



A GUIDE BOOK

ESSENTIALS OF THE RIGHT TO INFORMATION LAW (989)

GHANA



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ABOUT THIS BOOK

In an effort to contribute to public sensitization and access to information under Ghana's Right to Information Act (989), this Guide Book titled, ***ESSENTIALS OF THE RTI LAW***, is produced as a toolkit to help journalists, citizens and information holders understand the Act and how it operates.

ESSENTIALS OF THE RTI LAW is a five-chapter book containing practically all and everything in the Right to Information Act, 2019 (Act 989). It presents an easy understanding of the law and its operations, and empowers the reader to use and assert the law to procure information to which access is guaranteed under the law.

Chapter 1 has a unique but brief history of the two-decade journey to the passage of the law. The constitutional imperative for RTI, the RTI as fundamental human rights are explained with an introduction to the two major cases decided by the Ghanaian courts before the passage of the -RTI law and post the law. The chapter concludes with the two main approaches to information disclosure, discussing the ideal of *proactive disclosure* and that compelled by the law as *reactive disclosure*.

Chapter 2 deals with the institutional structures for the smooth operation of the RTI regime. It explains what constitutes a public institution to which one may request information as defined by the law to include private bodies that benefit from public resources or are engaged in providing a public function. It outlines their duties as information holders required to generate and store information, the information units that must be established, and the information officers to man the units, their roles to process requests and facilitate access to information.

Chapter 3 provides extensive practical steps on how to access information, the requirements of a valid application for information with a checklist and the timelines within which a request should be processed. It discusses the basis for which information requested may be refused, when fees may be paid and when information may be given free of charge.

Chapter 4 treats how one may seek internal review if their request is refused by the information officer and the timelines within which the head of entity is required by law to deal with the review and communicate a decision. There is a long checklist to assist the applicant. The chapter also deals with appeals to the RTI Commission and to the High Court as a last resort.

Chapter 5 is dedicated to the more important and vexed issue of the class of *information exempt* from disclosure and the *harm's test* by which exempt information may be disclosed on grounds of public interest. It also examines the powers and immunities as well as sanctions to suffer when information officers do what the law forbids.

ACKNOWLEDGEMENTS

This RTI Guidebook - ESSENTIALS OF THE RTI LAW - was commissioned by the Media Foundation for West Africa. It seeks to contribute to public sensitization and access to information under Ghana's Right to Information Act (989) and particularly to help journalists, citizens and information holders understand the Act and how it operates. The MFWA extends sincere gratitude to Lawyer and Journalist, Samson Lardy Anyenini for the production of the manuscript. We also commend MFWA's team led by Sulemana Braimah, Abigail Larbi, Adiza Moro Maiga and Meshack Yemoh Odoi for their dedicated efforts in ensuring that this Guidebook was completed.

CHAPTER ONE

1.1 BIRTH OF ACT 989



On May 21, 2019, President Nana Addo-Dankwa Akufo Addo assented to the Right to Information Bill to give it legal effect as law. A gazette notification three days later, officially introduced the Right to Information Act, 2019 (Act 989) to Ghanaians. But this did not exactly mean the two decades of crusade for passage of the law had ended. There was that rare provision in Section 86 of the law stating that ***“[t]his Act shall come into force at the commencement of the next financial year.”*** This meant the law’s implementation was suspended by Parliament until January of 2020 when its application will begin and will be binding. The RTI Act is the mother of all anti-corruption tools, yet a sustained crusade had to be waged two decades to get it passed.

