

Accessing Government information in Namibia as a human right issue¹

John Nakuta

*Human Rights and Documentation Centre,
Faculty of Law, University of Namibia*

Chiku Mnubi-Mchombu

*Human Rights and Documentation Centre,
Faculty of Law, University of Namibia.*

Abstract

There is general consensus that access to information is indispensable for a functional democracy. It is for this reason that access to information has been recognised and guaranteed as a fundamental human right in various international, regional and national instruments. The right to access to information is not explicitly guaranteed in the Namibian Constitution but is claimable through article 144 of since Namibia acceded and / or ratified various international human rights instruments which provide for this right. This article evaluates the question as to whether access to information is regarded as a human rights issue in Namibia. In determining this, the paper analysed the findings of the pilot study of the baseline study on human rights in Namibia with that of the main study with a specific focus on the theme dealing with access to information. Both studies found that it is almost as easy as it is difficult to access government information in Namibia. Both studies also show that elderly respondents and those with no formal education found it more difficult to access government information. Both studies show that the media was considered to be the main source of government policies, programmes and services. A mere 4 percent of the respondents in both studies indicated that they use libraries as a source for accessing public information. Distance to government departments and

¹ This paper is an adapted version of the chapter prepared for the 'Baseline Study Report on human rights in Namibia' (2013) for the Office of the Ombudsman: Namibia by the Human Rights and Documentation Centre (HRDC) of the Law Faculty of the University of Namibia. It specifically focuses on the data obtained during the piloting of the human rights household survey in Windhoek for the Human Rights Baseline Study for the Office of the Ombudsman. The authors sincerely thank the Office of the Ombudsman for their kind permission for the use of this data.

rude members of staff/poor service delivery were listed as the main barriers to accessing public information. Respondents in the pilot study listed outdated website content as their third major barrier, whereas respondents in the main study singled out too much bureaucracy as their third highest impediment to government information. The article asserts that the current situation whereby obtaining government information is at the discretion and disposition of civil servants is untenable and inconsistent with the right to access to information. The paper will explore how Namibians, from all walks of life, access human rights information. The paper is based on research which took place in Windhoek, Namibia in April 2012. The various aspects explored include access to government information and channels used to access information including the mass media. The final part of the paper will investigate barriers to accessing government information. Some recommendations will be made on how to improve access to government information in Namibia.

Key words: democracy; human rights; human rights-based approach; Namibia; Office of the Ombudsman; Namibia; Human Rights and Documentation Centre (HRDC).

1. Introduction

James Madison a leading figure in the drafting of the US Constitution described the importance of information to citizens in a democratic country as follows:

“A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.” (Coliver, 1999:54)

Scholars such as Fletschner and Mesbah (2010), Mendel (n.d) and Daniels (2011) similarly highlighted the importance of having access to State-held information. To them, access to information about government decisions, data, policies, legislations and research findings are important because it affects every citizen in society. Citizens, whose access to information is limited, or very costly, may be unaware of other resources available to them.

Access to information is a prerequisite for the exercising of choice and making informed decision in one’s life. Access to information is important for the attainment of human potential. This includes access to free internet, public libraries and government information. Mathies (n.d) argues that, the right to access information is not merely a liberty right but also a welfare right. He pointed three reasons to support the argument. Firstly, human beings are creatures with a capacity and a desire for knowledge. A

life deprived of adequate access to information and knowledge is thus a seriously impoverished life. Secondly, knowledge is not only good in itself, it is pragmatically essential that a person has access if they have to make an informed decision; and lastly, in order for a person to effectively exercise and protect their rights, they need access to information.

A study by Daniels (2011) on access to information in Namibia suggested that, there is no country which can call itself democratic, unless the citizens have a right to access and request information that is held by public and private bodies. Access to information is a key component of a transparent and accountable government. Mendel (n.d) and Daniels (2011) both pointed that, it is important to enable citizens to know what is going on within government, to expose corruption and mismanagement. A number of researchers conclude that, there is a relationship between access to information and economic growth in any country achieving society.

