

Ministry of Justice
Ref No. C/169/R
Revised Draft: Access to Information Bill, 2015 (Cabinet)
(Subject to Change)
Author: Kahaki Jere
Date: 31st October, 2015

ACCESS TO INFORMATION BILL, 2015

MEMORANDUM

The Bill seeks to provide for access to information that is in the custody of public bodies and private bodies. The Bill contains sixty clauses and is divided into the following eleven parts

Part I contains preliminary provisions including the short title and interpretation of terms used in the Bill. The Bill, when enacted, will apply to information holders which comprise public bodies and relevant private bodies. A person shall have a right to access information that is in the custody of an information holder in so far as that information is required for the exercise of his rights. The Bill creates a presumption of disclosure of information except in cases where non-disclosure of the information is specifically permitted under listed exemptions.

Part II designates the Malawi Human Rights Commission as the oversight institution for the implementation of the Bill. The Commission shall have powers to give directions of a general nature, to all institutions in connection to their duties and obligations under this Bill. The Commission shall have powers to review decisions of information holders with regard to requests for disclosure of information.

Part III provides for compliance with access to information obligations of information holders provided by the Bill. Information holders shall appoint or designate information officers and establish processes and procedures for implementing obligations related to disclosure of information. Information holders shall keep, maintain and preserve information in their custody or under their control, in a form that is complete, organized and accessible. The information shall be kept for a period of seven years and thereafter, be transferred to the National Archives where it shall be accessible by the public. To ensure accessibility of information, a public body shall, on a regular basis, conduct training of its staff on the effective implementation of the Bill and put in place the requisite infrastructure and mechanisms for implementation of the provisions of the Bill.

Part IV provides for disclosure of certain categories of information. A public body is required to disclose information generated or received by the public body within thirty days of the generation or receipt of the information. The information to be disclosed includes manuals, policies, rules used by, programmes run by, reports of surveys conducted by and details of employees of the public body.

Part V lays down the procedure for access to information held by information holders. Requests may be oral or written and shall be submitted to information officers who shall process the applications within a prescribed period. Information holders shall notify third parties who may be affected by the disclosure of information that is the subject of a request who shall be given an opportunity to make submissions regarding the disclosure of such information before it is disclosed by the information holder. Information may be disclosed partially where some of the information is determined to be exempt from public disclosure. An information holder may refer a request for information to another institution with greater interest in the information requested and notify the applicant. The Minister may prescribe fees payable to cover, among other things, costs of reproduction of information to be disclosed. An information holder may refuse to disclose information that is exempt from public disclosure and inform an applicant in writing of the decision. An information holder shall also notify an applicant when requested information cannot be found and give evidence of steps taken to find the information.

Part VI makes provision for grounds for exempting information from disclosure. Information may not be disclosed where that information relates to the privacy of a person, preserves national defence and security, relates to the life, health and safety of a person, is privileged information under law, relates to ongoing academic or recruitment processes or relates to Malawi's international relations. An information holder will have to show proof that information requested is exempt from disclosure before denying to disclose information that has been requested. Where public interest outweighs the interest that is protected by an exemption, the information requested shall be disclosed. A third party whose interests are protected by an exemption shall be notified of the disclosure of information where the protected interest is outweighed by the public interest. An information holder may refuse to grant access to information on grounds that a request for that information is made vexatiously.

Part VII makes provision for internal review of decisions of information holders relating to a grant or denial of access to information. An aggrieved person may lodge an application for review to an information officer or other authorized officer of an information holder, for onward submission to the head of the information holder. The head of the information holder shall make a decision on review within five working days. Where on review, the application to access information is granted, the applicant may access the information either immediately or on payment of the required fees where applicable. Where the head of the information holder decides not to grant access to the information, the applicant shall be informed of the reasons for the decision and his right to have that decision reviewed by the Commission.

Part VIII makes provision for the review of decisions of information holders. A person that is aggrieved by a decision of an information holder after an internal review of a decision may apply for a review of the decision to the Commission. An application for review of a decision by the Commission shall only be lodged after exhaustion of the internal review mechanism under Part IX.

Part IX makes provision for reporting requirements with regard to the implementation of the Bill. Information holders shall submit annual reports to the Commission on the compliance with their obligations under this Bill. The Commission shall include information in on the general implementation of access to information by information holders in its report to the National Assembly.

Part X makes provision for offences and penalties. Offences in this Bill include destruction of information as to prevent disclosure, wrongful denial access to information either through negligence, recklessness, failure to proactively disclose information or submit annual reports, and penalties therefor. A person, who without the authority of an information holder, misuses disclosed information commits an offence.

Part XI contains miscellaneous provisions. The Minister may make regulations for the effective implementation of the Bill. Information holders shall comply with the provisions of this Act within twelve months of its commencement.

