CHAPTER 8

COMPLIANCE THROUGH DECORATION: ACCESS TO INFORMATION IN ZIMBABWE

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Abstract

This chapter examines the impact of the Access to Information and Protection of Privacy Act in Zimbabwe, which has been in place since 2002, making the country one of the first African countries to have legislation seeking to promote the right to information. The chapter specifically assesses the extent to which the Act addresses citizens' rights to information held by both public and private bodies. This is measured against the best practice in promoting and protecting the right to information as espoused in both regional and international instruments, specifically the Model Law on Access to Information for Africa. Besides benchmarking the AIPPA against the Model Law, the chapter also examines the extent to which the Act, as currently framed, complies with the provisions of the new Constitution, which was adopted in 2013, more than 10 years after the enactment of the AIPPA. One of the main criticisms of the Law has been that it does the opposite of its legal intent through its imposition of restrictive administrative and procedural processes on those seeking to access information held by public bodies. It is against this perception that the chapter seeks to establish the source of such misgivings through the use of case studies on efforts made in putting the Law to the test and lessons drawn therefrom. In conclusion, the chapter makes recommendations on how to improve the legislative framework to ensure that the right to information is not merely a legal decoration but a reality for the majority of Zimbabweans.

1 Introduction

Zimbabwe is one of the first countries to enact an access to information law in Africa. This it did in 2002, attracting a barrage of criticism from freedom of expression and access to information advocates.[1] This is because the Access to Information and Protection of Privacy Act (AIPPA)[2] does the opposite of what is intended of an access to information law. However, this was to be expected when one examines the circumstances that led to the formulation of the law and the context within which it was enacted, which both betray the real motivation behind the government's adoption of the controversial legislation.

Following the formation in 2000 of a strong opposition party, the Movement for Democratic Change, the government resorted to enacting patently repressive laws to give a legal veneer to its power retention schemes anchored on three pillars.[3] These were control; sowing siege mentality; and self-preservation. The first included the freezing of the airwaves; the criminalisation of expression; and the annihilation of channels of criticism and spaces of activism while setting the agenda and entrenching hegemony through controlling the public sphere. The second involved inculcating a siege mentality by relentlessly projecting the country's sovereignty as under threat of Western military might, through the domineering media outlets the state controlled. The third entailed the preservation of the ruling elite, who were sold to Zimbabweans as the best custodians of their democratic and developmental aspirations as enunciated in the ethos of the country's liberation struggle. Any alternative thus was presented as neo-colonial, treasonous and a threat to Zimbabwe's political and socio-economic fibre. These reasons – singularly and collectively – became the mould for the legislative framework at the time the AIPPA was enacted.

It was hardly surprising that between 2000 and 2008, at the height of strong opposition to the ruling Zimbabwe African National Union – Patriotic Front (ZANU PF) government, Zimbabwe witnessed the enactment and implementation of several laws that completely eroded

1 IFEX report; see https://www.ifex.org/zimbabwe/2002/03/18/ president_enacts_ access_to_information/ (accessed 12 February 2018). Also see an analysis by the Crisis Coalition Zimbabwe, a grouping of Zimbabwean civil society organisations, http://www.humanrightsinitiative.org/programs/ai/rti/news/aippa_analysis.pdf (accessed 12 February 2018).

2 Access to Information and Protection of Privacy Act (Chapter 10:27) was passed by the Zimbabwean parliament in January 2002 and signed into law in March of the same year. The passage of the law was not smooth-sailing as the opposition MDC fought against it. Its arguments were based on the Parliamentary Legal Committee's report that had found the law to be in violation of some constitutional provisions. However, the ruling ZANU PF used its majority to force the passage of the law.

3 B Raftopoulos & A Hammar 'Zimbabwe's unfinished business: Rethinking land, state and nation' in A Hammar, B Raftopoulos & S Jensen (eds) *Zimbabwe's unfinished business: Rethinking land, state and nation in the context of crisis* (2003) 1-47).

basic liberties such as the right to free speech, assembly and association as well as media and artistic freedoms, among a raft of other fundamental rights. It became apparent that the laws that were being enacted were not motivated by the desire to promote freedom, but to give the ruling party's repressive measures a veneer of legality.[4]

This chapter will outline the constitutional provisions providing for the right of access to information, mentioning the other regional instruments to which Zimbabwe is a state party that promote this fundamental freedom. It then analyses the provisions of the AIPPA and assesses its compatibility with the Model Law on Access to Information for Africa (Model Law). This is done do identify defects in the law when compared to generally-accepted regional standards and principles on promoting the right to information. The chapter also highlights the way in which the Law has since its enactment been applied in Zimbabwe, before concluding by way of recommendations on the need to review the law and align it to the country's Constitution and structure it in accordance with the Model Law.

