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## **INFORMATION ABOUT NAMIBIA'S LAW**

### **Cabinet Confidentiality**

The fundamental right to seek, receive, and impart information has been recognized by the UN and around the world. Two weeks ago, Minister of Information and Communication Technology, Peya Mushelenga, took steps towards codifying and expanding this right in Namibia by tabling the much-anticipated Access to Information Bill.

This Bill aims to increase the transparency and accountability of public institutions by creating a process for citizens to request information from public entities. Allowing access to government records and information serves as a critical tool for fighting corruption, enabling better participation in public life and encouraging investment, among other benefits.

Access-to-information laws have been used by journalists around the globe to expose stories such as the 2009 United Kingdom scandal over MPs' expenses, which led to prison terms for seven MPs; how police in the United States are shielded from prosecution for the use of deadly force; and, in India, a serious problem of HIV transmissions through blood transfusions which the government had denied.

On 1 July, debate on Namibia's Access to Information Bill will continue in the National Assembly. The current draft is strong. However, there are a few exemptions in the Bill which pose obstacles to fully achieving its purpose. Most notable is the blanket and permanent exemption of "proceedings and decisions of Cabinet and its committees".

To be sure, there are arguments in favor of affording a degree of confidentiality to Cabinet. As recognized by Canada's Supreme Court, "the process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly." Also, it is often felt that Cabinet's agenda and minutes should be confidential so that Cabinet may conduct discussions without undue political pressure. This in turn ensures that Cabinet decision-making processes are carried out expeditiously and with thorough debate. These objectives, however, can be achieved by applying time limits and more specific categories of confidentiality - permanent, blanket confidentiality is not necessary.

Blanket confidentiality for Cabinet materials is not the international norm. For example, under the **United Kingdom's** rules on Cabinet confidentiality, the only protected aspect of Cabinet deliberations is the privacy of individual opinions. And even this protection can be overridden though by the passage of time or in the public interest. Similarly, **New Zealand** and

**Kenya** allow for public interest exceptions to their respective Cabinet protections. This “public interest” approach allows Cabinet proceedings to take place in confidence as a general rule, but provides for access to critical information that would reveal wrongdoing or corruption, or that could prevent harm.

Other democratic jurisdictions allow access to Cabinet documents where the decisions in question have already been implemented. Some apply confidentiality to Cabinet deliberations, but not to factual background documents submitted for Cabinet’s consideration. In **Canada**, for example, access is allowed to discussion papers containing background information that has been presented to Cabinet once the related decision has been made public or after four years. All documents related to Cabinet decision-making processes are available after 20 years. In **India**, similar exceptions allow access to all Cabinet materials once the relevant decision has been made or, again, if access is in the public interest.

Where broad exceptions for Cabinet documents have been implemented, they have received stark criticism. For example, one commentator noted that the exemption of Cabinet records from **South Africa**’s Promotion of Access to Information Act 2 of 2000 was “completely inconsistent with the constitutional right of access to information”. In **Australia** it has been argued that blanket protection for Cabinet documents “is antithetical to the values of open government and accountability and prevents legitimate public scrutiny of government activity”.

Another danger which has been noted in Australia is that some documents might be submitted to Cabinet purely for the purpose of protecting them from public disclosure. Australia addressed this concern by adding a provision to its Freedom of Information Act 1982 which limits protection for the confidentiality of Cabinet documents only to those “brought into existence for the dominant purpose of submission for consideration by the Cabinet”. In Namibia’s current Bill, no such safeguard exists.

Rather than falling into these traps, Namibia should follow the world’s best access-to-information law examples e. **Mexico**’s General Act of Transparency and Access to Public Information has been heralded as one of the best in the world. This law protects as confidential only Cabinet materials that “contain the opinions, recommendations or views that are part of the deliberative process of Public Servants, while a final decision is made”. Furthermore, even this limited category of material is not protected from disclosure if it relates to serious human rights violations, crimes against humanity or corruption. The protection also extends only for a period of five years at most. The **AU Model Law** on the topic, which took two and a half years to develop and involved expert consultations, consultative conferences and public calls for comment, does not suggest any exemption for Cabinet-related materials at all.

To better align with the Bill’s purpose and these exemplary laws, the ACTION Coalition - which consists of a range of activists, civil society groups, and media organisations – has recommended removing the clause which exempts Cabinet materials from the Bill. In its place, they recommend a new provision whereby Cabinet decisions and resolutions, as well as factual information submitted to the Cabinet or its committees, are subject to requests for access. Only information about Cabinet deliberations should be exempt to facilitate open and frank

discussions - but even then, only for a period of ten years. Also, they recommend subjecting all Cabinet materials (like other government documents) to a public interest override to ensure timely access to important information such as evidence of corruption or issues crucial to public safety.

With this and other small recommended changes, Namibia stands to be on the forefront of Africa's push for better governmental transparency.

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