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Right to access information with focus on its limitation by way of public interest in Tanzania: Challenges and Prospects

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ABSTRACT

Access to information, like most other rights, is not an absolute right and it can be restricted in variety of instances such as for the purposes of protection of public interest. Beside the fact that Tanzanian access to information law limits certain information from public access for the purpose of protecting public interest, it is very important to know defects of this limitation and challenges posed by it. Thus, this paper examines provision(s) which provide public interest as a ground for disclosure or non-disclosure of information in Tanzania in order to see their effectiveness in promoting right to access information. The paper finds that, 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 in Tanzanian access to information law, leaving that to the discretion of the information holders approached. Consequently, the paper reveals that the Access to Information Act, 2016, lack important provision regarding public interest override which can guarantee disclosure of information if public interest so demands. The author concludes that there is the need for the parliament to amend the Access to Information Act, 2016, to include provision(s) which, among other things, will eliminate the aforementioned challenges.

Keywords: *access to information; limitation of rights; public interest.*

I. INTRODUCTION

Access to information held by government and relevant private bodies is globally recognised as a fundamental human right under various international and regional instruments. At the international level, the right to access information was derived from the Universal Declaration of Human Rights (Universal Declaration) adopted in 1948, which in article 19 guarantees the right to freedom of expression and opinion as well as the right to seek, receive and impart information through any form of media. This was followed in 1966 by the International Covenant on Civil and Political Rights (ICCPR), which also recognize in article 19 the right to

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access information². At the African regional level, article 9 of the African Union (AU) Charter also recognizes the right to information³.

Not far from that, in Tanzania⁴, the right to seek information also guaranteed under Article 18 of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time (Constitution). The above mentioned article which is vital to the existence of the freedom of expression in Tanzania, provides that the freedom of expression is all about being free to; collect, receive and disseminate news, ideas, opinion and information beyond the frontiers. Furthermore, in 2016 the government of United Republic of Tanzania passed an Access to Information Act, 2016 (AIA Act) into law to give effect to the constitutional right of access to information held by the state and private bodies in Tanzania. Importantly, the AIA Act help to fleshes out the nuts and bolts of how to go about exercising these rights. The right of access to information in Tanzania is therefore, seen not only as an essential ingredient for democratic governance, but also as a fundamental human right.

Admittedly, right of access to information, like most other rights, is not an absolute right. All right to information laws recognise that there are circumstances in which information should not be released because it would harm specific public or private interests. This implies that every person, whether acting as an individual or group, has a right to all information in the custody of public institutions or agencies and other relevant private bodies except where there is an overriding public interest justifying non-disclosure. In some jurisdictions, there are guidance as to what constitutes public interest and the extent to which the disclosure of information would be prejudicial to public interest while others they don't have such guidance. Against this backdrop, this paper highlight the legal framework on access to information in Tanzania. It then investigates provisions under the AIA Act providing for limitation of the right to access information under the pretext of public interest. This is done to identify defects of this limitation and how these defects may pose challenges to the effective implementation of the access to information law in Tanzania. Finally, this paper makes some recommendations

² '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 print form of art or through any other media of his choice.' United Nations General Assembly International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 09:30AM, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

³ 'Every individual shall have the right to receive information.' Organisation of African Unity (OAU) African Charter of Human and Peoples' Rights, art. 9(1), June 27, 1981, 08:27AM, <https://www.du.edu/korbel/hrhw/researchdigest/development/au.pdf>

⁴ Tanzania is a country located in Eastern part of Africa between longitudes 290 and 410 East, and Latitude 10 and 120 South. The country occupies an area of 945,087 km² and is the largest country in East Africa.

that could help to alleviate these challenges.

II. THE LEGAL FRAMEWORK OF THE RIGHT TO ACCESS INFORMATION IN TANZANIA

(A) Access to information as a constitutional right in Tanzania

As already stated above, the right of access to information in Tanzania is contained in the Constitution as well as the AIA Act. In the context of the Constitution, the right to access and disseminate information is recognized in Articles 18. Article 18 of the Constitution provides that the freedom of expression is all about being free to; collect, receive and disseminate news, ideas, opinion and information beyond the frontiers.

Consequently, Article 30 (1) and (2) of the Constitution, insist on respect of other rights and freedom when one exercise his or her rights provided under the constitution or other instruments. The Limitation provided in the above said article extends also to matters of public interests. The Constitution also, in sub article two of article thirty, insists on the sovereignty of the parliament in enacting laws, which may infringe freedom and rights, including freedom of expression, provided that those laws are intended to; safeguard rights of freedom and rights of others, public interests, public peace, defense, public safety, public morality, public health, development and other matter which is important for the public benefit.