ACCESS TO INFORMATION BILL, 2015

ARRANGEMENT OF SECTIONS

SECTIONS

PART I - PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Application
4. Objects
5. Access to information
6. Invalidity of laws inconsistent with the provisions of this Act

PART II– OVERSIGHT MECHANISM FOR IMPLEMENTATION OF ACCESS TO INFORMATION

7. Malawi Human Rights Commission to oversee implementation of the Act
8. Functions and powers of the Commission
9. Publication of guides
10. Immunity of members and staff of the Commission and information holders
11. Annual reports

PART III – COMPLIANCE WITH ACCESS TO INFORMATION OBLIGATIONS

12. Appointment of information officers and establishment of procedures for compliance with this Act
13. Record keeping and maintenance of records
14. Capacity building for staff and provision of requisite infrastructure

PART IV – DISCLOSURE OF CERTAIN CATEGORIES OF INFORMATION

15. Proactive disclosure of information
16. Preparation and disclosure of information manuals
17. Annual report on compliance with disclosure obligation

PART V - PROCEDURE FOR ACCESS TO INFORMATION

18. Request for access to information
19. Processing of requests for information
20. Third Party notification
21. Partial disclosure of information
22. Means by which communication is to be provided to an applicant
23. Transfer of request of information to relevant institutions
24. Fees payable for production of requested information
25. Refusal of request for information
26. Information that cannot be found or does not exist
27. Deemed denial

PART VI – INFORMATION EXEMPT FROM DISCLOSURE

28. Limitation on the right of access to information
29. Protection of personal information
30. Protection of information that preserves national security or defence
31. Protection of information to preserve the life, health and safety of a person
32. Protection of legally privileged information
33. Protection of information on-going academic or recruitment processes
34. Protection of information on Malawi's international relations
35. Protection of commercial and confidential information of an information holder and a third party
36. Manifestly vexatious requests
37. Demonstrable harm to be shown in determining the application of any exemption
38. Public interest to override application of exemption
39. Third parties to be notified of disclosure of exempted information
40. Proof of exemption to be shown when disclosure is denied

PART VII– INTERNAL REVIEW OF DECISIONS OF INFORMATION HOLDERS

41. Right of internal review of decisions of information holders
42. Application for internal review of decisions of information holders
43. Decision on internal review
44. Decision making on internal review not to be delegated
45. Deemed refusal under an internal review process

PART VIII - REVIEW OF DECISIONS OF INFORMATION HOLDERS

46. Review decisions of information holders
47. Evidence from information in the custody of an information holder
48. Findings and determinations of the Commission
49. Dissemination of information on compliance with review determinations to affected parties
50. Access to information granted during or after review
51. Review of decisions of the Commission by the High Court

PART IX – REPORTING REQUIREMENTS

- 52. Submission of annual compliance reports to the Commission
- 53. Annual report of Commission to include information submitted by information holders
- 54. Commission to enforce compliance with Act by information holders

PART X – OFFENCES AND PENALTIES

- 55. Prevention of disclosure of information
- 56. Wrongful denial of disclosure of information
- 57. Misuse of disclosed information
- 58. Failure by information holder to comply with reporting obligations

PART XI – MISCELLANEOUS

- 59. Regulations
- 60. Transitional arrangements

SCHEDULE – INFORMATION HOLDERS TO WHICH ACT APPLIES

A BILL
entitled

An Act to provide for the right of access to information in the custody of public bodies and relevant private bodies; the processes and procedures related to obtaining that information; and provide for matters connected therewith or incidental thereto.

ENACTED by the Parliament of Malawi.

PART I -PRELIMINARY

- | | |
|------------------------------|--|
| Short title and commencement | 1. This Act may be cited as the Access to Information Act, 2015 and shall come into operation on a date appointed by the Minister by notice published in the <u>Gazette</u> . |
| Interpretation | 2. In this Act, unless the context otherwise requires-

“Court” means the High Court of Malawi;

“Commission” means the Malawi Human Rights Commission established pursuant to section 129 of the Constitution;

“information” includes an original or copy of any material, record or document which communicates facts, opinion, data or any other matter regardless of its form, characteristics or date of creation, that is in the custody or under the control of a public body, private body or any information holder to which this Act applies; |

“information holder” means a public body or a private body;

“personal information” means information about an identifiable individual, including -

- (a) information relating to the race colour, sex, language, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition of the individual;
- (b) information relating to the education, medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the address, fingerprints or blood type of the individual;
- (e) correspondences sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; and
- (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;

“private body” means a person or organization, not being a public body, but carries out any business in relation to public interest, or to rights and freedoms of people;

“public body” means the Government, a statutory body, or any other body appointed by the Government;

“record” means any recorded information, in any format, including an electronic format in the possession or control of a public body, whether or not that body created it;

“relevant private body” means any body which would otherwise be a private body under this Act, that is –

- (a) wholly or partially owned or controlled or financed, directly or indirectly, by public funds; or

- (b) carries out a statutory or public function or service, but only to the extent of such statutory function or service; and

“third party” in relation to a request for access to information , means any person, other than the person requesting the record.

Application

3.- (1) This Act shall apply to information in the custody or under the control of any public body, relevant private body or other information holders listed in the Schedule hereto regardless of whether such information came into existence before the commencement of this Act.

