The right to seek and receive information is a constitutional right in Tanzania. However, often this right cannot be legally enforced because a right to information law does not exist in Tanzania. In practice other contradictory law and policies take precedence over this constitutional right. This makes it difficult for ordinary citizens to take any type of redressive action whenever this fundamental right is denied.

This report analyses the laws and policies related to access to information in Tanzania with reference to relevant legislations and key international instruments. It also makes specific recommendations on how to promote and enforce binding legal claims of the right to access public information.

The research was conducted and written by the Legal and Human Rights Centre (LHRC) in collaboration with HakiElimu. It aims to inform concerned citizens and policy makers, and to stimulate debate, awareness and public action.

LHRC
The Legal and Human Rights Centre (LHRC) is a not for profit, non-partisan, non-governmental organization that strives to promote, reinforce and safeguard human rights in Tanzania. The main objective of LHRC is to create legal and human rights awareness among the public through legal and civic education, research, follow-up of human rights abuse and the provision of legal aid. For more information, contact: lhrc@humanrights.or.tz

HakiElimu
HakiElimu is an independent civil society organization that seeks to realize equity, quality, human rights and democracy in education and society. It facilitates communities to transform schools and influence policy making; stimulates imaginative public dialogue and organization for change; conducts critical research and inquiry, analysis and advocacy; and collaborates with partners to advance social justice. For more information, contact: info@hakielimu.org
Acknowledgments

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1. Introduction

Access to Information (ATI) is inextricably linked to democratic accountability and participatory development. Citizens’ right to access public information is well chartered internationally and the United Nations affirms that freedom of information is a fundamental human right.\(^1\) Moreover, Article 19 of the *Universal Declaration of Human Rights of 1948* provides that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

In a similar vein, Article 18 of *The Constitution of the United Republic of Tanzania of 1977* provides that:

> Every person:
> (a) has the right to freedom of opinion and expression;
> (b) has the right to seek, receive and impart information regardless of national frontiers;
> (c) has the freedom to communicate and the right to do so without interference; and
> (d) has the right to be informed at all times of various events of importance to the lives and activities of the people and also of issues of importance to society.\(^2\)

Despite these national and international provisions, ATI in Tanzania is impeded by the presence or enactment of contradictory laws and policies. Moreover, it is also impeded by the negligence, ignorance or violation of ATI-friendly provisions and policies. These legal and policy inconsistencies are further exacerbated by the absence of a specific progressive law regarding public access to information. Translating legal and constitutional rights to information into bureaucratic mandates and operational practices remains a key challenge in Tanzania.

Thus, we found it useful to conduct a thorough research and analysis of the laws and policies in Tanzania that need to be amended in order to promote the enforcement of binding legal claims of the right to access public information. We scrutinized specific laws and policies that govern issues pertaining to information and its accessibility. Through this report, our concerns will be channelled to the Government, key information stakeholders and the general public for appropriate deliberation and action.

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\(^1\) See Resolution 59(I) adopted by the UN General Assembly in its first session, 14 December 1946.

\(^2\) This is our English translation of the official Kiswahili Amendment, which can be found in the official website of the Parliament of Tanzania (See http://www.parliament.go.tz/Pols/PAMS/Docs/1-2005.pdf)
2. Methodology
The study made use of the secondary data collection method. In its first phase, LHRC’s legal analysts collected and perused a large corpus of legislations that touched on issues relating to ATI. These were critically examined and changes recommended. They also examined key international instruments that have been ratified by Tanzania. The main part of their research was carried out in the LHRC library where the analysts had easy access to various legal documents relating to ATI.

Subsequently, HakiElimu’s policy analysts used this analysis to study associated information-related policies with respect to the implications they have on ATI. Finally, the two research teams synthesised their analyses in order to assess and document the legal and policy status of ATI in Tanzania, with the purpose of spurring further legal and policy reforms.

3. Analysis of Various National Legislations
This section provides a detailed analytical outline of pieces of legislation that have a direct bearing on ATI. It particularly focuses on showing their impediments/weaknesses in protecting citizens’ right to access public information.

3.1 The Newspapers Acts Nos. 3 and 4 of 1976 and 1994 respectively
In spite of being amended in 1994, the Newspapers Acts are characterised by at least four provisions, presented below, that do not support the right to access information.

3.1.1 Excessive Powers of the Minister responsible for Information
The basic substantive and procedural legislation as far as issues of information are concerned is The Newspapers Act No 3 of 1976 as amended by Act No 4 of 1994. In this legislation there are provisions that give the Minister responsible for information excessive powers to prohibit the publication and use of any newspaper that he/she thinks is against public interest. Since the Act does not provide a solid list of criteria for prohibition, it gives the Minister discretion that can be unreasonably or even personally used to silence critical newspapers and investigative journalism. In the second part of the said Act, under Section 5(2), the Minister is empowered as follows:

The Minister may, by notice in the gazette, exclude any newspaper from the operation of all or any of the provisions of this part either absolutely or subject to such conditions as he may think fit.

In a similar vein, section 25(1) of the same Act empowers the Minister to prohibit the publication of any newspaper at any time he/she thinks fit. It states that:

Where the Minister is of the opinion that it is in the public interest or in the interest of peace and good order so to do, he may by order in the gazette, direct that the newspaper named in the order shall cease publications as from the date (herein referred to as the effective date) specified in the order.

Such provisions are likely to be unconstitutional as far as the right to access and disseminate public information is concerned. The excessive discretion granted to the Minister provides great room for the abuse of such powers, with few safeguards to protect critical journalism. Moreover, by being confined to rely on information ‘favoured by the Minister,’ citizens may miss out on critical
information that may help transform their lives for the better. Thus, the Minister’s excessive powers may work against the very public interest it is meant to protect.