(B) The Access to Information Act, 2016

On September 7, 2016, the Tanzanian Parliament enacted the AIA Act. As earlier stated, the cardinal purpose of the AIA Act is to give effect to the right to information provided for by the constitution⁵. The AIA Act is a relatively short piece of legislation. It consists of 24 sections divided into four main parts. The first part is divided into four sections, the title of the AIA Act; its applications; interpretation and objective of the AIA Act. The second part consists of two sections that provides for right to information and exempt information. Part three contains thirteen sections providing for appointment of information officers; obligation to keep information; obligation to publish certain information; application for access to information; notice where access to information is requested; access to document other than under the AIA Act; transfer of request; refusal of request; notice to third parties; deferral of request; means of accessing information; use of information and review of decision. Lastly, the fourth part contains general provisions comprising five sections relating to regulations; fees; offence of alteration, defacement, blocking or erasure; protection of a person who makes disclosure and

⁵ Section 4 of the Access to Information Act, 2016, No. 6, 2016 (Tanzania).

protection of officers.

- **Exempted Categories of Information under the Access to Information Act, 2016.**

Access to information, like most other rights, is not an absolute right. There are a variety of instances in which access to information can be justifiably restricted, such as for purposes of national security or the protection of the privacy of others. In this regards, the AIA Act exempts certain information from public access. It says that notwithstanding the right given to citizen to access information, the information holder may withheld information where he satisfied that all the information or part of the information is exempted or if he determines in accordance with the AIA Act that the disclosure is not justified in the public interest⁶. Generally, there are some matters where information can be denied, which are given in section 6 of the AIA Act. Section read as under:

The exempt information that may be withheld if the disclosure of such information is likely to:

- (a) undermine the defence, national security and international relations of the United Republic of Tanzania;
- (b) impede due process of law or endanger safety of life of any person;
- (c) undermine lawful investigations being conducted by a law enforcement agent;
- (d) facilitate or encourage the Commission of an offence;
- (e) involve unwarranted invasion of the privacy of an individual, other than an applicant or a person on whose behalf an application has been made;
- (f) infringe lawful commercial interests, including intellectual property rights of that information holder or a third party from whom information was obtained;
- (g) hinder or cause substantial harm to the Government to manage the economy;
- (h) significantly undermine the information holder's ability to give adequate and judicious consideration on to a matter of which no final decision has been taken and which remains the subject of active consideration;
- (i) damage the information holder's position in any actual or contemplated legal proceedings, or infringe professional privilege;
- (j) undermine Cabinet records and those of its committee; or

⁶ See Section (6) (1) (a) (b) of the Access to Information Act, 2016, No. 6, 2016 (Tanzania).

- (k) distort or dramatize record or data of court proceedings before the conclusion of the case⁷.

For the purpose of paragraph (a) above, information relating to national security includes:

- (a) military strategy, doctrine, capability, capacity or deployment;
- (b) foreign government information with implications on national security;
- (c) intelligence operations or activities, sources or information capabilities, methods or cryptology;
- (d) foreign relations or foreign activities;
- (e) scientific, technology or economic matters relating to national security; or
- (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security⁸.

Now as the main focus here is to analyse provisions under the AIA Act providing for limitation of the right to access information under the pretext of public interest and their challenges, I shall deliberately abandon at this juncture the discussion of the other limitations of access to information, such as those undermine the defence, national security, international relations of the United Republic of Tanzania, and proceed with the former in the next section.

III. IDENTIFIED CHALLENGES REGARDING LIMITING INFORMATION UNDER THE PRETEXT OF PUBLIC INTEREST

Though the AIA Act is a remarkable piece of legislation yet it has issues and challenges in its execution and implementation. There have been challenges in some provisions of the AIA Act relating to disclosure or non-disclosure of information under the pretext of public interest. This section analyses in a nutshell some challenges identified within the current Tanzanian access to information law regarding limitation under the pretext of public interest. Although these provisions are yet to be tested in court, they seem to be a hurdle for effective implementation of the right to access information in Tanzania.

(A) Undefined and vaguely-worded limitations

As pointed earlier, citizen's right to access information held by both government authorities and private bodies, is not absolute and it can be legitimately restricted in special circumstances.

⁷ Section (6) (2) of the Access to Information Act, 2016, No. 6, 2016 (Tanzania).