(2) This Act shall not apply to the following information -

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

Cap. 14:01

Objects

4. The objects of this Act are to -

- (a) make provision for access to information that is held by public bodies and relevant private bodies;
- (b) ensure that public bodies and relevant private bodies disclose information that they hold and to provide information on request, in line with the constitutional principles of public trust and good governance;
- (c) provide for a framework to facilitate access to information held by relevant private bodies in compliance with any right protected by the Constitution and any other law;
- (d) promote routine and systematic information disclosure by public bodies and relevant private bodies based on constitutional principles of accountability and transparency;
- (e) provide for the protection of persons who release information of public interest in good faith; and
- (f) provide a framework to facilitate civic education on the right to access information under this Act.

Access to information

5.- (1) Every 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 or under the control of a public body or relevant private body to which this Act applies, in an expeditious and inexpensive manner.

(2) This Act and any other law, policy, practice or procedure relating to the right of access to information in Malawi, shall be interpreted and applied on the basis of a presumption of disclosure of information:

Provided that non-disclosure may be permitted only in circumstances which warrant exemption from disclosure as set out under this Act.

Invalidity of laws inconsistent with the provisions of this Act

6.- (1) Subject to section 3 (2) (c), the provisions of any other law in force immediately before the commencement of this Act which prohibits or restricts the disclosure of information in the custody or under the control of a public body or relevant private body to which this Act applies, shall have no effect whenever the provisions of such legislation are inconsistent with the provisions of this Act.

(2) Any law enacted after the commencement of this Act which restricts the rights and obligations provided for in this Act, shall have no effect.

PART II- OVERSIGHT MECHANISM FOR IMPLEMENTATION OF ACCESS TO INFORMATION

The Malawi Human Rights Commission to oversee

7.- The Malawi Human Rights Commission (in this Act referred to as the “Commission”) is hereby designated to oversee the implementation of this Act.

Functions and powers of the Commission

8. (1) The Commission, in its oversight functions under section 7 shall have functions to –

- (a) raise awareness of the right of access to information among members of the public and officials of all information holders to which this Act applies;
- (b) advise Government and other institutions to which this Act applies, on matters related to the coordination and the management of information in the custody or under the control of all public bodies and relevant private bodies;
- (c) on request, act on behalf of illiterate and indigent members of the public by making requests for

access to information for such categories of members of the public where necessary;

- (d) on application, review decisions of information holders with regard to requests for information and make recommendations to the relevant information holder resulting from applications made;
- (e) make recommendations to Government on the declassification of information which is exempt from disclosure to enable access to that information;
- (h) make recommendations to Government on matters related to the legal framework on access to information and related legislation; and
- (f) perform such other functions as are conferred upon the Commission by this Act or any other law .

(2) In carrying out its functions under this Act, the Commission shall have the powers to-

- (a) give directions of a general nature to all institutions to which this Act applies, in connection with the performance of their duties and obligations under this Act;
- (b) make recommendations to the Minister on the fees payable with regard to processing of requests for information;
- (c) review decisions of information holders with regard to denial of disclosure of information or grant of access to information; and
- (d) enter and inspect premises to which an application for review relates and inspect, make copies of, and take extracts from any material relevant to the review process or proceedings as the case may be.

Publication of guides

9. The Commission shall publish and in forms accessible to the general public, guides which shall include –

- (a) objects of this Act;
- (b) contact details of the Commission;
- (c) existing obligations of all information holders under this Act, including their proactive disclosure obligations, amongst others;
- (d) various methods and means of applying for disclosure of information from an information holder and through the Commission; and
- (d) the rights of members of the public under this Act and the assistance that is available to the general public from the Commission, especially for purposes of ensuring compliance with this Act.

Immunity of members and staff of the Commission and information holders

10.- (1) Notwithstanding the provisions of any other law, no civil or criminal proceedings shall lie against any staff of the Commission, or any institution to which this Act applies, or a person acting on their behalf, for the disclosure of any information or for any other act done in good faith pursuant to this Act.

(2) A person shall not be subject to any sanction whatsoever, including an employment related sanction for disclosing information under this Act in good faith.

Annual reports

11. As soon as practicable, but not more than six months after the expiry of each financial year, the Commission shall submit to the National Assembly, a report concerning its activities during that financial year and this report shall include –

- (a) details of all activities undertaken by the Commission to ensure compliance with the provisions of this Act both by the Commission and all other information holders to which this Act applies;
- (b) a review of the status of implementation of this Act in that year ; and
- (c) a general assessment of the efficacy of the right of access to information in Malawi.

PART III - COMPLIANCE WITH ACCESS TO INFORMATION OBLIGATIONS

Appointment of information officers and establishment of procedures for compliance with this Act

12.- (1) Every information holder shall, within twelve months from the commencement of this Act,-

- (a) designate or appoint one or more officers as information officers ; and
- (b) establish processes and procedures for handling all obligations under this Act.

(2) Every information officer designated or appointed under subsection (1), shall, in addition to handling all requests for information made pursuant to section 18, render assistance to any person seeking such information and ensure compliance by the institution with all obligations under this Act, including the obligation to disclose all categories of information listed under section 15.

(3) A person designated or appointed as an information officer, shall be a person with competence to exercise the powers and perform the duties and functions of that office as stipulated in this Act.

(4) An information officer may, in the discharge of his obligations under this Act, seek the assistance of any other public officer and such officer shall be under an obligation to provide the information officer with the assistance sought.