2 Constitutional framework and regional instruments

In May 2013, Zimbabwe adopted a new Constitution to replace the old Lancaster House Constitution, which was basically a post-liberation war document meant to balance the interests of the warring colonial administration and liberation movements in an independent Zimbabwe. The new Constitution, which has been hailed as progressive, provides for adequate safeguards for the exercise of the right to freedom of expression, media freedom and access to information. Whereas the previous supreme law lumped all these rights together and one could only enjoy the right to access information through inference, the new Constitution explicitly provides for these freedoms as well as the right to privacy of communication. Most importantly, as regards the right of access to information, article 62 of the Constitution states:

> (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.
>
> (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the state, in so far as the information is required for the exercise or protection of a right.

4 Human Rights Watch *Sleight of hand: Repression of the media and the illusion of reform in Zimbabwe* (2010).

(3) Every person has a right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the state or any institution or agency of the government at any level, and which relates to that person.

(4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

This provision makes Zimbabwe one of the more than 16 African countries[5] of which the constitutions guarantee the right of access to information. However, despite this provision, the government is still to review the AIPPA to ensure that it is in line with the new Constitution.

Besides the constitutional framework providing for the right to information, Zimbabwe is a state party to some of the regional instruments that also recognise the fundamentality of this right. These include article 9 of the African Charter on Human and Peoples' Rights (African Charter)[6] and Principle 4 of the Declaration of Principles on Freedom of Expression in Africa.[7] The right to information is also enunciated in article 19 of the Universal Declaration of Human Rights (Universal Declaration)[8] and article 19 of the International Covenant on Civil and Political Rights (ICCPR).[9]

However, while in the past Zimbabwe could easily wish away its obligations under international human rights instruments, the new Constitution enjoins it to incorporate these into domestic law. Article 34 of the new Constitution states: 'The state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.'

This means that the country is duty bound to review its access to information law and to ensure that it not only conforms with the Constitution, but also to regional and international instruments on promoting and safeguarding the right of access to information.

5 Open Society Justice Initiative overview of Constitutional Protection of the Right to Information https://www.right2info.org/constitutional-protections.

6 Zimbabwe ratified the African Charter on Human and People's Rights in May 1986.

7 The Declaration of Principles on Freedom of Expression in Africa was adopted at the 32nd session of the African Commission on Human and Peoples' Rights in October 2002 in Banjul, The Gambia. Principle XVI of the Declaration obligates state parties to the African Charter, including Zimbabwe, to make every effort to give practical effect to the principles.

8 As a member of the United Nations, Zimbabwe is also bound by the Universal Declaration of Human Rights.

9 Zimbabwe ratified the ICCPR in 1991.

3 Architecture of the law: The AIPPA versus the Model Law

From the very outset, the AIPPA failed to pass the democratic test when it was tabled before Parliament in March 2002. Presenting its views on the law, the Parliamentary Legal Committee, chaired by the late ZANU PF official Eddison Zvobgo, noted:[10]

> The Bill in its original form was the most calculated and determined assault on our liberties guaranteed by the Constitution ... What is worse, the Bill was badly drafted in that several provisions were obscure, vague, overbroad in scope, ill-conceived and dangerous ... Ask yourself whether it is rational for a government in a democratic and free society to require registration, licences and ministerial certificates for people to speak. It is a sobering thought.

A close analysis of the law highlights the reasons behind such adverse comments by the Legal Committee.

The law merges the practice of journalism with citizens' rights of access to information. In that scope, while it purports to promote the right to information, it imposes restrictions on the media's right to the establishment and practice of journalism, which are key in enhancing access to information.

Since its enactment and enforcement, numerous media practitioners have been refused registration, deregistered, harassed, persecuted, arrested, detained, maliciously prosecuted, and ultimately silenced.[11] In fact, four newspapers were closed down in succession soon after the law was passed in 2002, thereby preventing the free flow of alternative news and information to the public. These included the *Daily News*, the *Daily News on Sunday*, the *Tribune* and the *Weekly Times.*

The closure resulted in self-censorship by the media, 'underground' journalism, and the fleeing of journalists and other media practitioners from Zimbabwe in search of safer environments. This development left the state-controlled media the dominant source of news and information, simply amplifying the voices of the governing elite.