Access to information implies quality information which means: information must be accurate, complete and timely. Citizens need sufficient and accurate information to evaluate options and decide the right choice. Given the importance of information, many countries have enacted legislation which guarantees access to information.

Furthermore, access to information is important because it enables political participation. For example the internet may be used to publicise government policy and draft legislation for educational purposes and for people to debate. The education sector including institutions of higher learning, and research entities exchange information through emails or online periodicals. In the health sector, doctors exchange notes on the causes and treatment of different diseases; and people need information on how to obtain titles deeds for their land; and they also need to know the requirements for obtaining loans with favorable conditions.

Providing access information is not an easy task. Decisions need to be made as to which type of information will be available; to whom will it be available; and under what conditions. Much existing legislation makes available only information in the possession of government departments or institutions funded by the state or acting on behalf of the state. Some information from institutions is regarded as confidential information, thus it is restricted to public access. The obligation to inform is important because it gives rise to the duties of the state and its citizens to reveal information on their respective actions.

Abid Hussain, the former UN Special Rapporteur on Freedom of Opinion and Expression, similarly, highlighted the importance of access to information in his 1995 Report to the UN Commission on Human Rights. In this regard he noted that

[i]n contemporary society, because of the social and political role of information, the right of everyone to receive information and ideas has to be carefully protected. This

right is not simply a converse of the right to impart information but it is a freedom in its own right. The right to seek or have access to information is one of the most essential elements of freedom of speech and expression. Freedom will be bereft of all effectiveness if the people have no access to information. (UN Commission on Human Rights, 1995)

The aim of this article is to examine whether the right to obtain information held by public bodies is considered to be a human right in Namibia. The research question is studied by analysing the data obtained during the piloting of the human rights baseline study which was conducted in April 2012 in 2012 in Windhoek for the Human Rights Baseline Study for the Office of the Ombudsman. The main study was carried out over the period May – September 2012.

2. The right to access to information

In 1946 the UN General Assembly adopted a resolution in which it recalled that “[f]reedom of information is a fundamental human right and [...] the touchstone of all freedoms to which the United Nations is consecrated.” (UN General Assembly, 1946: online) Two year later, the Assembly adopted the Universal Declaration of Human Rights (UDHR) which expressly guarantees the rights to access to information as discussed below.

2.1 The legal framework²

The right to access information held by the State is regulated in several international human rights treaties. Consequently, a number of international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental and legal nature of the right to freedom of information, as well as the need for effective legislation to secure respect for that right in practice.

2.1.1 United Nations-level

The UN General Assembly, as noted earlier during its first session in 1946 formally recognised freedom of information as a fundamental human right. In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right of freedom of expression, which includes the right to seek, receive and impart information. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). Article 19 of the UDHR states “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference

² This section is a verbatim presentation of the chapter: ‘The right to access to information in Namibia’ in the recently launched Baseline Human Rights Report’ for the Office of the Ombudsman: Namibia. The said chapter was also authored by the same authors Nakuta and Mchombu

and to seek, receive and impart information and ideas through any media and regardless of frontiers". Although the UDHR is not a legally binding document, the principles contained therein are considered to legally binding on States either as customary international law, general principles of law, or as fundamental principles of humanity.

The International Covenant on Civil and Political Rights (ICCPR), widely considered as the central instrument of protection for the right to access to information, guarantees the right to freedom of opinion and expression in very similar terms as the UDHR. This right is guaranteed in the article 19 of the ICCPR. The right to information (RTI) is also recognised in numerous other international human rights treaties, some of which are of general application while others address the human rights of specific groups such as women, children, or people with disabilities. Namibia ratified or acceded to most of these international instruments. These, amongst others, include the United Nations Convention on Corruption (UNCAC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD). Namibia acceded and/or ratified to all these instruments and is thus bound by their provisions.

2.1.2 African level

The African Charter on Human and Peoples Rights (ACHPR) guarantees the right to access to information in Article 9. In 2002, the African Commission adopted a Declaration of Principles on Freedom of Expression in Africa. The Declaration clearly endorses the right to access information held by public bodies, stating that:

"Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law." (African Commission on Human and Peoples Rights, 2002: online)

Further to this, the Declaration set forth several principles which should underpin an access to information regime. The part of the Declaration relating to freedom of information is presented verbatim below.

1. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;

- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.
2. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.(Ibid)

Namibia is a State party to the African Charter. It is thus bound by its provisions. As a State party Namibia is also bound by the declarations, resolutions and jurisprudence of the African Commission.

2.1.3 National/domestic level

The Namibian Constitution does not expressly provide for the right to access to information. It does, however, guarantee the right to freedom of speech and expression which includes press and media freedom. (Namibian Constitution, Article 21(1)(a) It is commonly understood that the RTI is implied within the right to freedom of expression. However, whereas international human rights treaties establishing the right to freedom of expression to include the 'right to seek, receive and impart information and ideas, such a construction is glaringly absent from the phrasing of the right to freedom of expression as founded under Article 21(1)(a) of the Namibian Constitution. The ACHPR, arguably, as a way to discard all doubt, guarantees the right to freedom of expression and the right to access to information as two distinct rights. The right to access to information is thus neither expressly nor impliedly guaranteed under article 21(1)(a) of the Namibian Constitution.

Namibia also does not have access to information legislation. In fact, the prevailing trend seems to be to control rather than availing State-held information. The Namibia, as noted by a key informant for the baseline study, is having '*...hordes of restrictive legislation which [...] curb instead of promote access to information*' (KI, Media Institute for Southern Africa, Windhoek, 2013). In 2009, the Special Rapporteur on Freedom of Expression and Access to Information in Africa of the African Commission, Adv. Pansy Tlakula, expressed her concerns about the "*lack of access to information provision in the Namibian Constitution [.....] and of information legislation*"(ACPHR,2009: online). She has recently reiterated her concerns in this

regard, during her address at a two-day conference on 'Access to Information' held in Windhoek on 21-22 August 2012. In this regard, she specifically urged Namibia to leapfrog the access to information legislation-making process by using the draft model law on the right to information for the African Union (AU) member states as a basis for drafting its own.

Does this then mean that the right to access to information is not guaranteed and/or claimable in Namibia? Most certainly Not! This is so because article 144 of the Namibian Constitution explicitly and unequivocally declares that:

"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

The status of this part of the law of Namibia is further enhanced by article 96(d) of the Constitution which provides that:

"The State shall endeavor to ensure that in its international relations, it [...] fosters respect for international law and treaty obligations."

By way of getting the government to give effect to such international and treaty obligations the Namibian Supreme Court in the *Cultura 2000* case pointed out that:

"Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community by providing that [...] international agreements binding upon Namibia ... shall be part of the law of Namibia."

Similar sentiments and affirmations were also expressed in the *Kauesa*, *Mushwena* and *Mwilima* cases, amongst others. From this, it ought to be beyond doubt that the law referred to in article 144 clearly includes international law provisions. This is why, for example, the High Court and the Supreme respectively found that the Government of Republic of Namibia (GRN) had a treaty obligation (under the ICCPR) to provide all the accused persons in the marathon Caprivi-secessionists trial with legal aid despite the fact that this right is not expressly guaranteed under the Namibian Constitution. There is no reason in logic or principle why the same argument cannot be made to apply to the right to access to information. These authors, thus, forcefully argue that the right to access to information is fully claimable and enforceable in Namibia either under article 19 of the ICCPR or article 9 of the ACHPR.

Having established the legal basis for the existence of the right to access to information in Namibia, the rest of this article will seek to shed light on the extent to which this right is currently enjoyed in Namibia with data collected from the Human Rights Baseline Survey Report referred to earlier.

3. The enjoyment of the right to access information in Namibia: A case of the Khomas Region.

The Human Rights Baseline Survey gauged people's experiences in accessing State-held information. To this end, the survey posed six questions on how respondents generally obtain/access information from public bodies. Only the three questions most relevant to this article will be considered and analysed. An attempt is made to compare and analyse the data gathered from the pilot study conducted in the Khomas Region (urban and rural) with that gathered from the national household survey.

The responses (pilot versus national survey) to the question 'Is it easy to access information on government policies/ programmes/ services?' were as follow:

Responses from pilot:

Table 1: Is it easy to access information on government policies/ programmes/ services?