(5) Where an information holder fails to designate or appoint an information officer, the head of the institution, will, in such circumstances, serve as the information officer for purposes of this Act.

Record keeping
and maintenance of
records

13.- (1) Every information holder shall ensure that it keeps information or record about its operations , personnel, activities and other relevant or related information or records.

(2) Every information holder shall ensure the proper organization and maintenance of all information or record in its custody, in a manner that facilitates access to such information or record in accordance with this Act.

(3) Every information holder shall maintain information, for a period of seven years from the date on which the information is generated by the institution or on which the information comes under its custody or control.

(4) At the expiration of the seven year period, the information holder shall transfer the information in its entirety, to the National Archives, where that information, document or record shall be accessible to the public in accordance with the provisions of this Act.

Capacity building
for staff and
provision of
requisite
infrastructure

14.- (1) Every public body and relevant private body shall ensure the provision of appropriate training of its personnel on the right of persons to access information or records held by the institution as provided in this Act.

(2) Every information holder shall provide the requisite infrastructure and institute mechanisms, processes and procedures for ensuring effective compliance and implementation of this Act.

PART IV – PROACTIVE DISCLOSURE OF CERTAIN CATEGORIES OF INFORMATION

Proactive
disclosure of
information

15.- (1) Every public body and relevant public body, shall proactively make available to the general public or, on request by any person, information in its custody or under its control as provided in this Part

(2) Every public body or relevant private body shall publish the following information produced by, or in relation to, that institution within thirty working days of generation or receipt of the information -

- (a) manuals, policies, procedures, rules or similar instruments which have been prepared for, or are used by officers of the institution in –
 - (i) discharging the functions and powers of the institution;
 - (ii) handling complaints, making decisions or recommendations; or
 - (iii) providing advice to persons outside the institution with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which, such persons may be entitled or subject to;
- (b) the names, designations and other particulars of information officers, including their official physical contact details and electronic addresses where an applicant may submit requests for information;
- (c) any prescribed forms, procedures, processes or rules for engagement with the institution by members of the public;
- (d) the particulars of any arrangement, statutory or otherwise, that exists for consultation with, or representation by, members of the public in relation to the formulation or implementation of policies or similar documents of the institution;
- (e) information on any programmes implemented with public funds;
- (f) all contracts, licences, permits, authorizations granted, and public-private partnership arrangements entered into by the institution;
- (g) reports on surveys, studies or tests prepared by the institution; and

(h) any other information that the Commission may prescribe.

(3) Every public body shall publish the following information produced by, or in relation to, the institution-

- (a) the particulars of its organization, functions and duties;
- (b) information containing interpretations or particulars of legislation or policies administered by the institution;
- (c) details of its processes and procedures for creating, keeping, organizing, maintaining, preserving and providing information, documents or records;
- (d) the annual report submitted by the institution, to the Commission; and
- (e) any other information prescribed by the Commission.

(4) Every relevant private body shall make available, on request, information in its custody or control, which it holds on a person who submits a request for that information.

(5) The publication of the information pursuant to this section, shall be done electronically, and where possible, in tangible form or any other manner as may be prescribed by the Minister.

Preparation and disclosure of information manuals

16.- (1) All public bodies and relevant private bodies shall, within twelve months of commencement of this Act, prepare information manuals which shall be accessible electronically and may be disseminated in tangible form.

(2) The information manuals, referred to in subsection (1), shall include the categories of information that an information holder is obliged to proactively disclose under section 15.

(3) A public body and relevant private body shall update and publish its information manual whenever material changes occur to the information contained therein.

Annual report on compliance with proactive disclosure obligation

17. All public bodies and relevant private bodies shall, at the end of each financial year, but not later than the end of the first quarter of the

succeeding financial year, submit to the Commission, a report stating the categories of information that have been proactively disclosed by the institution as prescribed by this Act, including information on where and how, such information can be easily accessed by members of the public.

PART V - PROCEDURE FOR ACCESSING INFORMATION

Request for
access to
information

18.- (1) A request for access to information may be made orally or in writing, and shall be addressed to an information officer:

Provided that an illiterate and indigent person, or a minor may request the Commission to obtain the information on his behalf from an information holder.

(2) Where an applicant makes an oral request for information, the information officer shall put the oral application in writing, which shall then be read to the understanding of the applicant to secure his consent that the content of the written document fully represents the content of his oral request for information made to the said official, after which, a copy of the written request for information shall be handed to the applicant for his record, and the original shall be kept by the information holder.

(3) The request for information shall provide sufficient details to enable the information officer to identify the person making the request.

(4) For purposes of subsection (1), a request for information shall also be treated as made in writing where the text of the request –

- (a) is transmitted by electronic means;
- (b) is received in legible form; and
- (c) is capable of being used for subsequent reference.

Processing of
requests for
information

19.- (1) Where a request for access to information is made, an information officer shall, subject to the provisions of this Act, within fifteen working days after the request is received, -

- (a) give written notice to the applicant as to whether the information exists and, where it does, whether access to the entire information requested or a part thereof will be given; and
- (b) where access shall be granted, promptly give the applicant access to the information.