- March 2019: RTI bill passed
- May 21, 2019: RTI receives presidential assent
- January of 2020: Implementation RTI Act begins

In their book, *Access to Information and Documents as a Human Right* (by Mariya Riekkinen and Markku Suksi), we read how Sweden and Finland had cherished the principles of RTI for over 250 years by 2015. They passed specific RTI laws in the seventeen and eighteen hundreds (1700-1800). Ghana certainly knew the right to public information is a human right in 1992 and fixed a clause for it in Article 21 of the Constitution. It is however not difficult to tell the foot-dragging in passing the law and slow pace of implementation after the passage. The parliamentary debates of Thursday, July 2, 2015 show Member of Parliament for Adansi Asokwa (NPP), Kobina T. Hammond mounted a spirited

argument as he did more recently against the core purpose of the RTI Bill. He kept cautioning members and stressing that ***“[o]pen access to government invariably leads to weak governance.”*** He was livid that there were as many as about three hundred thousand requests within three years after the UK had passed its Freedom of Information law in 2000 and cautioned his colleagues against the Bill as presented to the House. The MP, together with others including government officials with similar views, maintained that posture up to and even after passage of the law.

1.2 A CONSTITUTIONAL IMPERATIVE

The preamble of the law does not miss the cardinal point that the law is a requirement by or an imposition of the Constitution of Ghana. *Article 21(1)(f) of the Constitution makes access to information generated by public institutions a matter of a fundamental human right.* That is to say, people are entitled to information not because a benevolent government decides to do them a favour, but they are entitled as a matter of a birth right by reason of being human. It is to be remembered that whatsoever government or the executive does, it is under obligation to do for and do on behalf of citizens as commanded in Article 1 of the Constitution.

People are entitled to information not because a benevolent government decides to do them a favour; but they are entitled as a matter of a birth right by reason of being human

The fact of law, in that provision of the Constitution, is that sovereignty or ultimate power resides in citizens who donate that power to the group of people forming the government to exercise that power in working to serve their interest and welfare within the bounds and dictates of law. The preamble of the Constitution is straightforward plain in the declaration that what we have given ourselves, as Ghanaians, is a framework of government with commitment to ***“probity and accountability”*** in a democracy built on ***“[t]he Principle that all powers of Government spring from the Sovereign Will of the People.”***

The Constitutional imperative must also be viewed in the prism of access being a fundamental human right and the onerous citizen-duty in Article 41(f) to ***“protect and preserve public property and expose and combat misuse and waste of public funds and property.”*** This way, the understanding becomes full and complete that people cannot participate in that exercise of duty to the State if they do not have access to information. ***Good governance is manifest in deliberative democracy and the truest expression of deliberative democracy is right to access information.***

1.3 THE COURTS AND RTI AS A FUNDAMENTAL RIGHT

In recent past there have been two major cases decided by the Ghanaian courts before the passage of the -RTI law that lends a strong credence to the RTI as fundamental human rights.

1.3.1 THE 116 BUS BRANDING SAGA

The Human Rights Division of the High Court presided over by Justice Anthony K. Yeboah on 13th

April 2016 rendered what would become the first judgment sending a signal that the courts will enforce the rights of citizens to information even if the law was not passed. In fact, the State argued that it could not give the information because there was no RTI law. News reports emerged from Parliament revealing that the Ministry of Transport spent GHC 3.6 million on the branding of 116 Bus Rapid Transit (BRT) buses at the cost of approximately GHC 31,000 per bus. However, in some media interviews granted by the artist, who was engaged to undertake the bus branding, he disclosed that he charged GHC 1,600

per bus. Lolan Kow Sagoe-Moses and six other members of the Citizen Ghana Movement (CGM) mounted the suit in the performance of their civic duty under Article 41(1) of the Constitution, 1992 ***“to protect and preserve public property and expose and combat misuse and waste of public funds and property”***. It was a long drawn battle but in the end, the court ordered that they should be furnished copies of the contract for the branding of the 116 buses because it was their fundamental human right to be given that information.

The court held that “[e]very person in Ghana has the inalienable right to information including official information. It is a right that is primarily inherent in the person as a human being and secondarily, constitutional. The right is virtually boundless unless the State takes steps to limit, through legislation, its scope, reach or mode of application.