	N	%
Yes	39	47.6
No	43	52.4
Total	82	100.0

Responses from national household survey:

Table 2: Is it easy to access information on government policies/ programmes/ services?

	N	%
Yes	632	50.2
No	626	49.8
Total	1258	100.0

The responses from the pilot study and the baseline study on this question were very close. Generally, the respondents in both the the pilot and the baseline study, were almost equally divided when we asked if it was easy to access information on government policies, programmes and services. For instance, the pilot responses show that almost 48 percent of the respondents were of the view that it was easy to access government information on policies, programmes and services, whereas slightly more than 51 percent shared the same view during the baseline study . The no-responses show similar trends. During the pilot more than 52 percent of the respondents answered this question in the

negative compared to the almost 50 percent negative responses gathered during the baseline study. Upon desegregation the pilot reveals that those below the age of thirty (61 %), those with tertiary education (65 %) and men (62%) found it more difficult to obtain information on government policies, programmes and services. In the same vein, the baseline study shows elderly persons i.e. those older than sixty (59%), those with no formal education (63%) and men (51 %).

These results imply that accessing of government information in Namibia is very much linked to one’s age, level of education and sex.

Our respondents were also asked to list the most common sources from which they usually obtain information on government policies, programmes and services. The results from the pilot study show the following responses.

Table 3: How do you access the government information?

	Resp	Col R %
Visiting the offices (Ministries)	30	25.2
Through media (radio, TV, newspapers)	51	42.9
Calling/ phoning offices	2	1.7
Visiting websites	16	13.4
Public/ community libraries	5	4.2
Politicians	7	5.9
Other	8	6.7
Total	119	100.0

The pilot results showed that the most common source of information on government programmes, policies and services was found to be the media (43 %), followed by visits to government ministries (25 %), accessing websites (13 %) and politicians (6 %). A mere 4 % of respondents indicated that they use libraries as a source of Government information.

The results from the baseline study for the same question show the following responses.

Table 4: How do you access the government information?

	Resp	Col R %
Visiting the offices (Ministries)	418	24.5
Through media (radio, TV, newspapers)	727	42.5
Calling/phoning offices	57	3.3
Visiting websites	125	7.3
Public/community libraries	76	4.4
Politicians	106	6.2
Other	200	11.7
Total	1709	100.0

The responses from the baseline study on this question were almost identical to that obtained in the pilot. The only difference was found in the use of the internet as a source for obtaining State-held information on government programmes, policies and services. The baseline study, in a mirror-image fashion, revealed that the most common source for such information was also the media (43 %), followed by government ministries (25 %), websites (7 %) and politicians (6%). As was the case in the pilot study, a mere 4 % of respondents indicated that they use libraries as a source of Government information. Although the media was the main source of information for all age groups, visiting websites was more prominent amongst the youth, while visits to ministries was most common amongst the middle-age respondents. The use of websites and libraries was more common amongst respondents with higher levels of education. The results from both the pilot and the HHS also showed that more female respondents singled out the media as their preferred source of information compared to their male counterparts.

The two most common barriers for accessing State-held information identified in both the pilot and the baseline study were listed as the distance to government offices (23 % versus 28%), and rude staff members/poor services delivery (19% versus 20%). Respondents in the pilot study listed outdated website content as their third major barrier (8%), whereas respondents in the main study singled out too much bureaucracy as their third highest impediment to government information (14%). Young and middle-age respondents (tended to identify rude staff members and too much bureaucracy, as well as the distance to government departments as their main obstacles, while the elderly identified the distance to government departments as by far the most pressing obstacle. This problem also featured more prominently in rural areas than in urban ones. Distance to government departments was more commonly cited as an obstacle by respondents with lower educational levels. They tended to live in rural areas and thus the response is consistent with the one provided earlier. The obstacles of too much bureaucracy and outdated websites were cited more frequently by respondents with

higher levels of education. These were the results for both the pilot and baseline study. A key informant for the baseline study also observed that: *"Getting information in Namibia is largely dependent on the attitude and goodwill of the civil servant you are going to encounter in your quest for information- this should not be the case!"* (Nakuta, 2013: 134). A recent study by Mnubi-Mchombu (2013:254) highlighted the same issues as identified in the two studies as barriers for accessing government information for orphans and other vulnerable children and their caregivers.