(2) Where the information holder requires further information in order to identify or locate the information requested, the applicant shall be notified of the need for such further information within seven working

days of receiving the request and in that case, the period referred to in subsection (1) shall be calculated from the date on which such further information is received from the applicant.

(3) Where a request relates to information which reasonably appears to be necessary to safeguard the life or liberty of an applicant, the information holder shall, within forty eight hours after the request is submitted –

- (a) determine whether it shall grant the request or not;
- (b) notify the applicant of the decision in writing; and
- (c) where the request is granted, give the applicant access to the information.

Third party notification

20. (1) Where an information holder determines that a request for access to information relates to confidential or commercial interests of a third party, the information holder shall notify the third party in writing of the specifics of the request.

(2) The third party shall respond to the notice in subsection (1) in writing and indicate whether he considers the information to be confidential and give reasons why the information should not be disclosed.

(3) If, based on the response in subsection (2), the information holder determines that harm is in all likelihood bound to occur, the information holder shall not disclose the information.

Partial disclosure of information

21. Where an information holder determines that part of the information requested is exempt from disclosure, the information holder shall disclose the remainder of the information which is not exempt from disclosure and shall, accordingly inform the person who made the request.

Means by which communication is to be provided to an applicant

22.- (1) All institutions to which this Act applies, shall, having regard to any specific request by an applicant of the format in which the applicant wants the requested information, as well as the circumstances and the costs to provide the information in the manner requested, provide the information requested -

- (a) in a permanent form or in another form acceptable to the applicant;
- (b) with a reasonable opportunity to inspect the original document or record containing the information;
- (c) in a digest or summary of the information, document or record; or

- (d) in the case of an applicant with sensory disability, in a format that allows the applicant to view, read or listen to the record, document or information.

(2) Notwithstanding subsection (1), an information holder shall provide information orally where an applicant, on making the request for information, specifically requests that the information be so provided.

Transfer of request for information to relevant institutions

23.- (1) Where an information holder to which a request for information is made considers that another institution has greater interest in the information requested, the information officer to which the request was initially made, shall, within three working days after the request is received, transfer the request to the other institution and give written notice of the transfer of the request to the applicant.

(2) For the purposes of this section-

(a) the processing period specified in section 19 shall apply to the institution to which the request is transferred with effect from the date on which the transferred request is received; and

(b) an institution has greater interest in information requested if -

(i) a record or document, containing the information was originally produced by or for the institution; or

(ii) in the case of information not originally produced by or for the institution, the said institution was the first recipient of the original information.

24.- (1) A person shall not pay any fees on lodging an application for request of information.

Fees payable for production of requested information

(2) The fees payable by an applicant under this Act, shall be limited to reasonable, standard charges for document duplication, translation or transcription where necessary.

(3) The Minister shall, on recommendation of the Commission, prescribe a uniform scale of fees applicable for processing requests for information.

Refusal of disclosure of requested information

25. Where an information holder refuses to disclose information which has been requested either in whole or in part, the information holder shall, in writing, notify the applicant of the refusal and -

- (a) state the grounds for the refusal including the specific provisions of this Act relied on to justify its decision; and
- (b) inform the applicant of the availability of a process for reviewing the decision, the institution to which the review may be lodged and the period within which the application for review may be made.

Information that cannot be found or does not exist

26.- (1) Where an application for request for access to information is made to an information holder in respect of which -

- (a) the information is not in the possession or under the control of the information holder and the information officer does not know which institution has possession or control of the information;
- (b) all reasonable steps have been taken to find the information requested; and
- (c) there are reasonable grounds for believing that the information is not in the possession of the institution or does not exist,

the information officer shall notify the applicant in writing that it is not possible to disclose the information requested.

(2) The notice referred to in subsection (1) shall include a statement of the details of all steps taken to find the information, or to determine whether the information actually exists.

(3) Where the information is found after notice is given to the applicant under subsection (1), the information officer shall immediately notify the applicant in writing.

(4) The information holder shall within seven working days after the information is found after the notice is given under subsection (3)

-

- (a) determine whether to grant the request;
- (b) notify the applicant of the decision in writing;
- (c) if the request is granted, subject the disclosure of the information to the payment of any applicable reproduction, translation or transcription fee; and
- (d) give the applicant access to the information.

Deemed denial

27.- (1) Where an information holder fails to give an applicant access to information requested within the time limits set out in this Act,

the information holder shall be deemed to have refused to grant access to the information.

(2) Any refusal by an information holder to disclose information requested by an applicant under this Act shall be subject to review.