It is not the legislation that vests the right in the individual; the individual has the right to information as both a human right and a constitutional right. The individual does not need a Freedom of Information Act to enjoy the right to information in Ghana. The Act is necessary to sanitize the flood of requests or applications for official information and to recover the costs of answering such requests or applications. Additionally, the Act may be for the purpose of designating the authority to release the information as well as to circumscribe information that, in the public interest, ought to be off-limits. In other words, the legislation may be passed to set out the mode of application for the information sought, the officer responsible for handling the application, the time frame for responding to the application, what information is off-limits and the financial implications of the requisition for the information.” The money involved, GHC 3.6 million, was eventually refunded to the State by the Smarttys Management and Production Limited, the company awarded the contract. The Attorney-General who was sued together with the Ministry of Transport recovered the money on the instructions of the Chief of Staff.

1.3.2 ASHAIMAN MP VRS EC

The Human Rights Division of the High Court again on 21st July 2020 compelled the Electoral Commission of Ghana to supply the Member of Parliament for the Ashaiman Constituency, Ernest Henry Norgbey, information on the acquisition of a new Biometric Voter Management System (BVMS). It held that the EC’s refusal to hand him documents on the procurement of devices with the excuse that Parliament has not yet approved fees and charges for accessing some information amounts to a violation, continuing and a threatened violation of their rights.

The court presided over by Justice Gifty Agyei Addo emphasized that *“[u]nless the request for official information sins against the public policy of the state and or its disclosure will endanger the security of the state, the courts must tread in favour of ordering their release. The exercise of the right to information is one prime approach to helping to put state actors on their toes. It is necessary to improving the democratic values of the state and ensures probity and accountability of the state.”*

It continued that “[a]s sacrosanct and inviolable as the fundamental rights of the people are, same cannot, be rendered inoperative as a result of the action of Parliament...the courts are enjoined to stand in for the marginalized and weak in society, particularly as regards the action or inaction of the executive and legislature.

The action of Parliament should not prevent a constitutionally guaranteed right of a person to be violated.”

1.4 PROACTIVE AND REACTIVE DISCLOSURE

The State is enjoined by law to practice proactive disclosure of information. In the circumstances, *proactive disclosure* implies an obligation, generally, of public institutions to, on their own initiative, publish non-exempt information. Despite the constitutional imperative, the State has acted in a near default fashion of electing *reactive disclosure* of information, and by that, public institutions tend to disclose information upon request. In the Ghanaian context, it is no secret that many public office holders, without the compulsion of law, treated public information as though it were their private property.

The State is enjoined by law to practice proactive disclosure of information

They often exercised a self-serving discretion to disclose information only if the disclosure coincides with promotion of their interests, personal or institutional, in the operation of a particular public institution. The reference to interests here extends to private business/political or organizational, political and partisan interests that may also be influenced either by a political party or central government. Written constitutions, such as we have in Ghana, generally provide the broad strokes of the law. Act 989 therefore fleshes out the right guaranteed in the Constitution by providing the detailed mechanics of operationalising that right. There is now therefore no excuse for denying access to information that is non-exempt. The disclosure or supply of information upon request is by compulsion of law, and a public institution must attend to request for information within specific timelines and conditions set out by the law.

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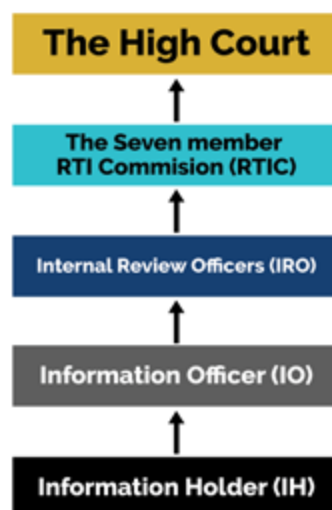
EXERCISE

Let's attempt the following exercises for this chapter

1. The basis of the RTI is that it is a fundamental human right. What do you understand by that?
2. In Ghana the fundamental human right has been guaranteed in Article 21(1)(f) thus: "All persons shall have the right to information, subject to such qualifications and laws as are necessary in a democratic society". How do you understand this in light of Act 989?
3. What does the posture of the courts pre-Act 989 and post-Act 989 say about their preparedness to deal with RTI cases?
4. Discuss the proactive disclosure and reactive disclosure approaches to the roles of citizens, the media and civil society national development.