3.1.2 Excessive Powers of Police Officers
The Newspaper Act also gives the police extraordinary powers. For instance, Section 22(1) provides that:

Any police officer may seize any newspaper, wherever found, which has been printed or published or which he reasonably suspects to have been printed or published, in contravention of this Act.

The wording of this provision shows that the said police officer is not bound by a clear set of legal criteria on what constitutes the contravention of the Act. Since the law does not provide for checks and balances in the operationalisation of this provision, it allows the police force to directly interfere with a key source of information. Moreover, certain police officers are even empowered to bypass legal processes if they only ‘reasonably’ suspect that a certain newspaper is not line with the Act. This is expressly found in Section 22(3), which stipulates that:

If any police officer of or above the rank of inspector has reasonable cause to believe that the delay which would occur in obtaining a search warrant under subsection 2 would or would tend to defeat the purpose of this Act, he may without warrant, exercise the powers described in that section as if he had obtained a search warrant under that subsection

In short, subsection 2 of Section 22(3) introduced above provides that the court may issue a search warrant to the police officer of or above the rank of inspector to search and arrest any person(s) suspected to have printed and or published any newspaper in contravention of the Newspapers Act.

The observation is that Section 22(3) of the Act and the above mentioned provisions are not functional provisions of the law due to the fact that they grant police officers great leeway to apply them for their own interests and not necessarily that of the public. This would not only result in the denial of citizens’ right to access information, but also other human rights that are insolubly linked to ATI.

3.1.3 Excessive Powers of the President of Tanzania
Another provision in The Newspapers Act No 3 of 1976 as amended by Act No. 4 of 1994 threatens citizens’ right to access relevant information is Section 27. It, inter alia, gives the President of the United Republic of Tanzania the power to prohibit importation of publications. Subsection 1 of this provision stipulates that:

If the President is of the opinion that the importation of any publication would be contrary to the public interest, he may, in his absolute discretion, by order, prohibit the importation of any part or future issue thereof.

This provision is similar in effect to the provision that confers powers to the Minister responsible for information. It is a criminal offence for any person to publish, sell, print and distribute such a publication after the prohibition by the Minister under Section 25 or the President under Section 27. Again, the authorities are not bound by clear criteria or the need to demonstrate harm. In this
situation it should be clear that the provisions of the Act are excessively restrictive and prone to curtail freedoms of information and expression.

These provisions of law are not reliable because they do not provide a legal guarantee for upholding the interest of the public given that they may be subject to abuse by the Ministers or the President. Critically, the law does not define the term “public interest”. The term public interest has changed with time so as to comply with the ideological currents and global theories of the times. It is therefore dangerous to use a vague term - without fully defining it in terms of its legal implications - in the provisions of a penal law such as the Newspapers Act.

3.1.4 Judicial Activism in the Protection of Freedom of Information:
In a number of cases, the courts have reiterated that the right to information, especially as it applies to freedom of speech, is a Constitutional right. For instance, in 1995 in the case of Rev. Christopher Mtikila Vs AG, (1995) T.L.R.31, the High Court of Tanzania declared the Police Force Ordinance as unconstitutional for, among other reasons, violating the Constitutional right of free public expression. The Judge ruled that:

Fundamental rights are not gifts from the state. They are inherent in a person by reason of his birth and therefore prior to state and other laws...the Constitution is the paramount law of the land and cannot be overridden by any other law... Where enjoyment of a Constitutional right is subject to the laws of the land, the necessary implication is that those laws must be lawful laws.

Another instance of judicial overruling of arbitrary legal decisions that are not pro-ATI is the 1997 decision by the High Court of Tanzania in the case of Adam Mwaibabile Vs The Republic, High Court of Tanzania at Dar es salaam: Miscellaneous criminal case No 1 of 1997(Unreported). Mwaibabile, a freelance journalist and trader, obtained a confidential directive from a Regional Commissioner to the Regional Trade Officer to refuse Mwaibabile a trading license. Suspecting corruption, he took the Regional Commission to court. However, Mwaibabile was arrested because he was not authorised to possess such a confidential letter. In the lower court, he was alleged to have violated The National Security Act of 1970 by possessing a classified Government document. LHRC provided legal aid to Mwaibabile in the High Court where he won the appeal. The High Court noted that the Resident Magistrate had misinterpreted the Act as he failed to consider that the document in issue was not under the category of classified information.

It was also the High Court’s finding that the Resident Magistrate erred for not holding that the said document was unlawful as it was meant to deny the appellant’s right of means of earning a living. Moreover, the Court held that the directive was not a Government document as defined in the Act on the grounds that it is not the duty of the government to refuse the granting of business licence to citizens. However, the High Court did not nullify the National Security Act, rather it expressed concern on the interpretation of the provisions of the said Act by the lower courts. Nevertheless, these judicial interventions highlight the level of discretion and loopholes inherent in the implementation of provisions that are vague and not in harmony with the Constitutional right to access public information.

3.2 The National Security Act No. 3 of 1970
As hinted in the previous section, this Act is characterised by subtle provisions that do not support the right to access information. These are expounded within the two subsections below.
3.2.1 Restricted Communications
The Act imposes severe restrictions on ATI and harsh penalties on those who supposedly violate it. The provisions of sections 4 and 5 of the Act make it almost impossible for people to obtain the information sanctioned under this Act. In relation to communications of certain information pertaining to national security, for instance, Section 4 (4) states that:

Any person who communicates to any person other than a person to whom he is authorized by an authorized officer to communicate it or to whom it is in the interests of the United Republic his duty to communicate it, any information relating to the defence or security of the United Republic shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding twenty years.