10 Minutes of the 9th meeting of the Parliamentary Legal Committee held on 23 January 2002.

11 MISA-Zimbabwe Report (2010), Media Laws in Zimbabwe: An analysis of amendments to media laws in Zimbabwe since the year 2005.

Since its adoption in 2002, the AIPPA has undergone several amendments. Although the law was first amended in 2003, this amendment was not intended to make it more democratic, but to address administrative gaps that could potentially weaken its repressive nature.[12] Subsequent amendments in 2004 followed a similar route, ensuring that the law did not provide primacy of the right to information when it came to state secrets and the business of Cabinet.[13]

Even as the Southern African Development Community (SADC), through the mediation efforts of former South African President Thabo Mbeki, pushed for legislative reforms including democratising the media ahead of the 2008 elections, the outcome of such interventions remained largely marginal. The 11 January 2008 amendments to the AIPPA remained a far cry from what had been expected as the law's repressive provisions with regard to access to information, freedom of expression and media freedom remained intact. The amendments introduced the following key aspects:[14]

- It established a statutory Zimbabwe Media Commission (ZMC) to replace the Media and Information Commission (MIC). Besides the name change and its reconstitution, the ZMC essentially had similar functions to that of its predecessor, the MIC. The functions of the ZMC included upholding and developing freedom of the press; accrediting journalists and monitoring mass media; investigating and dealing with complaints against any media or journalist; and promoting and enforcing good practice and ethics in the media as well as acting as an appeals body on issues related to access to information.
- It introduced a procedure for appeals and enforcement of ZMC decisions.
- It set up the Media Council of Zimbabwe to assist the ZMC in developing codes of conduct for media practitioners, and to exercise disciplinary control over them.
- It increased the period of validity of a mass media registration certificate from two to five years and set out procedures for the renewal of such registration certificates and the circumstances in which the ZMC may cancel, suspend or refuse to register a mass media service.
- It provided the Minister with an absolute discretion to exempt from registration those mass media services in which non-Zimbabweans hold a controlling interest, but these services had to be 'approved' by the Minister.

12 The 2003 Amendment redefined what was meant by 'mass medium', and dealt with the composition of the media and Information Committee, the qualifications for media ownership, the protection of information related to public safety as well criminalising the abuse of freedom of expression.

13 The 2004 amendments criminalised the practice of journalism by unaccredited journalists by imposing a fine or imprisonment for a period not exceeding two years or both; introduced the nomination of some of MIC members to be appointed from nominees of media houses association; as well as prescribing procedures for the dismissal and suspension of committee members.

14 See n 9 above.

- It maintained the criminalisation of operating mass media services without a registration certificate.
- It laid down new procedures and conditions for accreditation; introduced a roll of accredited journalists; substituted journalistic rights with privileges which can only be enjoyed on condition of accreditation; and laid down penalties of up to two years' imprisonment for a breach of the requirements for accreditation.
- It significantly reduced the powers of the Minister responsible for the administration of the AIPPA. However, it bestowed these powers on the President, for example, in relation to the appointment of members of the ZMC.

The following provisions relating to access to information remained intact in the Act:

3.1 Scope of application

In Zimbabwe, the right to access information does not extend to persons who are not citizens or permanent residents of Zimbabwe or who are not lawfully working or studying in Zimbabwe.[15] It also excludes information held by private bodies, unlike similar laws in other countries, such as South Africa's Promotion of Access to Information Act 2 of 2000.

The restriction of the application of the AIPPA to only public bodies is contrary the Declaration of Principles on Freedom of Expression in Africa (Declaration), which provides in Principle 4: 'Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.' The exclusion of private bodies is also in conflict with Part II of the Model Law, which provides for access to information held by relevant private bodies and private bodies.[16] According to the Model Law, a relevant private body is[17]

(a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or

(b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service.

A private body is defined as

(a) a natural person who carries on or has carried on any trade, business or profession or activity, but only in such capacity;

(b) a partnership which carries on or has carried on any trade, business or profession or activity; or

15 Sec 5(3)(a) AIPPA.
16 Sec 2 Model Law.
17 See definition of terms in Part 1 of the Model Law.

(c) any former or existing juristic person or any successor in title; but excludes public bodies and relevant private bodies.

The inclusion of these types of private bodies that perform public functions or receive public funds is critical in ensuring accountability even among private entities that use public resources.