CHAPTER TWO

2.1 INSTITUTIONAL STRUCTURES



A number of structures have been provided under the law to facilitate its implementation. The institutional structures to support a smooth RTI regime are five:

- (i) Information Holders (IH) who must generate and preserve information so it will be readily available for persons making requests for information;
- (ii) Information Officers (IO) who must be trained to manage information units to process requests to facilitate access to information;
- (iii) Internal Review Officers (IRO) who are heads of institutions and who are assigned the role of reviewing the decisions of an information officer to grant access or confirm denial of access to information;
- (iv) The seven-member RTI Commission (RTIC) which deals with appeals if one is dissatisfied with a review, and with powers to ensure full implementation of the law as implementing agency; and
- (v) The High Court where persons aggrieved by decisions of the RTI Commission may seek further redress in judicial review applications.

We shall discuss, in detail, the roles of each structure within the RTI regime. But before that, it is helpful to understand what the law, in its preamble, means by a *public institution* and public institutions being the only entities to which the law applies.

2.2 SPECIAL DEFINITION OF PUBLIC INSTITUTION

A significant development under this law is the broadening and extension of the definition of a public institution to include “*a private institution or a private organization that receives public resources or provides a public function.*” An entity is said to be performing a public function when its objective is to work to achieve benefits for the general public or a section of the public. It normally has general

acceptance or some members of the public consider it to have the authority to undertake the activities that benefit the people. Consequently, such a body may be engaged in providing services in education, healthcare and such other social services but may not be doing so because it is set up by parliament to do so.

The entities performing public functions provide the public goods or such services for the general benefit of the public relying on funds from the State. Otherwise, a public institution will in the old-fashioned legalistic sense be what the Constitution in article 595 prescribes variously as civil service, public corporation and public service. The central identifier of a public institution is the fact of such an establishment being a creature of statute and being either directly or indirectly, fully or partially funded from the Consolidated Fund or moneys provided by Parliament. Obviously, an institution funded primarily from moneys raised by taxation must be accountable to the tax-payer. Again by section 83, the application of this law could see a further extension to the private sector generally although it may come with some limitations.

2.3 INFORMATION HOLDERS

Every public institution is under obligation to “generate, process, maintain, and preserve information which is accurate and authentic”. Section 3(3) makes this, the setting up of an *information unit* and designation of an *information officer* to manage the unit mandatory. Public institutions therefore have no discretion to exercise but to comply with this mandatory requirement. An institution that defaults or is found to be non-compliant will be compelled by the RTI Commission to fully comply. A defaulting institution may not only be directed and given timelines to ensure it has arranged its affairs in compliance with the law to serve persons seeking information, they may face administrative fines. Public institutions, as defined in this law, must therefore be deliberate in generating accurate and authentic information and preserving them in a manner easily accessible.

2.3.1 Annual Manual

Every public institution is required to publish a manual each year. This manual will give guidance to the public so they know exactly what information to request from an institution, where and whom to direct the request to in the institution. Here is a *checklist* of what the manual must contain:

- i. A list of the departments or agencies under the institution.
- ii. An organogram of the institution with a description of responsibilities of the institution and details of the activities of the various divisions or units.
- iii. The classes of information that the institution prepares, has custody of or under its control.
- iv. The name, address and contact details of the information officer as well as the information unit and this must include telephone, email, fax and postal address.
- v. The arrangements and procedures for amending personal records in the institution.