3.2.2 Classified Information
While classification of some official information is common all over the world for obvious security reasons, it is important to have clear guidelines for such classification, and differentiated “life spans” for classification of different categories of information. For instance, Section 5 of the National Security Act unnecessarily hinders public access to information as it prevents any fair determination of what is truly in the national interest. Classified information, according to this section’s provisions, is only accessible to very few authorised Government officials. If any Government employee wishes to review a document that is classified, he/she must seek permission from the authorized officer. While this is understandable, in practice the process is very bureaucratic and laden with red tape so much so that it tends to take a very long time, thereby defeating the purpose for which the information was requested. Obtaining information becomes unreasonably difficult.

As a result, these provisions exclude other people, especially non-government persons and the majority of Government employees, from accessing the classified information. Moreover, in the absence of clear guidelines and specifications of information classification, the whole process may become a whimsical determination of individual bureaucrats. In actual sense, when the citizens request for information they do not get it or if they do get it, then sharing it is restricted as it is given in the form of classified information on the grounds of National Security. These provisions of law tend not to safeguard the right to access relevant information as they dissuade and hinder citizens from actively demanding and obtaining information. Consequentially, this may create apathy among citizens, discouraging them to even attempt to access information that is vital to their lives.

3.3 The Public Leadership Code of Ethics Act No 13 of 1995
This law is also important as far as the right to ATI in Tanzania is concerned since it is well-meant to empower citizens with information that can be used to hold their leaders accountable. It obliges public leaders to declare their assets that are registered by the Ethics Secretariat. In essence, the major purpose of that Act is to lawfully demand that public leaders declare their properties so that the public may be in a good position to know whether such leaders are using their positions to accumulate wealth for their personal interests.

The register of assets declared by public leaders is by law available for inspection by members of the public. This has been provided for in Section 20 of the Act. However, there are complicated conditions that render access to such information difficult. Some of the said conditions under section 22 of that law are:

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That, the person wishing to inspect the register must have lodged a complaint with the Ethics Commissioner against a specific public leader;

That, the ethics commissioner must be satisfied that the complaint is genuine, relevant and is in good faith.

The said procedures might be an obstacle to people who are interested in acquiring information on their leaders. Moreover, the Ethics Commissioner has been provided with enormous discretion to accept or reject the complaints from people demanding certain leaders declare their assets. In stating that the Ethics Commissioner must be satisfied that the complaint is genuine, relevant, and is in good faith, Section 22 (1) and (2) provides him/her with arbitrary powers for legal decision-making. This is so because what is “genuine” and “relevant” to someone might not be genuine and relevant to another person. The said commissioner might decide to refuse to accept complaints, not because they are not relevant and genuine, but because they are against his political leaning or personal interest. In doing so, he will be operating within the framework of a law that would be denying citizens’ Constitutional right to access information that is of importance to the wellbeing of the society. The relaxation of these provisions would increase transparency and accountability, thereby reducing subtle avenues for grand corruption and embezzlement.

It is important to also note that even if one met all the conditions for perusal of a property declaration made by a public leader, one cannot make the information public through, for example, the media. Regulations are very clear. A person who peruses a property declaration of a public leader and then publishes or broadcasts or communicates it to the general public is committing an offence. Any person who violates the regulation is liable on conviction to a fine of 10,000 shillings or to imprisonment for a term not exceeding two years or both. Thus communicating information about a public leader’s property declaration is criminalised.

3.4 The Broadcasting Services Act No 6 of 1993

This Act contains some provisions that deny the community’s right of access to public information. Section 4 of the Act gives wide discretionary powers to the Minister responsible for information. For instance, Section 4(1) (d) provides that:

> The Minister may establish, maintain or continue to maintain and operate on any part of the United Republic such number and size of broadcasting stations as he may consider necessary or expedient for the carrying out of the provisions of this section.

There is still a need to check these powers though we have noted that these powers may be modified by the Tanzania Communication Regulatory Authority established by Act no. 12 of 2003 that states that it is an:

> Act to establish the Tanzania Communications Regulatory Authority for the purpose of regulation of telecommunications, broadcasting, postal services; to provide for allocation and management of radio spectrum, covering electronic technologies and other Information and Communication Technologies (ICT) applications and to provide for its operation in place of former authorities and for related matters.

In spite of this establishment, the Minister is still provided with wide discretionary power to the extent that he/she can direct it to put in effect his/her orders against some information sources. For instance, based on the improvisation of Section 25(2) of The Broadcasting Services Act No 6 of 1993
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below, the Minister may interdict a broadcaster from disseminating certain information in public and having done that, he/she can then direct the Board to ensure that the order is obeyed:

If the minister is of opinion that the broadcasting of any matter or matter of any class or character, would be contrary to the national security or public interest he may, by notice in writing delivered at the principal office of the licence holder, prohibit the licence holder from broadcasting such matter or matter of such character and the licence holder shall comply with any notice so delivered

In essence, the Board is not independent enough to be able to serve the citizens’ need for ATI sufficiently since it is still vulnerable to political interference. As Article 19: Global Campaign for Freedom of Expression (2004) affirms, it is well established that in order to ensure that regulatory decisions are not based on political considerations, rather than the need to respect and promote freedom of expression and ATI, any regulation of the media should be done by a body that is independent of the Government and protected from political interference. Civil society organizations and broadcast media may face problems if they broadcast or advertise issues that reasonably challenge and question the Government on certain matters of public relevance.

4. Analysis of Various International Instruments

The right to access information is a universal right. In its affirmation of this fundamental human right, the United Nation Organisation’s General Assembly, at its very first session in 1946, stated that freedom of information is “the touchstone of all the freedoms to which the United Nations is consecrated.” In line with this information-friendly position, there are numerous international instruments that provide for the right to receive and give information. Tanzania, being a signatory to these international instruments, has an obligation to comply with them. For the purpose of this study, we make reference the Universal Declaration of Human Rights of 1948, the International Covenant of Civil and Political Rights of 1966, and The African Charter on Human and People’s Rights, of 1981.