3.2 Proactive disclosure

While the Model Law provides for a broad framework for proactive disclosure, the AIPPA fleetingly does so and in the context of information pertaining to third parties in section 28. The provision also limits circumstances upon which proactive disclosure could be made. These include information concerning the risk of significant harm to the health or safety of members of the public; significant harm to the environment; matters related to the prevention, detection or suppression of a crime; as well as threats to national security and public order and security. Even so, threats to public security or public order are not to be disclosed to the general public but to the relevant law enforcement authorities. This means that an applicant or even affected persons would remain uninformed about such critical public interest matters.

By contrast, section 7 of the Model Law provides for two categories of information to be proactively disclosed by public bodies and relevant private bodies. On one side are those categories that must be made available within 30 days of their being generated or received. These include (i) manuals, policies, procedures or similar documents which are prepared for or used in discharging that body's functions, exercising powers and handling complaints, making decisions or recommendations or providing advice to persons outside the body with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons may be entitled; (ii) the names, designations and other particulars of the information officer and deputy information officer for the purposes of submitting requests for information; (iii) any prescribed forms or procedures for engagement by members of the public with the public body or relevant private body; (iv) details of any existing avenues for consultation with, or representation by, members of the public in the formulation or implementation of policies or similar documents; (v) whether meetings are open to members of the public and, if so, the process for direct or indirect engagement; (vi) details of any subsidy programmes implemented with public funds; (vii) contracts, licences, permits, authorisations and public-private partnerships granted; (viii) reports of surveys, studies or tests, including scientific or technical reports and environmental impact assessment reports; and (ix) any other information directed to be proactively disclosed by the oversight mechanism.

On the other side are those categories of information to be proactively published annually by public and relevant private bodies. These are (i) particulars of its organisation, functions and duties; (ii) interpretations or particulars of Acts or policies administered; (iii) details of processes for creating, keeping, organising and maintaining information; (iv) a list of categories of information held or under its control; (v) a directory of employees and their powers, duties and title and the band of remuneration; (vi) the annual band of remuneration for each public employee and public officer, including the system of compensation as provided in its laws, the procedures followed in its decision-making process, including channels of supervision and accountability; (vii) travel and hospitality expenses for each employee; (viii) composition, functions, and appointment procedures of the boards and other bodies constituted for the purpose of providing advice to or managing it; (ix) detailed budget, revenue, expenditure and indebtedness for the current financial year; (x) the annual report; and (xi) any other information so directed to be proactively disclosed by the oversight mechanism.

3.3 Primacy

Contrary to the Model Law, which requires states to establish the primacy of an information law over all other national legislation save the Constitution,[18] the AIPPA does not explicitly spell this out in promoting the right of access to information. As a result, access to information can easily be derogated though other pieces of legislation such as the Official Secrets Act, which is used to broadly embargo information held by government bodies and agencies. In reality, therefore, the effectiveness of the AIPPA in giving effect to the right of access to information is seriously limited by the provisions of numerous other laws in the Zimbabwean legal system which promote secrecy over transparency.

3.4 Cumbersome procedures for access

Persons seeking information held by a public body have to go through a cumbersome procedure under the AIPPA, making it practically difficult for these persons to obtain such information.

According to the law, for one to obtain information from a public body, they have to make a formal request in writing to the head of such public body. The official has 30 days in which to respond to the application, and in certain circumstances this can be extended to for a further 30 days or indefinitely with the permission of the Zimbabwe Media Commission. No justification is given in relation to these long timelines, which are unnecessarily long and insensitive to the needs of those seeking

18 Sec 4 Model Law.

information, especially if it is key to addressing an urgent and serious matter. The Model Law, on the other hand, provides for a response within 21 days after the submission of a request and within 48 hours if the information 'is necessary to safeguard the life or liberty of a person'.[19]

Further, the AIPPA does not provide for oral requests to cater for illiterate persons. It also does not provide for persons living with disabilities when it relates to requests for information. However, the Model Law not only allows for oral requests,[20] but also requires that where a request is made by a person living with a disability, the relevant official 'must take all necessary steps to assist such person to make a request in a manner which meets their needs'.[21]

The cumbersome modalities one has to contend with to access information from state bodies under the AIPPA and the lack of flexibility and assistance to vulnerable groups severely restricts the exercise of the right to information and is antithetical to relatively simpler procedures enunciated in the Model Law.