4. Conclusion

Generally, the situation with regard to obtaining State-held information in Namibia is less than ideal. The results from both the pilot and the national household survey showed that the current situation mainly affects the most vulnerable. These include elderly persons, the least educated and those living in rural areas. Certainly, the current situation whereby obtaining information held by public bodies and/or officials is at the discretion and disposition of civil servants is untenable and inconsistent with the right to access to information. It is worth iterating that public bodies hold information not for themselves but as custodians of the public good. It is no hyperbole to assert that the current practice and experiences pertaining to access to information as highlighted in this article do not connote a human rights-based approach to access to information on the part of public officials. The Government of the Republic of Namibia will have to do much more to dispel the notion that the absence of access to information legislation connotes a lack of political will. The need for adopting a human rights-based approach to access to information by all in the country cannot be overemphasised. This presupposes several things. Amongst others, the enactment of access to information legislation; the repeal and /or amendment of overly secrecy laws to comply with freedom of information principles; the capacitation of both duty-bearers and rights-holders in respect of their obligations and entitlements respectively; the construction of more public libraries in rural and urban poor areas; all public libraries should well-stocked with updated government policies and programmes; concerted efforts must be made to keep government websites current; the office of the Ombudsman should work in collaboration with libraries to sensitise the general public on how to lay complaints with this office regarding harsh, insensitive and discourteous treatment they receive from civil servants in their quest to access State-held information.

References

Coliver, Sandra 1999. Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. In *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*. Edited by Sandra Coliver, Paul Hoffman, John Fitzpatrick and Stephen Bowen. The Hague: Martinus Nijhoff. p.54

Daniels, Clement 2011. *Access to Information in Namibian-litigation strategies* (unpublished)

Fltshner, D. and Mesbah, D. 2011. Gender Disparity in Access to Information: do spouses share what they know? In *World Development*. Vol. 39 No.8 pp.1422-1433

Government of the Republic of Namibia & Another v Cultura 2000 & Another 1994 (1) SA 407 (Nm SC) at 412.

Kimber, Cliona 1996. "Equality or self-determination". In *Understanding Human Rights*. By Conor Gearty and Adam Tomkins. London: Pinter. p281

Legal Assistance Centre, 1990 *The Namibian Constitution*, Windhoek: LAC

Mathies Kay n.d. Access to information as a Human Right. [online]. Available at <http://www.sssm.com/abstract=1264666> accessed on 19 March 2012

Mendel, Toby n.d. Freedom of Information as an Internationally Protected Human Right [online]. Available at <http://www.article19.org> accessed on 18 March 2012

Mnubi-Mchombu, Chiku 2009. "Access to information by orphans and other vulnerable children in Ohangwena Region. In Oliver C. Ruppel. *Children's Rights in Namibia*. Windhoek: Konrad Adenauer Stiftung and Human Right and Documentation Centre.

Mnubi-Mchombu, Chiku, 2013. The information needs and seeking behaviour of orphans and vulnerable children and their caregivers, and the role of service providers in Namibia. [online]. Available at: <http://uzspace.uzulu.ac.za/handle/10530/1235>

Shields, R. 2009. "The landlocked island: information access and communications policy in Nepal". [online]. Available at <http://www.elsevierbusinessandmanagement.com/locate/telpol>

Webliography

The African Commission, Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia, Part IV: Freedom of Information, par.1.

UN General Assembly. 1946. Resolution No. 59 (1) Adopted during its First Session, December 14. Available at <http://www.un.org/documents/ga/res/1/ares1.htm>

African Commission on Human & Peoples' Rights, Promotion Mission Report to the Republic of Namibia, 24 - 27 AUGUST 2009, par. 211 (xiii) Available at http://www.achpr.org/files/sessions/47th/missionreports/namibia/misrep_promo_namibia_2009_eng.pdf