4.1 The Universal Declaration of Human Rights (UDHR) of 1948

The Universal Declaration of Human Rights (UDHR) was one of the first documents to be universally adopted, with the consensus of almost every nation. Although it is not a binding law, it has been the cornerstone of the bill of rights of the Constitutions of a number of countries worldwide. Article 19 of the UDHR provides that:

Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The Tanzanian Constitution took aboard the spirit of Article 19 of the UDHR in 1984 when it incorporated the Bill of Rights.

4.2 International Covenant on Civil and Political Rights (ICCPR) of 1966

Unlike UDHR, this Treaty imposes formal legal obligations on signatories to respect its provisions. Tanzania ratified the Covenant in June 1976, but it has not ratified its two optional protocols that render the rights enforceable. The said unratiﬁed additional protocols are: (i) Optional protocol one to the ICCPR, aimed at setting the mechanism of enforcing the civil and political rights of the

3 UN General Assembly Resolution 59(1), adopted 14 December 1946.
peoples in the state members (as proclaimed in 1976); and (ii) Second optional protocol to the ICCPR, aiming at the abolition of death penalty (as adopted and proclaimed by the General Assembly resolution 44/128 of 15th December, 1989).

In this covenant, the right to access information has been provided under Article 19. Paragraph 2 of Article 19 states that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in prints, in the form of art, or through any other media of his choice.

As with the case of the UDHR, Tanzania has basically adopted the principles of this ICCPR provision.

4.3 The African Charter on Human and Peoples’ Rights of 1981
Tanzania is a signatory and a party to The African Charter for Human and Peoples Rights of 1981, also called the Banjul Charter. In regards to freedom of information, this Charter, under Article 9, provides that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Since Tanzania is a democratic country and a key signatory to this Charter, as entered into force in 1986, it is supposed to strictly adhere to its requirements. So far, Article 18 of the Tanzanian Constitution is in line with Article 9 of the African Charter. However, as the analysis of unconstitutional laws has revealed, the phrase “within the law” remains problematic in the Tanzanian context. There is a serious need to ensure that all laws are constitutionally harmonised so as to protect and promote the constitutional right to enjoy the freedoms of information and expression within the law.

While there are gaps and weaknesses in policies as shall be pointed out shortly, it is interesting to note that generally, policies in place are mostly more progressive and appreciative of current technological advances and human rights than the laws. What this means is that the legislative process is too slow, and that positive policies lack the force of law to enforce them.

5.1 The National Policy on Non-Governmental Organisations of 2001
In Section 7.0 of the NGO Policy on Exchange of Information and Reporting recognizes the importance of ATI. Its policy statement on this section indicates that it aims to “facilitate exchange of information and regular dialogue among all parties involved in or with NGOs in Tanzania.” This exchange of information and reporting, as it further states, would maximize utilization of resources, minimize loss of understanding and a general lack of information. Moreover, the Government, through this section’s policy directives, commits itself to ATI by stating that it “shall provide information relevant to NGO activities so as to promote fair information exchange between the Government and NGOs.” In line with the citizens’ constitutional right to be informed, NGOs are
required to produce activity reports and make them “available to the public, National Bodies of NGOs, the Government and other stakeholders for use on request.”

At first glance, these directives look progressive as far as the promotion of the right to access public information is concerned. However, the Non-governmental Organisation (NGO) Act of 2002, as amended in 2005, and in actual sense supposed to enforce these policy directives, includes provisions that interfere with the overall roles of NGOs. For instance, Article 7 Section 1 (l) of the NGO Act provides the NGO Board with the right to “investigate and to inquire into any matter in order to ensure adherence with the constitution of each of such Non Government Organizations.” This, as well as the provision that give this board discretion of coordinating NGOs activities, may be unconstitutional since it clearly violates the right to freedom from interference as stipulated by Article 18 of the Tanzanian Constitution. Besides, this Board, like the Tanzania Communications Regulatory Authority, is not a truly independent regulatory body and is therefore vulnerable to governmental and political interferences, which often work against the right to information.

5.2 The National Information and Communication Technologies Policy of 2003
Tanzania is increasingly embracing the idea of using Information and Communications Technologies (ICTs) to tackle poverty and promote development. In line with this global information society discourse, Tanzania issued a policy that aimed, among other things, to provide a national framework to accommodate the convergence of information, communication and technology. This policy, commonly known as the ICT policy, is very important for the protection of the right to ATI because it directly addresses the need to promote information access, especially among those who do not have access to ICTs.

For instance, in section 3.9.1, it declares that “ICT needs to be conveyor of locally relevant messages and information, providing opportunities for local people to interact and communicate with each others, expressing their own ideas, knowledge, heritage and culture in their own languages.” Moreover, in section 3.10.1, it places a specific emphasis on Universal Access to Information generated from ICTs. To ensure that the policy does not exacerbate the difference between those who have access to information from ICTs and those who are unable to access it, this section deems it necessary for the policy to “contain provision for bringing access to the more remote areas of the country and those under served in urban areas.”

Thus, the Government, through section 3.9.4 (2) of this policy, commits itself to “allow appropriate access to its archives and other information sources as a basis for developing local content.” Moreover, through Section 3.10.2 (b), it commits itself to “provide citizens with universal access to ICT in order to improve their productivity and to broaden their opportunities for knowledge sharing and for general content.” These commitments and their associated objective are progressive and promising. However, they are heavily impeded by the provisions inherent in the Acts analysed in the section 4 of this report. These Acts ought to be amended so that they can be in harmony with the policy directives of the ICT policy.