3.5 Refusals and exemptions

Under the AIPPA, the head of a public body is entitled to decline access to a record of information if they deem disclosure is not in the public interest.[22] There is no precision or guidance on the meaning of the term 'public interest', leaving the provision susceptible to abuse. It is acceptable international practice that any legal provision of which the effect is to curtail the enjoyment of fundamental rights of people ought to be clear enough to allow people to appropriately modify their conduct.[23] One such example is the ICCPR, which provides for a narrow scope within which states can derogate fundamental freedoms.[24]

Access to information can also be denied if its disclosure would prejudice 'national security',[25] which again is vague and broad. There are no specifications as to what constitutes 'national security' and the extent to which the disclosure of information would be prejudicial to national security. Consequently, access to information can be arbitrarily restricted on the pretext that disclosure is not in the 'public interest' or would prejudice 'national security' when the information is merely politically sensitive and its disclosure would not be in the interest of the ruling elite.

19 Sec 15(2) Model Law.
20 Secs 13(1) & (2) Model Law.
21 Sec 14(2) Model Law.
22 Sec 9(4)(c) AIPPA.
23 See n 7 above.
24 Art 4 of the ICCPR allows for limitations and circumstances for state parties to derogate from their responsibilities under the Covenant. However, state parties may not derogate from arts 6, 7, 8 (paras I & 2), 11, 15, 16 & 18.
25 Sec 17(1) AIPPA.

Other categories of protected information include deliberations of Cabinet and local government bodies; advice relating to policy; information of which disclosure will be harmful to law enforcement processes; information relating to inter-governmental relations or negotiations; financial or economic interests of a public body of the state; and information relating to the conservation of heritage sites, among other broad exemptions.

While it is standard practice for states to classify certain information, the exemptions in the AIPPA are too wide to the extent of impeding the public and the media from accessing information from public bodies which should be subject to public scrutiny.[26] The impact of such provisions is that they disable citizens' ability to fully participate in the governance of their own resources from an informed position as well as to hold their leadership to account. Together with stringent regulations controlling media practice under the AIPPA and other laws criminalising media freedom, the exemptions are also harmful to free and investigative journalism, which is an essential tool for entrenching the free flow of information necessary for accountable governance.

Although the Model Law also recognises exemptions, these exemptions are clearly and narrowly defined, and are also subjected to different levels of thresholds to prevent reliance on them by public and private institutions as a pretext for maintaining secrecy.[27]

Measured against the Model Law, the AIPPA falls far too short in promoting access to information. In fact, 'the list of 'excluded information' under sections 4 and 5 of the AIPPA is too long and broad to the extent of detracting the right of access to information to unacceptable levels.[28] For example, while documents pertaining to client-attorney privilege[29] could justifiably be legally confidential, the protection of, for example, 'a personal note' or of 'teaching materials' constitutes irrational limitations that are not justifiable or reasonable in a democratic society[30] and, thus, is in contravention of section 62(4) of the Constitution as well as provisions of the Model Law. Further, the limitations in the AIPPA have the effect of unjustifiably curtailing the right of access to information. For example, while section 9(1) read with section 46(1)(d) of the Constitution mandates that the state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution, the grounds for limiting the access to information outlined in the AIPPA militate against the

26 UNESCO and MISA Report (2004) Undue restriction: Laws impacting on media freedom in the SADC.
27 See generally part III of the Model Law.
28 n 9 above.
29 Sec 16 AIPPA.
30 As above.

attainment of these values. This is particularly the case for the following reasons:

3.5.1 Undefined and vaguely-worded limitations

Some of the grounds for limitations are undefined and potentially compromise the transparent, open and accountable governance envisaged in the Constitution.[31] The terms include 'public interest' (section 9(4)) and the requirement for disclosure to 'authorised persons' only.

While public interest is a ground for refusal of disclosure of information, there is no definition of what is considered to be or not to be in the public interest, leaving that to the discretion of the public official approached.

Furthermore, whereas section 14(1) of the AIPPA prohibits the disclosure of cabinet deliberations to persons who are not 'authorised', it does not define who an 'authorised person' is or how one becomes so authorised. This provision read with the provisions of the Official Secrets Act gives a blanket denial of the public's access to key governmental decisions and processes, amounting to a denial of critical information on state policy and processes.[32]

Finally, there is no precise definition of the ground upon which a refusal can be granted with regard to the disclosure of information that may cause harm to the planning, financial and economic interests of a public body or of the state, such as financial, commercial, scientific or technical information that belongs to a public body or to the state and has a monetary value.[33] This is contrary to the principles of public financial management outlined in section 298(1) of the Constitution, such as (a) transparency and accountability in financial matters; and (b) transparent, prudent and effective expenditure of public funds. It is also contrary to other provisions of the Constitution, such as the requirement for state-controlled commercial entities to establish transparent and open procurement systems.[34]

31 MISA Zimbabwe position paper on the defects of AIPPA that seeks to influence the realignment of laws with the 2013 Constitution. The paper was produced on behalf of Zimbabwe Civil Society Constitution Monitoring Consortium.

