclusion and Recommendations

Malawi has made some progress on the right of access to information. It now has an ATI Policy which was adopted in 2014. Malawi also has a gazetted 2016 ATI Bill which is pending debate in the National Assembly.

The analysis and assessment of the gazetted Bill has shown that out of the seven internationally recognised principles on access to information legislation, the Bill has incorporated five, and left out two. It is extremely weak on the principle dealing with an oversight mechanism which has been removed altogether from the Bill. This goes against international best practice on access to information legislation and Malawi's National ATI Policy. The removal of the oversight mechanism in the Bill has also created a gap; there is no body to handle appeals following decisions on internal review by the head of an information holder. This cannot be justified by cost. To avoid the cost of a newly established IIC, the HRC could have been left intact in the Bill to exercise the role of oversight. The HRC was willing to take on board this added responsibility.

The objective of promoting awareness and civic education of the right to access information has also been affected by the removal of both the IIC and HRC from the Bill. No section in the Bill has given that responsibility to the Minister as alleged.

The section on disclosure of wrongdoing based on public interest which was in the original Bill has also been removed. This means that the Bill is so weak that it cannot be used as a tool in the fight against corruption and fraud and other unlawful activities occurring in public bodies and relevant private bodies. This fails one of the objectives of access to information legislation and is a lost opportunity. The Bill would have strengthened the existing legal framework on the fight against corruption in Malawi.

In an ideal situation, it would also have been better to remove the need for justification on the part of the requester for the access to information as it is also against international best practice now, notwithstanding that the Malawi Constitution is frozen, on that point, in time. The annual compliance requirements by information holders need to be as water-tight as they were in the original Bill.

67 See section 58(3) of the original Bill (on file with the author). MWK1 000 000 (Malawian Kwacha) was equivalent to \$1 387 on 27 September 2016.

68 See section 59 of the original Bill (on file with the author).