5.3 The National Information and Broadcasting Policy of 2003
This policy, commonly known as the Media Policy, is crucial to the promotion of the right to access public information. It is encouraging to note that it refers to the public service rendered by the Information and Broadcasting Sector as a basic human right recognized by the Tanzanian Constitution through its Article 18. It also acknowledges the importance of this right in relation to
public accountability when it states that the right is pegged on the responsibility of every citizen to uphold public welfare and other personal freedoms. Moreover, in line with the views presented in section 4 of this report, the policy acknowledges that a number of provisions in Acts responsible for information have a lot of shortcomings that have attracted widespread public complaints. Section 2.1 of this policy explicitly states that:

Presently attainment of the constitutional right to receive and impart information hinges on controversial laws that have remained subject of complaints, examples include the National Security Act, No 3, 1970, the Newspaper Act, No 7, 1976, the Broadcasting Services Act, No 6, 1993 and several other pieces of legislation that relates to information and broadcasting.

Stemming from this acknowledgment are ATI-friendly policy objectives such as the removal of all impediments to citizens’ right to access information and to educate people on the constitutional rights to receive and impart information. Significantly, the ensuing policy directives indicate that the Government will ensure that all laws being disputed are reviewed and amended so as to enable citizens to enjoy in full their basic legal right to access information.

These commitments are commendable as far as the promotion of freedoms of information and expression are concerned. However, as Article 19: Global Campaign for Freedom of Expression (2004) notes, the media policy contains a number of statements that are not in harmony with the protection of the right to these interrelated freedoms. For instance, its section 2.4.2 states that the Government will continue to own media outlets even though it is internationally accepted that any public media must be independent from the government in order to protect it from political interference and control. This international standard against government bias is captured well by Principle VI of the Declaration of Principles on Freedom of Expressions in Africa, which states, in part, that:

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;

Thus, there is a need to revise the media policy so that it can reflect a commitment to the transformation of government media into independent public service media. The same principle should also apply to the registration of newspapers.

6. Essentials for Access to Information in Tanzania
This section reviews the use and lack of use or abuse of some key political and legal factors that provide means for enhancing the right to access information.

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6.1 Political Will

Soon after being elected the President of Tanzania in 1995, former President Benjamin William Mkapa espoused the idea of enhancing truth and transparency. Throughout the past decade during his presidency, President Mkapa regularly referred to his era as that of truth and transparency.

In his keynote address at the workshop on Improving Public Communication of Government Policies and Enhancing Media Relations delivered on March 18, 2003 in Bagamoyo, President Mkapa described the task to improve public communication of Government policies as essentially one of national capacity for good governance. According to the former president, good governance is participatory, yet effective participation is informed participation.

Pitching for transparency and accountability, President Mkapa observed that governments the world over have information which it is in the national interest to keep classified for a certain period of time. But he hastened to admit that it is also true that the concept of government secrecy has sometimes been abused. He therefore declared that transparency and accountability must now cease to be a condition to be tolerated, but be perceived as a Government’s core function to be cherished as party to a deepening culture of service to the people. To this end, the president declared: “The duty to communicate… is not optional; it is a duty; and it is mandatory.”

In his December 30, 2005 speech to inaugurate the newly elected National Assembly soon after he became head of state, President Jakaya Kikwete told the parliamentarians and Tanzanians in general that they should expect a Government that would be run on the principles of good governance, upholding transparency and accountability.

President Kikwete vowed that his Government would fight corruption vigorously, and that procurement and large contracts would be open to scrutiny. In mid-March 2006, he announced plans to set up a website to receive citizens’ comments. The website, which was functional at the time of this writing, is meant to allow Tanzanians to air their opinions and make suggestions to the Government.

The concept of an open government is also firmly entrenched in Tanzania’s National Strategy for Growth and Reduction of Poverty, commonly known by its Kiswahili acronym, MKUKUTA. Cluster Three of the MKUKUTA focuses on Governance and Accountability. This is explained as the bedrock on which the other two clusters (Growth and Reduction of Income Poverty, and Improved Quality of Life and Social Well-being) stand. It calls for openness, transparency and accountability not only on the part of Government but also of all stakeholders. One of the four expected broad outcomes under this cluster is that leaders and public servants will be accountable to the people through the effective reduction of corruption and public access to information.

There is therefore expressed political will to an open government, and the will has been taken to the strategy drawing board.

Experience has shown that access to information, accountability and transparency tend to go together. The more people have access to public information, the more they are equipped to

5 See www.maoni.org
demand accountability from those in positions of authority, and the higher the standards of responsibility and openness placed on the discharge of public duties.

Public advocates, non-governmental organizations, the media, and legal aid provision committees/clinics are vigorously working to inform the public of its rights, so as to motivate and empower it to play a significant role in the collection and dissemination of public information. However, the majority of Tanzanians are still frequently denied their right to timely and relevant information on the premise that the information is classified and confidential. Such citizens rely on other channels, such as the media and civil society organisations, to obtain information that is sometimes incomplete.

Although it is generally understood and accepted that for the sake of protecting national interests and diplomatic relations within the community of nations, certain information must be kept confidential through a system of classification, it is important that this policy complies with the right to access relevant information on matters that directly affect citizens’ daily lives. Since human rights are essential elements of the democratic process, there can be no true democracy in a country that tends to unnecessarily deny its citizens their human right to freedom of information. Even though we acknowledge that the Government is still grappling with the legacy of having a relatively closed and centralised information system, we are of the opinion that it ought to seriously review its role as a custodian of public information so that it can reflect a more open and decentralised information system.

In order to achieve this ATI transformation in Tanzania, there is a need for a change of mindset in the Government and the citizenry – a change that will motivate both parties to actively demand and supply each other with relevant information. Political will, from both the high and low echelons of the Government, is essential for the promotion of this ATI-friendly mindset and its codification in a progressive Access to Information law.