A manual that gives you such view of a public institution, what information it has and which unit of branch you should direct your request etc is certainly very useful to facilitate access to information

.The list must include the types of information one can access or inspect at the institution and whether or not it is free or at a fee. In this case, the institution may be capable of indicating what is or is not exempt information which it can or cannot make available. An institution can procure the professional services of RTI experts including lawyers to advise and empower it to make this determination in advance. This, however, is never to suggest, not even remotely, that you are bound by any such determination. You have, as a matter of right, to challenge any such if you hold a contrary view of the characterization of information you request.

By this law, members of the public have a right to amend their personal official records with a public institution, and there is a further requirement for institutions to indicate in the manual arrangements or procedures people desiring to make changes to their personal records may follow to do so. Institutions like schools, hospitals, banks, the Social Security and National Insurance Trust, the National Health Insurance Authority, National Identification Authority, Driver Vehicle Licensing Authority and the EC who deal with people's personal records are bound to clearly detail how one may effect changes to his records in the custody of a public institution.

2.4 INFORMATION OFFICERS

These, according to section 19, are the individuals who must be designated by information holders to receive and process applications to access information. It was therefore wrong and unlawful for the Electoral Commission of Ghana to have handed to its private lawyers the application for information dated 3rd February 2020 by Ernest Henry Norgbey, the Member of Parliament for the Ashaiman Constituency. The act was clearly wrong and in breach of the law.

The law requires employees of the information holder-public institutions to deal with all applications. The EC's use of a private lawyer or law firm to deal with the application renders the action of denying the MP access to the information he sought on rather curious and spurious excuses (i.e. the reply dated 12th February 2020 by Amenuvor & Associates) unlawful and invalid in the eyes of the law.

EXERCISE

1. By the extended definition of a public institution, list at least five non-state institutions/ organizations you know to be affected.
2. Information officers are expected to be proactive in assisting applicants and facilitating access rather than showing conduct that tends to frustrate and discourage requesters. How can they achieve this ideal which is the goal of Act 989?
3. Discuss some of the methods information holders may adopt to encourage a robust regime of access to information.
4. What would you advice information holders and information officers to do to avoid delays and the potential of being overwhelmed by applications for information?

CHAPTER THREE

3.1 HOW TO ACCESS INFORMATION



The procedure is simple and requiring an application to be made either in writing or orally. Appendix A is a sample, and here is a *checklist* of what the application must contain:

- 1 Name and address of the applicant/requester
- 2 A form of identification of the applicant
- 3 A description or particulars of the information being sought
- 4 Indicate form and manner of access required
- 5 Capacity of applicant if application is made on behalf of another person
- 6 Confirm address/contact to which communication or notice can be sent
- 7 It must be signed by the applicant

The description or particulars of the information being sought must be sufficient to enable the information officer correctly identify the information and work on the application. You must also indicate if you want to merely inspect the information or receive a print, email, photocopy or on a device. You may also be aware the information is in a particular language but you want to receive a transcription in a particular translation or you may even want it in Braille. The information officer may, upon receipt, inform the applicant he/she does not have enough particulars to identify the information requested and as such assist the applicant to sufficiently identify the information so the application may be processed.

3.2 APPLICATION BY ILLITERATE OR PERSONS SUFFERING A DISABILITY

An illiterate person or a person suffering a disability who is unable to make the application in writing, can simply visit the institution and be directed to the information unit to be attended to by the information officer. The information officer is required to carefully record in detail and in writing the oral request of the illiterate person. An independent witness is to observe the process and sign it to indicate that he/she was present when the request was read over to the applicant in a language he/she understands and that the applicant “appeared to have understood the content of the request. The applicant has the opportunity to effect changes and/or introduce additions to reflect his/her desired request. The applicant then makes a thumbprint or a mark on the written request, and is handed a duplicate copy.