PART VI –INFORMATION EXEMPT FROM DISCLOSURE

- Limitation on the right of access to information
- 28.- (1) Information requested under this Act may only be exempt from disclosure by an information holder where all or part of the information in the custody or control of the information holder, falls within the categories exempted from disclosure under this Act.
- (2) The Minister may by notice published in the Gazette, declassify information as exempt from disclosure.
- Protection of personal information
29. An information holder shall not disclose information which has been requested where the information holder determines that disclosure of the information requested would result in the unreasonable disclosure of personal information about a third party.
- Protection of information that preserves national security or defence
30. An information holder may not disclose information which has been requested where disclosure of the information would reasonably be expected to -
- (a) cause damage to the security or defence of Malawi or would divulge information which relates to the defence or security of a foreign government which is communicated in confidence by, or on behalf of such foreign government;
 - (b) disclose or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of law or endanger the life or physical safety of any person; or
 - (c) cause substantial harm to the legitimate interests of Malawi in crime prevention and any preliminary investigation of criminal or other unlawful acts.
- Protection of information to preserve the life, health and safety
31. An information holder may refuse to disclose information that has been requested where disclosure of that information has a real likelihood of endangering the life, health or safety of a person.
- Protection of legally privileged information
- 32.- (1) An information holder may refuse to disclose information which has been requested where the information -
- (a) consists of confidential communication between a medical practitioner and his patient;

- (b) consists of confidential communication between a lawyer and his client;
- (c) consists of confidential communication between a journalist and his informant; or
- (d) would otherwise be privileged from production in legal proceedings.

(2) The information in subsection (1) may be disclosed where the patient, client, source or person entitled to the privilege, as the case may be, consents to the release of the information or has waived the privilege.

Protection of information on on-going academic or recruitment processes

33.- (1) An information holder may refuse to disclose information which has been requested where the information relates to an academic or professional examination, or recruitment or selection process prior to the completion of that examination or recruitment or selection process where the release of the information is likely to jeopardize the integrity of the process.

(2) Information referred to in subsection (1) may be released on request after the academic or professional examination or recruitment or selection process has been completed.

Protection of information on Malawi's international relations

34.- (1) An information holder may refuse to grant access to information which has been requested where the information –

- (a) has been supplied by or on behalf of, the Republic of Malawi, to another state or an international organisation, pursuant to an international agreement with that state or organisation which requires the information to be held in confidence;
- (b) is required to be held in confidence under international law;
- (c) is on the positions adopted or to be adopted by the Republic of Malawi or another state or an international organisation for the purpose of present or future international negotiations; or
- (d) constitutes diplomatic correspondence exchanges with another state or with an international organisation or official correspondence with diplomatic missions or consular posts of the Republic of Malawi,

where the release of the information would cause substantial prejudice to the international relations between the Republic of Malawi and another state or international organization as the case may be.

Protection of commercial and confidential information of an information holder and a third party

35. An information holder may refuse to disclose information which has been requested if that information contains—

- (a) trade secrets of the information holder or third party; or
- (b) information about the information holder or third party that would substantially prejudice a legitimate commercial or financial interest of the information holder or third party.

Manifestly vexatious requests

36. - (1) An information officer may refuse to grant a request for information where the request is manifestly vexatious.

(2) Where an information officer refuses a request pursuant to subsection (1), he shall state the reasons for which the information officer considers the request to be manifestly vexatious.

Demonstrable harm to be shown in determining the application of any exemption

37.- (1) Notwithstanding any of the exemptions contained in this Act, an information holder may only refuse to grant a request for information where harm to the interest protected under the relevant exemption provided for by this Act resulting from the release of the said information, demonstrably outweighs the public interest in the release of the information to an applicant.

(2) An information holder shall consider whether subsection (1) applies to any information requested by an applicant, before refusing to grant an applicant access to the information requested, on the basis of any exemption stated in this Act.

Public interest to override application of exemption

38.- (1) An information holder shall disclose information requested notwithstanding that the information is exempted from public disclosure where to do so would be justified in the public interest having regard to both benefits and harm that may accrue from disclosure of the information.

(2) In determining whether disclosure is justified in the public interest, the information holder shall have regard to the following considerations –

- (a) obligations to comply with legal requirements on disclosure of information;

- (b) the prevention of the commission of offences or other unlawful acts;
- (c) miscarriage of justice;
- (d) abuse of authority or negligence in the performance of an official duty;
- (e) unauthorized use of public funds or the avoidance of wasteful expenditure of public funds;
- (f) danger to health or safety of a person or the public,
- (g) the need to protect the environment; and
- (h) the need to improve public participation in, and understanding of public policy making.

Third parties to be notified of disclosure of exempted information

39. Where disclosure of the information in respect of which an information holder has claimed an exemption is determined to be of public interest, the information holder shall –

- (a) 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
- (b) inform the third party –
 - (i) of 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.

Proof of exemption to be shown when disclosure is denied

40. An information holder that refuses to grant access to information which has been requested shall, on a balance of probabilities, prove that –

- (a) the information is exempt from disclosure under this Act; and
- (b) the harm to the protected interest under the relevant exemption that would result from the disclosure of the information outweighs the public interest in the information.

PART VII- INTERNAL REVIEW OF DECISIONS OF INFORMATION HOLDERS

Right of internal review of decisions of information holders

41.- (1) An applicant may, where an information holder refuses to disclose information requested, apply for an internal review of the decision.

(2) A third party may, where an information holder grants access to information containing information relating to the third party without consent of the third party, apply for an internal review of the decision.

Application for internal review of decisions of information holders

42.- (1) A person aggrieved by a decision of an information holder may submit an application for a request for an internal review, to an information officer within sixty working days of the receipt of a notice of the decision.