The question of motivation, as Calland (2002) aptly notes, is important because the success and effectiveness of such a law depends fundamentally on political will. In other words, ATI as a right is not only a legal issue but also a political one. It is important that the presidential agenda of openness is shared by other leaders in the executive, legislature and the judiciary. However, as various studies have shown, leaders holding various positions in Government offices are still reluctant to give information to people. This trend seems to suggest that the overall state of political will in Tanzania is still not strong enough to effectively support the right to ATI.

6.2 The Constitution

Before 1984, The Constitution of the United Republic of Tanzania of 1977 did not provide for the right to information as one of its justifiable rights. The insertion of the bill of rights in the Constitution in 1984 saw the right to freedom of expression and opinion become one of the new provisions on peoples’ rights. However, the Bill of Rights only became enforceable in 1988 and, particularly, in 1994 when the Parliament enacted The Basic Rights and Duties Enforcement Act No. 33 of 1994.

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With the legal mechanism in place, the Bill of Rights was now enforceable though with some clawback clauses that expressly subjected the Constitution to the jurisdiction of other laws. For instance, before the 14th Amendment of the Constitution, Article 18 (1) started with the claw back clause, “without prejudice to the laws of the land,” which implied that other laws had precedence over the right it stipulated. Fortunately, this claw-back clause was repealed on 6 April 2005 when the then President Mkapa assented the 14th Amendment of Constitution passed by the Parliament on 7 February 2005.

In essence, the amended Article 18 provides for various legal principles that can be classified into three categories: the enabling/enhancing principles, the prohibition/sanction principles and the obligatory principle.

Under the enabling/enhancing principles, the first aspect is the recognition of an absolute freedom of opinion. This liberty enhances the right to think and share ideas. The second aspect is the recognition of the absolute freedom of expression. In this case, expression is unlimited. However, under internationally acceptable principles, it has to be qualified as a reasonable expression. In essence, freedom of expression includes the right to strike or collectively withdraw from labour; the right to peaceful demonstrations, the right to picketing, peaceful protest and all sorts of reasonable expressions. The third aspect is the right to information. This has three major elements, that is, as a matter of an absolute right, everyone is entitled to (i) seek information, (ii) receive information, and (iii) impart information. This particular provision extensively covers the Freedom of the Press and our topic on ATI. The fourth and final aspect of the enabling/enhancing principle is concerned with the absolute guarantee of the right to communication. An absolute right simply means any unqualified right that is legally enforceable. The right to communication means that everyone is free to communicate without any interference/interruption of his or her communication.

There are no longer claw-back clauses in our Constitution that require this freedom to be subject to other laws of the land. The guarantee that is provided by the Constitution is drawn from the fact that the Constitution is above all laws of the land and that in case there is conflict between the two, it is the former that prevails. In this sense, it is now technically easier to enforce the right of freedom of communication than it was prior to the 14th Amendment of the Constitution.

The strength of the second category of legal principle, i.e. the prohibition/sanctioning principle, lies in the fact that it has a sanctioning principle on the part of decision-makers. In fact, it prohibits any sort of interference/interception or interruption of anyone’s communication. From the wording of Article 18(c), the sanctioning principle can be construed accordingly. The provision categorically states that everyone has the freedom to communicate and the right of not being interfered with in the cause of his/her communications. Thus, on the basis of the prohibition/sanctioning principle, the said provision demands that no one’s communications should be interfered with. This means that neither government officials nor private individuals are excused from this prohibition. It is therefore unconstitutional for any one to interfere with the communications of another person.

Lastly, within the framework of the obligatory principle, the provision states that everyone has a right to be informed at all times of various important events to the lives and activities of the peoples and also of issues important to society. This obligation is attributed to the media, government, the public itself and any custodian of information in order to ensure that the public is informed of issues that concerns it. In other words, every one has the duty to disclose information that may be relevant
to anyone who, by virtue of the Constitution, is entitled to always be kept informed of all relevant issues pertaining to his/her life.

Having read the provisions of Article 18 of the Constitution, one should keep in mind that giving or receiving information from any source of information is not a privilege but, rather, it is a fundamental right/obligation that is now enshrined absolutely in our Constitution. It is categorical and cannot be overruled by any law.

6.3 The Legislature

Both the National Assembly and the Zanzibar House of Representatives have enacted legislation that is contrary to the spirit of the Constitution with regards to access to information. Provisions in certain Acts provide for the right to access information on one hand, but other provisions take away the same rights.

A particular problem with the functioning of the Houses, especially the Union Parliament, is the overwhelming domination of the party in power. With the infancy of multiparty politics in Tanzania, and the inexperience and lack of exposure of a sizeable number of MPs, partisan block voting has been the order of the day. It appears that MPs from the ruling party tend to view voting against the Government as betraying the party. It is therefore common practice for MPs to bitterly criticise bills but end up voting for them anyway. Unless this mindset changes, the possibility of the Houses passing laws that curtail access to information, and that potentially violate the Constitution, remains.

There is therefore need to look into the possibility of adapting something similar to the Fourth Amendment in the United States constitution which prohibits the Houses from making laws that curtail access to information.

6.4 Codes of Conduct and Client Service Charters

In general, codes of conduct are sets of rules that are based on ethical and professional principles, which guide the behaviour, decisions and performance of groups of people or professionals. In Tanzania, this is an essential tool in regard to ATI since it enables public servants to clearly understand what is required of them in terms of how to handle information. Tanzania issued A Code of Ethics and Conduct for the Public Service in 1999 for the first time since independence. This Code applies to all public servants who are not covered by the Public Leadership Code of Ethics Act. No. 13 of 1995. In part Section III, titled Disclosure of Information, the Code states:

i) A Public Servant shall not use any official disclosure of document or photocopy such a letter information or any other document or information obtained in the course of discharging his/ her duties for personal ends;

ii) Public Servants shall not communicate with the media on issues related to work or official policy without due permission;

iii) Official information will be released to the media by officials who have been authorized to do so according to the laid down procedures.