32 Centre for Applied Legal Research Constitutional Alignment Discussion Paper Series – Discussion Paper 4, Access to Information and Protection of Privacy Act [Chapter 10:27] on Amendments to Provisions Relating to Access to Information 15.

33 See sec 19 of AIPPA. The section forms part of Part III of the Act, which provides for broad limitations to access to information.

34 See sec 195(2) of the Constitution.

3.5.2 Unjustifiable limitations[35]

Section 18(1)(a)(i) of the AIPPA restricts access to information relating to inter-governmental relations or negotiations, including the disclosure of information that may affect the relations between the government and a municipal or rural district council.

This limitation flouts the grounds provided for in section 62(4) of the Constitution, which permits the restriction of the right to information in the instance where the restriction is fair and 'justifiable in a democratic society based on openness'. This is more so when the provisions of sections 62(4) and 86(2)(b) are read together with the values of openness, responsiveness, transparency and accountability that are outlined in sections 3, 8, 9 and 194(1)(f) of the Constitution on which basis laws and policies must be crafted. Juxtaposed with these constitutional provisions, it can be argued that the status of the relationship between government and a council cannot justifiably outweigh the public interest override, public accountability and the exercise and protection of rights, which access to information is supposed to facilitate.

3.6 Public interest override

Under the AIPPA, the concept of 'public interest' is relied upon broadly and vaguely as criteria for determining the categories of information that can legitimately be exempted from disclosure. This is directly contrary to international best practice, which instead requires that information be disclosed if public interest so demands, even where such information falls within exempted categories of information under the relevant law.

Section 25(1) of the Model Law states:

> Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.

The AIPPA, as it is currently structured, completely ignores this key principle in promoting access to information, opting rather to use this internationally-recognised best practice standard as a means of witholding information.

35 See n 17 above.

3.7 Oversight mechanism

Although the AIPPA sets up a very weak oversight mechanism by delegating oversight powers and duties to the Zimbabwe Media Commission (ZMC) established under the same Act, this body was in 2013 transformed into a constitutional body. However, the ZMC yet has no specific oversight function with regard to overseeing the promotion of the right of access to information as stipulated under the Model Law. The functions of the new constitutional ZMC only vaguely refers to access to information. While article 249(f) states that one of the functions of the Commission is to 'ensure that the people of Zimbabwe have access to information', article 249(h) mandates the Commission 'to encourage the adoption of new technology in the media and in the dissemination of information'. Because article 2 of the new Constitution provides for the supremacy of the Constitution, it may be argued that currently there is no properly-constituted, independent and functional oversight mechanism to promote and monitor the implementation of the AIPPA as enunciated in the Model Law.

Part V of the Model Law establishes an independent and impartial oversight mechanism comprised of information commissioners. Their purpose includes the promotion, monitoring and protection of the right of access to information. The Model Law also outlines the appointment procedure for commissioners as well as the selection criteria, which includes requisite academic qualifications and working experience; publicly-recognised human rights advocates; independence, impartiality and accountability; and demonstrable knowledge regarding access to information, transparency or public and corporate governance. All these provisions targeted at ensuring the establishment of an independent and effective oversight mechanism are glaringly lacking under both the AIPPA and the Constitution.

4 The deviation: Combining media regulation and access to information

Instead of extensively concentrating on other key elements as contained in the Model Law, which would ensure that the right of access to information is a living reality in Zimbabwe, the law detours into issues of media regulation and the practice of journalism. The entangling of access to information issues with media issues has over the years cast the AIPPA as simply a media-policing Act and not an access to information law. This is because, apart from the fact that media regulation and control make up the largest chunk of the law, the Act has not been implemented in such a manner as to give effect to access to information in the country.