(2) Where the person who submits the application under subsection (1) is a third party, the application shall be submitted within ten working days of the receipt of a notice of the decision with regard to a request for information.

(3) An application for review of a decision may be submitted orally or in writing.

(4) Where an applicant or a third party makes an oral application for an internal review, the information officer shall reduce that oral request into writing and provide a copy thereof to the applicant or third party as the case may be.

(5) An application for an internal review shall clearly state the request and decision which is the subject of the internal review.

(6) Where an application for internal review is submitted after the expiration of sixty working days, the information officer shall, on good cause shown, allow the late lodging of the application.

(7) The information officer shall, within five working days after receipt of the request for internal review -

- (a) submit to the head of the information holder –
 - (i) the request for internal review;
 - (iii) the information that is the subject of the review; and
 - (iv) the reasons for the decision made; and
- (b) notify the applicant and, where relevant, the third party, in writing that the documents relating to the appeal have been submitted.

Decision on internal review

43.- (1) The head of an institution to which an application for internal review of a decision is submitted in accordance with section 42, shall, within five working days of receipt of the application for review –

- (a) make a new decision on behalf of the institution; and
- (b) notify the applicant and, where relevant, the third party of that decision in writing.

(2) Where the head of the information holder decides to disclose the information requested, the notice to the applicant referred to in subsection (1) shall state the fees if any, payable for access to the information requested and the form in which access to the information will be given.

(3) Where an applicant has been given notice that access to the information has been granted, that applicant shall be given access to the information immediately, or upon payment of fees if so required.

(4) Where the head of the information holder has determined to disclose information containing third party information, the applicant may not be granted access to that information until such time as any right of the third party to oppose the release of the information has expired, or any appeal lodged by the third party has been finally determined.

(5) If the head of the information holder decides not to disclose information requested, the notice to the applicant referred to in subsection (1) shall-

(a) state reasons for the refusal with reference to specific provisions of this Act upon which the refusal is based; and

(b) inform the applicant that he may lodge an appeal against the decision.

Decision making on internal review not to be delegated

44. The decision referred to in section 43 shall be made by the head of the information holder personally and may not be delegated to any other person.

Deemed refusal under an internal review process

45. Where the head of the information holder fails to give a decision on an application for request for an internal review within the time specified in section 42, he shall be deemed to have affirmed the original decision of the information officer which is the subject of the application for internal review.

PART VIII - REVIEW OF DECISIONS OF INFORMATION HOLDERS

Review decisions of holders of information

46.- (1) A person may only apply to the Commission for the review of a decision of an information holder if the applicant has exhausted the internal review mechanism of the information holder.

(2) The application made pursuant to subsection (1) shall be in respect of the following -

(a) the refusal of access by the information holder to the information requested;

- (b) the payment of fees payable pursuant to section 43 which the applicant considers to be unreasonable;
- (c) the failure of the information holder to comply with the various timelines stipulated for processing requests for information or decisions on internal review; or
- (d) any other matter relating to a request for or access to information under this Act.

(3) A third party who is of the opinion that his interests referred to in section 38 are likely to be adversely affected by the decision of the information holder to disclose information requested under this Act, may apply to the Commission for a review of that decision.

(4) Applicants shall be given an opportunity to make representations during review proceedings.

(5) The Commission shall, within thirty working days of receiving an application under subsection (1) or (2), consider the application and may, within that period make an inquiry or investigate the matter which is the subject of the application as the Commission may consider necessary.

(6) An application for review under this Part shall be in writing unless the Commission authorizes that it may be made orally and made not later than two years from the date from which a request for information was received by an information holder.

Evidence from information in the custody of an information

47. Subject to the exemptions provided in this Act, the Commission may, during investigations relating to any application for a review under this Part, examine any record that is under the custody or control of an information holder.

Findings and determinations of the Commission

48.- (1) If, after the consideration of an application for review, the Commission finds-

- (a) that an applicant is entitled to the disclosure of the information requested, the Commission shall immediately provide the head of the information holder concerned with a report containing-
 - (i) the findings of the review and the determinations made by the Commission; and
 - (ii) a direction that, within a time specified in the report, notice is to be given to the

Commission of all actions taken to implement the determinations in the report; or

- (b) that the applicant is not entitled to the disclosure of the information requested, the Commission shall, within seven working days of making the determination, inform the applicant of the decision in writing stating the reasons thereof and inform the applicant of the right to appeal to the Court.

(2) The Commission shall give a copy of the decision made under –

- (a) subsection (1)(a), to the applicant and any third party that made representations to the Commission in the course of the proceedings; and
- (b) subsection 1(b), to the head of the information holder concerned.

Dissemination of information on compliance with review determinations
Access to information granted during or after review

49. The Commission shall, within thirty working days from when the Commission made the determinations on review, inform the applicant and any third party of whether the information holder concerned has taken action to comply with the determinations of the Commission.

50. Where, during or after the consideration of an application for review, the head of the information holder notifies the Commission that access to the information requested has either been given or will be given to an applicant, the head of the information holder shall give the applicant access to the information requested –

- (a) within five working days of the notification, if no notice has been given to a third party under section 39; or
- (b) within ten working days after the notification, if notice has been given to a third party under section 39.

