

Theme 3

Freedom of Information and Records Management

Introduction

This discussion paper concerns Freedom of Information (FOI, also called Access to Information and Right to Information) legislation. FOI laws require public bodies to release information requested by citizens or groups outside government, subject to certain exemptions pertaining to such matters as national security, personal privacy and intellectual property. This paper is based on a study called *Aligning Records Management with ICT, e-Government and Freedom of Information in East Africa*, funded by the International Development Research Centre and conducted by the International Records Management Trust. The research was carried out across the East African Community by teams in each of the constituent countries; Burundi, Kenya, Rwanda, Tanzania and Uganda. FOI legislation has not been drafted in Burundi, Rwanda and Tanzania, has stalled in Cabinet in Kenya, and has been passed but not implemented in Uganda. The study has identified a series of records management issues affecting FOI implementation in the region.

Misconceptions about Freedom of Information

The research found that there was a prevalent misconception of FOI in the East African region. With the exception of the staff of the National Archives in the five countries, the policy makers and public servants interviewed consistently believed that enacting FOI legislation would require the publication of government information, rather than the release of unpublished government information on request. The idea that governments can choose what information to release, when, and in what formats is not in keeping with the spirit of FOI laws, which seek to change the way that information is shared between public bodies and the public.

In Uganda, for example, the Access to Information Act, 2005, was seen as requiring proactive information dissemination by ministries, departments and agencies, rather than creating processes by which citizens could request and be supplied with information. This misconception may be seen in the steps towards implementation taken by the Office responsible for FOI, which included weekly radio addresses by the Minister and public fora (barazas) held for the purpose of questioning civil servants about activity and expenditure.

This misconception may be contributing to the lack of government enthusiasm for enacting and implementing FOI, since many government organisations in the region already publish some information.

Inconsistencies Between Acts of Parliament

Those interviewed stated consistently that FOI would not change the ‘thirty year rule’, a convention in many Commonwealth countries, usually embodied in National Archives and Official Secrets Acts, that permits the opening of government files to the public thirty years after closure. Neither the Ugandan Access to Information Act nor the Kenyan Freedom of Information Bill, 2007, has clearly addressed this convention, which persists as the dominant principle in the release of government information. If the perceptions of public servants in Burundi, Rwanda and Tanzania are an indicator, it is likely that FOI laws that are unclear on this issue will have not have the anticipated level of impact in these countries.

In Kenya, the Freedom of Information Bill reallocates responsibilities to the Freedom of Information Commission that are already assigned to the National Archives under the Public Archives and Documentation Service Act. For example, Section 42. (1) indicates that the Minister may prescribe anything under the act, including:

- (f) the measures which public authorities shall take to ensure that adequate records are created and maintained by public authorities;*
- (k) the records that public authorities shall be required to keep.*

Should the Bill proceed in this form, responsibility for government record-keeping could be dispersed between the two bodies, which could result in divergent records management policies and guidance to government organisations.

In Tanzania, where no Freedom of Information Bill has been drafted, interviews with the Media Council of Tanzania revealed that media laws and policies were not reformed during the period of media liberalisation in the 1990s. The Council considered a number of these laws to be impediments to FOI. The Tanzanian National Security Act, 1970, which gives government the right to withhold information, at its discretion, was given as an example. A Commission was established in 1990 to study obsolete and unconstitutional laws; this Commission advised abolishing the laws in question, but, still, no action has been taken.

The Implications of Government Record-Keeping for Freedom of Information

The problem of information retrieval will need urgent attention if FOI laws are to be enacted and implemented in eastern Africa. In order to answer FOI requests, it must be possible for government organisations to search for all records relating to a particular matter, retrieve them easily, review them against the exemptions of the Act and prepare suitably framed responses.

Interviewees who did understand that FOI is properly a citizen-initiated process rather than a government-initiated one, stated that government organisations are not ready for FOI. Staff of one ministry in Kenya cited the British strategy of allowing

five years after enactment for FOI implementation as a model the Kenya Government might follow. This would allow time for government records to be put in order. However, some staff members felt that even this would not allow sufficient time to ensure that adequate planning and preparation were carried out.

Section 41 (2b & 2c) of the Kenyan Bill requires that all records, including those held in electronic format, should be maintained in good order and condition. The Bill indicates that within three years of enactment, every government organisation should computerise its records and information management systems in order to facilitate efficient and effective access to information.

The Bill is forward-looking in its inclusion of electronic records, but the provision for computerising systems in government organisations poses a problem. If existing records are not in order and new ICT systems are not capable of managing the electronic records they produce, the Bill, in encouraging computerisation, will result in the transfer of existing problems into the electronic environment and the creation of new problems. Computerising systems and digitising hardcopy records do not, of themselves, facilitate efficient and effective access to information.

Discussions Questions

Question 1: Given that the Kenyan Bill has been under consideration for four years, the Ugandan Act has not been implemented in the six years since its enactment, and there is no discernible plan to introduce Freedom of Information in Burundi, Rwanda and Tanzania, East African governments do not seem to be embracing FOI. What factors have caused this lack of enthusiasm?

Question 2: The conflicts between existing Acts of Parliament and new FOI laws need to be addressed, particularly the 30 year rule. FOI laws may erode the powers of National Archives and contradict the provisions of existing Acts. What steps can be taken to highlight these issues to legislators, given that the recommendations of Law Reform Commissions and NGOs have not yet been acted upon?

Question 3: Government organisations in the region are unprepared for the demands that FOI will place on records management services. Poor record-keeping may serve as an argument for delaying Freedom of Information enactment and the failure to implement Freedom of Information Acts. What strategies could be developed to synchronise Freedom of Information and records management initiatives?