Although these requirements need to include an obligation to provide information to citizens, the Code provides a practical orientation. Coupled with a strong political will and a sense of duty among public servants, the Code could provide a mechanism for enhancing access of information.
Moreover, when citizens are aware of the Code and other binding documents, such as the Client Service Charters, they will be able to monitor their implementation. In line with former President Mkapa’s (2003) speech that stressed that the Government’s duty to communicate is not optional, there is a need to ensure that the core functions vis-à-vis ATI are articulated in the Code and are legally binding. This will enable citizens to have a legal base for holding the Government and public servants accountable. It is encouraging to note that the Media Council of Tanzania has adopted a code of conduct for journalists. Civil society organisations also need to develop codes of conduct that promote transparency and access to information.

7. Recommendations and Conclusion

7.1 Recommendations

A nation that is governed by the rule of law must leave its doors open to its citizens to access timely and relevant information necessary for their development. The public must as well be guaranteed its freedom of expression. Citizens cannot freely air their views if the barriers that hinder them from receiving or giving information are not removed. For Tanzania to live up to its constitutional obligation to freedom of information, we recommend the following actions:

7.1.1 Repeal Laws that Deny the Right to Access Information

All laws scrutinised herein, and others perused and listed in the Annex, be repealed or amended in order to conform to Article 18 of the Constitution, as amended. In particular, laws such as the National Security Act No 3 of 1970 and the Tanzania Newspapers Act No 3 of 1976 need serious reform. The Newspapers Act of 1976 should be further amended to include provisions that foster freedom of speech, dissent and the press.

7.1.2 Enact a Freedom of Information Act

Since Access to information legislation guarantees citizens’ legal right of ATI and obliges the Government to facilitate this access, we recommend its enactment in the foreseeable future. As Transparency International Source Book (2000) notes, such a law would not only confer legal rights on citizens that can be enforced, but it will also seek to change the culture of secrecy within the civil service, provide access to records, and define exemptions and rights of appeal. However, as Calland (2002) reminds us, having a law is insufficient for a law that is not implemented properly may cause harm. Thus, there should be a broad social consensus, adequate systemic resources and a strong political will to implement such a law effectively. The ongoing Legal Sector Reform Program (LSRP), which aims to establish a harmonized national legal framework in Tanzania, could function as an impetus for the enactment and effective implementation of a freedom of information act.

7.1.3 Enhance a Culture of Seeking and Giving Timely Information

A culture of seeking information should be encouraged. Information can be sought through various ways such as reading books, listening to the radio and watching TV. It is recommended that concerned citizens/organizations design and implement creative initiatives such as book clubs, information notice boards, library tours and reading competition in order to nurture a culture of accessing information. Civil society organisations should take up this challenge of enhancing a culture of learning as well as demanding information.
7.1.4 Educate the Public

The Government, civil society organisations, media and other stakeholders should collaborate in educating the society on the importance of information and how to access it. It is unfortunate that many Tanzanians do not know their rights and how to exercise them. Thus, extra efforts should be employed to inform citizens that accessing information is not a privilege or a favour but, rather, a fundamental right that go hand in hand with the responsibility of seeking and disseminating information relevant for the citizenry. Although it may be argued that this is currently part of civic education, we believe that civic education is too wide in scope to the extent that it does not sufficiently give the right to access information the attention it deserves.

7.2 Conclusion

This report has provided an analysis of various legislation, instruments and policies with respect to the right to access information. Overall, the study indicates that the policy and legal status of access to information in Tanzania is not conducive to citizens’ right to access timely and relevant information. It is clear that there is a need to harmonise progressive policy statements, which aim to promote the right to access information, with various Acts that curtail the enjoyment of these rights. This harmonisation is consistent with key international instruments and the 14th Constitutional Amendment of the Tanzanian Constitution.

Moreover, there is a need to recognize that freedoms of expression and association are inextricably linked to the right to access information. Thus, in order to protect these freedoms, it is very important for the media, civil society organizations and other information actors to operate independently without interference or control from the Government. This will enable them to play their role of public watchdog and also ensure that the public has access to a wide range of information. Imposing special registration requirements and unnecessary authoritarian regulations on these actors would open avenues for abuse of power, corruption and inefficient operation. Any registration system that allow the arbitrary discretion to refuse registration of, or impose substantive conditions on, informational bodies, or that are overseen by bodies that are not independent of government are not conducive to the exercise of the right to access information.7

The only legal guarantee for ensuring that citizens can exercise this right, promote it and effectively check its abuse is by enacting a policy and legal framework that will enforce an absolute freedom of information in Tanzania.

In order to set the base for working on the afore-mentioned recommendations, and realize the vision of this conclusion, the following next steps are proposed for consideration:

1. Translate the report into Kiswahili for broader distribution and upload it on websites of both organizations that conducted the study.
2. Distribute this study widely among Government and others for discussion of the findings, possible causes and potential solutions; hold public debates on the same.

7 This position is adapted from the Joint Declaration issued in December 2003 by the three specialized mandates for protecting freedom of expressions, namely UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (See Article 19: Global Campaign for Freedom of Expression (2004) pages 6 & 10).
3. The Ministry responsible for Information and the Directorate of Communication in the State House assess the extent to which their work is affected by these laws and policies.

4. Hold public debates and government/non-governmental reviews to consider the value of drafting progressive legislation on access to information, and learn from the experience of countries such as South Africa in this regard.