⁸ Section (6) (3) of the Access to Information Act, 2016, No. 6, 2016 (Tanzania).

Prime among the reasons for refusal to accede to demands for the right to access information is in order to protect the public interest⁹. The point to be underscored here is that, these limitations need to be clearly and narrowly defined and also subjected to different levels of thresholds to prevent reliance on them by information holders as a pretext for maintaining denial of requested information.

Undoubtedly, still some limitations in different right to information laws, are drafted so vaguely that they give too much leeway for the information holder to evade providing the requested information. For stance, Tanzanian AIA Act, provides that information shall be exempt from disclosure if a public authority claims an exemption or determines that the disclosure is not justified in the public interest¹⁰. In other words, it means that information holder is entitled to decline access to information if they deem disclosure is not in the public interest. However, under the AIA Act, there are no specifications as to what constitutes public interest and the extent to which the disclosure of information would be prejudicial to public interest.

From the foregoing, it is very obvious that lack of guidance as to what constitutes the term public interest under the AIA Act will make information holders to be unsure of how they should deal with that aspect at the time of dealing with the requested information. In other words, this gap in access to information law in Tanzania may open the door for information holders to arbitrarily refuse access to information on the pretext that disclosure is not in the public interest. Besides that, this gap also seems to make the right of access to information very vulnerable for restriction and it may cause difficulties in the implementation of the AIA Act in Tanzania.

(B) Public interest override

International best practice requires that information be disclosed if public interest so demands, even where such information falls within exempted categories of information under the relevant law. In other words, even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm¹¹. In this regards, the harm to the legitimate aim must be weighed against the public interest in having the information made public. Where the latter is greater, the law should provide for disclosure of the information. This is called a public

⁹ See for stance, S.P Gupta v. Union of India (1981)1 S.C.C 87 (India), wherein the court stated *inter alia* that whenever disclosure of document is clearly contrary to the public interest it is immune from disclosure.

¹⁰ See section 6 (1) (b) of the Access to Information Act, 2016, No. 6, 2016 (Tanzania).

¹¹ ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation, principle 4, 1999 11:48AM, <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

interest override.

The AIA Act, as it is currently structured, important provision regarding public interest override is absent from the AIA Act. This view is confirmed by the provision of section 6 (1) (b) of the AIA Act which provides that information holder may withhold information where he determines that the disclosure is not justified in the public interest. It is pertinent to note that formulation of this provision gives the information holder power to withhold information if the public interest in maintaining exceptions outweighs the public interest in disclosing it. However, the same provision does not provide for mandatory disclosure of information if the public interest in disclosure is greater than the public interest in maintaining the exemption. In the light of the above predicament, one sees that access to information law in Tanzania is inadequate and if not addressed, may seriously affect the implementation of it as well as compromising capacity of citizen to exercise their constitutional right of access to information in Tanzania.

IV. CONCLUSION AND RECOMMENDATIONS

This paper has demonstrated that, although Tanzanian Constitution and the AIA Act provides right of access to information, there are several hurdles to be surmounted for the promises that are contained in the laws to be translated into real practice. Under the AIA Act, the information holder is entitled to decline access to information if they deem disclosure is not in the public interest while the same law lack guidance on the meaning of the term public interest, leaving the provision susceptible to abuse.

As it is propounded elsewhere in this paper, access to information law also gives the information holder power to withhold information if the public interest in maintaining exceptions outweighs the public interest in disclosing it. However, the same provision does not provide for mandatory disclosure of information if the public interest in disclosure is greater than the public interest in maintaining the exemption. This seemingly to be 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.

It should be emphasized here that, the weaknesses which have been identified in the AIA Act is likely to impede effective and practical implementation of the AIA Act. Consequently, this is a very sensitive area of concern, which reiterates the need for the parliament to amends the AIA Act, to include provision(s) which, among other things, will eliminate the aforementioned challenges.

If the parliament decides to tow the path of an amendment, it is important that the following aspects relating to access to information in light of its limitation by way of public interest, are addressed:

1. Section (6) (1) (b) of the AIA Act should be amended in order to ensure that the AIA Act includes provisions which will give guidance on the meaning of the term public interest as well as the extent to which the disclosure or non-disclosure of information would be prejudicial to public interest.
2. Amendments must also ensure that a provision regarding public interest override is clearly stipulated in the AIA Act. This will enable information be disclosed if public interest so demands, even where such information falls within exempted categories of information under the AIA Act.