Review of decision of the Commission by the High Court

51. A person may make an application for review of a decision of the Commission to Court only after proceedings for review under this Part have been concluded.

PART IX – REPORTING REQUIREMENTS

Submission of annual compliance reports to the Commission

52.- (1) All public bodies and relevant private bodies shall not later than three months after the end of a financial year, submit a report to the Commission on their level of compliance with the provisions of this Act, during that financial year.

(2) The report referred to in subsection (1) shall also be made available to members of the public, at the same time at which it is submitted to the Commission.

Annual report of Commission to include information submitted by information holders compliance with Act by information holders

53. The Commission shall in its annual report submitted pursuant to section 11 include information contained in the annual reports submitted to the Commission by information holders pursuant to section 52.

54.- (1) If, at any time, it appears to the Commission that an information holder has failed to comply with the provisions of this Act or with a determination of the Commission, the Commission shall, by notice in writing, require that the information holder to comply with the Act or determination, as the case may be, within a specified time.

(2) Where the institution concerned fails to comply with the notice referred to in subsection (1), the Commission shall impose such fine as may be prescribed or issue a directive that it considers appropriate.

(3) Where the institution continues with non-compliance with both the original determination made by the Commission and any subsequent sanctions made pursuant to subsection (2), the Commission shall apply to the Court for an order compelling the institution to promptly remedy the default in both instances and the Court may make an order to this effect or any order as the Court considers appropriate.

PART X- OFFENCES AND PENALTIES

Prevention of disclosure of information

55.- (1) Any person who wilfully conceals, destroys, mutilates, falsifies or otherwise alters a document or record containing information which has been requested with intent to prevent disclosure of the information, commits an offence and shall, on conviction be liable to a fine of two hundred and fifty thousand Kwacha (K250, 000.00) and imprisonment for a term not exceeding six months.

Wrongful denial of disclosure of information

56. Where an information holder wrongfully denies to disclose information either through negligence, recklessness or otherwise under this Act, whether it is in response to a specific request for information or proactive disclosure of information under Part IV, the officer or institution responsible shall be liable to a fine of two hundred and fifty thousand Kwacha (K250, 000.00) and imprisonment to a term not exceeding six months.

Misuse of disclosed information

57. Any person who, having being granted access to information under this Act, uses that information –

- (a) for unlawful purposes;
- (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 public interest,

commits an offence, and shall, on conviction be liable to a fine of two million kwacha (K2, 000, 000.00) and imprisonment for two years.

Failure by information holder to comply with reporting obligations

58. - (1) Failure by an information holder to comply with the provisions of this Act, including submitting its annual compliance report to the Commission and also making such report, simultaneously, available publicly, shall be actionable before the Court.

(2) The Court shall, on application by a person, make an order it considers appropriate to ensure that the information holder complies with this Act.

PART XI- MISCELLANEOUS

Regulations

59.- (1) The Minister may make regulations for the better carrying out of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may prescribe –

- (a) the manner in which applications for requests for information are to be made;
- (b) the form in which information requested under this Act is to be supplied;
- (c) the measures to be taken by public bodies and relevant private bodies in order to assist persons to exercise their rights under this Act;
- (d) the measures which information holders shall take to ensure proper keeping of records of information;
- (e) the procedure to be followed by information holders in consulting with a third party before disclosing

information relating to or obtained from that third party;

- (f) the procedures to be followed in ensuring that personal information held by a public body or relevant private body is accurate;
- (g) fees payable for processing requests for information;
- (h) the procedure for conduction reviews of decision of information holders;
- (i) fines that the Commission may impose on information holders for non-compliance with this Act;
- (j) form and procedures of publication of information; and
- (k) such other matters that are necessary for implementation of this Act.

Cap 1:01

(3) Notwithstanding section 21(e) of the General Interpretation Act, the regulations made pursuant to subsection (1) may prescribe penalties of up to two million Kwacha (K2,000, 000.00) and imprisonment for a maximum term of two years .

Transitional arrangements

60. All information holders shall comply with the provisions of this Act within twelve months of commencement of this Act.

SCHEDULE

(s.3(1))

INFORMATION HOLDERS TO WHICH THIS ACT APPLIES

1. The Executive and all its organs including ministries, departments, parastatals and other agencies of Government.
2. The National Assembly and all its organs.
3. The Judiciary and persons in their service.
4. Institutions and organizations whether established by or under an Act of Parliament or otherwise, in which the Government holds shares or exercises financial or administrative control and persons in the service of those institutions and organisations.
5. Civil society organizations that utilize public funds or carry out public interest functions.

6. Commissions and persons in the service of those commissions established by or under the Constitution or any Act of Parliament.
6. Quasi-governmental organizations and persons in the service of the quasi-governmental organizations.
7. Public corporations and persons in their service.
8. Organisations in receipt of public funds and persons in the service of those organisations.
9. Organisations contracted by Government to do work for government and persons in the service of those organisations.

OBJECTS AND REASONS

The object of this Bill is make provision for access to information held by public bodies and relevant private bodies in so far as that information is relevant for the exercise of their rights and related matters.

KALEKENI KAPHALE
Attorney General