With regard to the media, the Act imposes statutory regulation of the media; stringent requirements for establishing and operating media houses as well as practising journalism, and redefines media freedom through the practice of journalism as a privilege. Clearly, privileges are not guaranteed and can be waived, altered or withdrawn more readily than rights. Some of the privileges in terms of the law include

(1) visiting parliament and any public body as a journalist;

(2) accessing records permitted in terms of the AIPPA;

(3) attending national events as a journalist;

(4) attending any public event as of right; and

(5) making recordings in parliament, national events and public meetings, with the use of audio-video, photography and cine- photography.[36]

The AIPPA goes further to criminalise the practice of journalism and impose disproportionate penalties such as prison terms and heavy fines for those deemed to have violated the law by exercising their right to freedom of expression through unsanctioned journalism. All these provisions singularly and collectively erode freedom of expression and access to information through multiple and diverse media platforms.

In effect, the fact that, on the one hand, the Act purports to promote information while, on the other, it negates the same through stringent media-policing provisions making it one of the most conflicted pieces of legislation found in the country's statutes. Thus, the aim of AIPPA is not really to promote and safeguard the exercise of Zimbabweans' rights, but to handicap their active agency while insulating the governing elite's excesses from the public glare.

The repressive nature of the provisions of the AIPPA was clearly underscored by the African Commission on Human and Peoples' Rights in the case of *Scanlen and Holderness v Zimbabwe*.[37] In this case, the Commission held in 2009 that the accreditation of journalists – even for the sake of protecting 'public order', safety and the rights and reputation of others – was a violation of the right to freedom of expression and media freedom as protected under the African Charter.[38] Despite the African

36 Sec 78 AIPPA.

37 (2009) AHRLR 289 (ACHPR 2009). The Independent Journalists Association of Zimbabwe, Zimbabwe Lawyers for Human Rights and the Media Institute of Southern Africa (Zimbabwe) approached the African Commission to express dissatisfaction about secs 79 and 80 of AIPPA, which they argued contravened art 9 of the African Charter by imposing the compulsory licensing of journalists and criminalising the profession. The complaint was filed with the African Commission in 2005.

38 See details of the case and ruling at http://www.achpr.org/files/sessions/6th-eo/comunications/297.05/achpreo6_297_05_eng.pdf (accessed 4 February 2018). Also see news report by Kubatana.Net, 'Amend AIPPA: African Commission', http://archive.kubatana.net/html/archive/media/090828misaz.asp?sector=MEDIA (accessed 17 November 2015).

Commission's ruling, no substantive changes were made to the AIPPA to bring about a positive effect on access to information, freedom of expression or press freedom.[39]

5 Application of the AIPPA in Zimbabwe

It is a matter of public record that the AIPPA has been selectively applied to target the independent media with a view to silencing voices critical of the governing elite. Almost all cases of media and journalists that have fallen foul of the Act work for the private media.[40] While the selective application of the law has been obvious with regard to media regulation, there is little evidence to demonstrate that the government has used the law to empower citizens' rights of access to information held by public bodies, nor have there been concerted efforts by members of the public to put the law to the test.

This appears to be largely due to the prevalent ignorance among citizens about their right to access information, the value of exercising this right and how to do so. The few isolated cases of active demands for information emanate mostly from selected civil society organisations, of which MISA-Zimbabwe is one. Over the years, this organisation has sought to put the law to the test in a bid to ascertain the degree to which the AIPPA fosters access to information as it purports to do. The results have been less than encouraging.

Between 2015 and 2016, MISA-Zimbabwe sent requests for information to 35 public bodies in line with procedures prescribed in the AIPPA, seeking what can easily pass for innocuous records of their operations as public entities.[41] Of these, only 12 bodies responded positively while the rest either openly refused to provide information or simply did not respond. Even so, fewer than half of those that responded gave written responses. Others referred MISA to chief executive officers of institutions, partly answered questions sent to them and declined responding to others, and were hostile towards persons who were requesting information. This is despite the fact that the questions sent could hardly be considered sensitive but simply bordered on seeking a

39 See n 11 above.
40 MISA-Zimbabwe *Access to Information and Protection of Privacy Act: Five years on* (2005).
41 MISA-Zimbabwe annually conducts research to assess the openness of public bodies in providing information to citizens. This is part of MISA's regional *Golden key and padlock* research conducted in Southern Africa, to examine the accessibility of information held by public bodies, with a view to using the findings as an advocacy tool to push for greater openness in the provision of information which is beneficial to citizens.

greater understanding of the administrative and operational issues of the organisations, which are matters of public interest.[42]

These statistics illustrate just how difficult it is to obtain information under the prevailing access to information law, and this is when the information sought is not particularly sensitive. It is not difficult to imagine how much more difficult it is to seek information that is regarded as politically sensitive. In fact, with the broad exemption clauses contained in the AIPPA, it will not be difficult for public bodies to find an excuse not to divulge information they hold on grounds of 'national security' or 'public order', among other such vague parameters.