5. Leading NGO networks, the media and other stakeholders reflect on these findings and explore ways of jointly campaigning for a Freedom of Information Act (FOIA).
References

i. The Constitution of the United Republic of Tanzania of 1977 as amended from time to time;
ii. The Basic Rights and Duties Enforcement Act No. 33 of 1994;
iii. The Newspaper Act No. 3 of 1976;
iv. The Ministers Discharge of Ministerial Functions Act No. 10 of 1980;
v. The Broadcasting Services Act No. 6 of 1993.
vi. The Code of Ethics for Media Professionals;

vii. The Public Leadership Code of Ethics (Declaration of Interests, Assets and Liabilities) Regulations of 1996;

viii. Universal Declaration of Human Rights of 1948;


xi. The First Optional Protocol to the International Covenant on Civil and Political Right of 1976;

xii. The Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989;

xiii. The High Court of Tanzania, Dar-Es-Salaam 1997. District Registry, Civil Case No. 36;

xiv. The High court of Tanzania, at Dodoma 1995. Rev. Christopher Mtikila V. Attorney General, Dodoma Registry, Civil Case No. 5;

xv. The High Court of Tanzania, at Songea 1997. Adam Mwaibibile V. Republic, Criminal Appeal No. 13;

xvi. The National Policy on Non-Governmental Organisation of 2001;

xvii. The National Information and Communications Technologies Policy of 2003;

xviii. The Information and Broadcasting Policy of 2003;


xxvi. URT (2005): The Constitution of the United Republic of Tanzania (The 14th Amendment of the Constitution)

Annex: References of Perused Pieces of Legislation

A. Principal legislations
   i. Basic Rights and Duties Enforcement Act No. 33 of 1994
   ii. The Education Act No. 25 of 1978
   iii. The Copyright and Neighbouring Rights Act, (Act No.7 of 1999);
   v. The Films and Stage Plays Act, (Act No. 4 of 1976);
   vi. Institute of Adult Education Act No. 3 of 1973;
   vii. The Mental Diseases Act, (Ordinance No. 13 of 1937);
   viii. The Ministers (Discharge of Ministerial Functions) Act, (Act No. 10 of 1980);
   ix. The National Kiswahili Council Act,(Act No. 27 of 1967);
   x. The Parliamentary Immunities Powers and Privileges Act No 3. of 1988;
   xi. Patents (Registration) Act No. 1 of1987;
   xii. Petroleum (Exploration and Production) Act No. 27 of 1980;
   xiii. The Presidential Affairs Act No. 4 of 1962;
   xiv. The Preventive Detention Act No. 60 of 1962;
   xv. Protection from Radiation Act No. 5 of 1983;
   xvi. The Public Officers (Recovery Off Debts) Act No. 37 of 1974;
   xvii. The Public Order Act No. 21 of 1951 (cf. GN 20/57);
   xviii. The Public Procurement Act No. 3 of 2001;
   xix. The Public Service Act 8/2002;
   xx. The Public Trustee (Powers and Functions) Act 2/30 ;
   xxi. The Publications (Compulsory Deposit) Act No. 14 of 1962;
   xxii. The Tanzania Commission for Science and Technology Act 7/1986;
   xxiii. The Tanzania Commission for AIDS Act No. 22 of 2001;
   xxiv. The Tanzania Communications Act No. 18 of 1993;
   xxv. The Tanzania Industrial Research & Development Organizations Act No. 5 of 1979;
   xxvi. The Tanzania Industrial Studies and Consulting Act 2/1976;
   xxvii. The Tanzania Institute of Education Act 13/75;
   xxviii. The Tanzania Intelligence and Security Services Act 15/96;
   xxix. The Tanzania Investment Act 26/1997;
   xxx. The Tanzania Library Services Act 6/75;
   xxxi. The Tanzania News Agency (Repealing) Act 7/2000;
   xxxii. The Tanzania Posts Corporation Act 19/1993;
   xxxiii. The Tanzania School Of Journalism Act 8/81;
   xxxiv. The Tanzania Telecommunication Incorporation Act 20/93;
   xxxv. The Trade marks and Service Act 12/86;

B. Subsidiary Legislations
   i. Government Notice No 108/96 and 261 of 2001;
   ii. GN 22/75.

C. National Policies
   i. The National Telecommunication Policy of 1997
   ii. The National Cultural Policy of 1997
   iii. The National Policy on Non-Governmental Organisations of 2001
   iv. The National Information and Communication Technologies Policy of 2003
The right to seek and receive information is a constitutional right in Tanzania. However, often this right cannot be legally enforced because a right to information law does not exist in Tanzania. In practice other contradictory law and policies take precedence over this constitutional right. This makes it difficult for ordinary citizens to take any type of redressive action whenever this fundamental right is denied.

This report analyses the laws and policies related to access to information in Tanzania with reference to relevant legislations and key international instruments. It also makes specific recommendations on how to promote and enforce binding legal claims of the right to access public information.

The research was conducted and written by the Legal and Human Rights Centre (LHRC) in collaboration with HakiElimu. It aims to inform concerned citizens and policy makers, and to stimulate debate, awareness and public action.

LHRC
The Legal and Human Rights Centre (LHRC) is a not for profit, non-partisan, non-governmental organization that strives to promote, reinforce and safeguard human rights in Tanzania. The main objective of LHRC is to create legal and human rights awareness among the public through legal and civic education, research, follow-up of human rights abuse and the provision of legal aid. For more information, contact: lhrc@humanrights.or.tz

HakiElimu
HakiElimu is an independent civil society organization that seeks to realize equity, quality, human rights and democracy in education and society. It facilitates communities to transform schools and influence policy making; stimulates imaginative public dialogue and organization for change; conducts critical research and inquiry, analysis and advocacy; and collaborates with partners to advance social justice. For more information, contact: info@hakielimu.org