6 Conclusion and recommendations

Since Zimbabwe has voluntarily ratified and is a state party to some key international and regional human rights instruments that contain protections in relation to press freedom, freedom of expression and the right to access information, it is duty bound to abide by these treaties. In this vein, it is therefore critical that government either completely repeals the AIPPA and replaces it with new access to information legislation or extensively amends the law to bring it in line with the new Constitution. If the law is repealed, it will be important that the new Act is a stand-alone access to information law that is divorced from media regulation. This is to enable the effective and practical implementation of the right of access to information. Such an Act will be in line with article 62(4) of the Constitution, which enjoins the government to enact a law that will give effect to the right to information.[43]

The new law should also be anchored on the Model Law, the Declaration of Principles on Freedom of Expression in Africa, and key principles on promoting access to information as pronounced in the African Platform on Access to Information.[44]

42 See MISA Regional Report Government Openness in an Information Age: 2015 Report on Open and Secretive Public Institutions in Southern Africa. http://www.freedominfo.org/wp-content/uploads/Padlock-survey-2015_v11.pdf. See also 'MISA Transparency Assessment: 2016 Report on Open and Secretive Public Institutions in Southern Africa' http://misa.org/wp-content/uploads/2016/10/TransparencySurvey2016.pdf.

43 MISA-Zimbabwe position paper submitted to government-sponsored Information and Media Panel of Inquiry in 2013.

44 The African Platform on Access to Information (APAI) Declaration was adopted at the Pan-African Conference on Access to Information (PACAI) on 19 September 2011, held in Cape Town, South Africa, upon a motion for adoption moved by Advocate Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information of the African Commission and seconded by Norris Tweah, Deputy Minister of Information, Culture and Tourism for the Republic of Liberia. The document lists a number of key principles intended to advance the right of access to information in all its dimensions, nationally, regionally and internationally. See http://www.africanplatform.org/(accessed 4 February 2018).

If the government decides to tow the path of an amendment, it is critical that the following issues relating to access to information, together with those relating to media regulation, are addressed:

(1) Section 5(1) should be repealed and replaced by a provision which, among other things, ensures that the Act provides for access to 'information' and not merely records held by public bodies as is currently the case. The provision should also be expanded to include relevant private and private bodies as contained in the Model Law.

(2) Amendments must ensure the simple, quick and easy exercise of the right of access to information and do away with the current cumbersome procedures of requesting information.

(3) Sections 4 and 5 should be amended to substantially narrow down the compass of exemptions which are presently too broadly defined.

(4) An independent oversight mechanism should be established that will ensure the monitoring and enforcement of provisions of the law as clearly enunciated in the Model Law.

(5) The primacy of the access to information law and the public interest override must be clearly stipulated in the law.

A report by a government-sponsored Information and Media Panel of Inquiry (IMPI), which was set up to assess problems bedevilling information and the media sector, also recommends action with regard to the AIPPA.[45] It states:

> This (AIPPA) law should be repealed and replaced with a law that specifically provides for access to information with ample provision for protecting this right, including its expansion to information held by non-public bodies as envisaged in ... the Constitution ... Media regulation issues are provided for under a separate law.

No action has to date been taken to implement the IMPI recommendations.

It is crucial that Zimbabwe separates access to information from media regulation. This will ensure that the right of access to information is not subsumed or conflated with media freedom issues. Media regulation should be provided for under a different media law. A separate access to information law will ensure that the right is not viewed as a journalistic privilege but as a basic right that should be enjoyed by citizens. The danger of merging access to information with journalism is that the right to know

45 IMPI was set up by the government to investigate challenges affecting the media and the information industry as well as to carry out public consultations on how to address these. The Panel started its work in 2014 and submitted its final report in March 2015. The report contains broad recommendations, including the need for legislative reforms. Among a host of laws that the Panel identified for review is AIPPA, and the government has pledged to be guided by the report as it aligns the laws with the new Constitution.

tends to fall victim to state actors' paranoia against robust media, thereby disabling citizens' ability to access relevant information with which they can meaningfully participate in the governance of the country, hold their leaders accountable and entrench transparency.