3.3 PROCESSING THE APPLICATION

The information officer has **14 days** within which to process the request and to announce or notify the applicant of a grant of access or refusal to grant access. However, where the request for information is necessary to safeguard the life or liberty of a person, the information office must process it within 48 hours.

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But there may be a situation where the institution is unable to deal with the request because the information sought is not information in its custody or information under its control. It could also be the case that the information requested, though in the custody of the institution approached, it is more closely related to the functions of another institution. In such a situation, the information officer is under obligation to refer the application or transfer it to the relevant institution *within two days of receiving the application* and then write to inform the applicant of the transfer.

The institution to which the application is handed to is also required to write to notify the applicant of the transfer of the application *within three days after receiving it*.

The fact that an institution does not have in its custody information requested must not lead to the information officer abandoning dealing with the request. Section 20(3) commands the information officer to, *within a period of not more than 10 days*, do the following:

- Make enquiries to confirm if any other institution has the information requested
- Transfer the application to the institution found to have the information requested
- Inform the applicant stating the institution, date of transfer and reason(s) for the transfer

The institution that receives the application has to treat it as the request for access to information having been made to it, and therefore the attendant timeline of either 14 or 2 days within which to process it commences from the date of receipt of the transfer.

In dealing with the request, it may become necessary to extend the 14-day standard timeline for process a request. Section 25 anticipates such a situation may be occasioned by three events:

- By a request for large volume of information requiring search through large number of records
- The information requested has to be collected from multiple sources
- The requirement of consulting a person outside the institution

The law, consequently, empowers the head of institution to grant extension of only *7 days* to the information officer. This will make a total of *21 days* standard timeline for processing the application. The information officer, upon the grant of extension, shall write to inform the applicant of the extension, the duration, the reason(s) and the right of the applicant to file an application for internal review or appeal to the RTI Commission within the prescribed time.

It is possible the information sought is information readily available in an official publication by another institution; the information officer shall direct the application to that institution and inform the institution of the request by the applicant. One may also be granted *deferred access* wherein an applicant may only access the information *within 90 days* when it is expected to be published by the institution. Access may also be deferred because the information sought has been prepared for onward submission to a person.

In such circumstance, *within three days after the deferment*, the information officer is required to write to inform the applicant of the reason for the deferment and the likely duration.

There is also *direct access* where an application may seek information directly from the RTI Commission without having to first exhaust the internal review procedures. There are six grounds for direct access to information under section 67 of the law.

- If the information sought is personal information of the applicant and initial request to an institution has been refused
- If the information requested is already in the public domain
- If the head of the institution doubles as the information officer
- If the requested information is time bound
- If it is a review application for information under the 48-hour processing rule
- If no notice is received for an application for information under the 48-hour rule

The RTI Commission may process the application instantly or remit it to the information officer for further investigations before making a decision to grant access or refuse access.

A staff of an institution or the institution may report about wrongdoing to the RTI Commission without having to first exhaust any internal procedures.

Where the information is *non-existent information* despite reasonable and practical steps taken in search of the requested information, the information officer shall write to inform the applicant that it is not possible to grant access. The applicant shall be informed of the steps taken in search of the information.

3.4 REFUSAL OF ACCESS

An institution, acting through information officer, may grant access or refuse access to information within the timelines prescribed by the law. The general major ground for refusing to grant access to information is that the information requested is *exempt information*. What is exempt information is dictated by the law especially in sections 5-17. The subject of exempt information is discussed in chapter 5. Information officers need education to confidently exercise judgment to serve the purpose of this law to grant access and not fall into a default of declining access in the name of exempt information.

A training that makes information officers correctly appreciate the law and its purpose as being to give access to information, and their section 3(3)(b) role and mandatory duty to “facilitate access to information” is very essential. The information officer may also refuse to grant access in one other situation. This will however be rare because a good understanding of the law’s purpose and their role will make them rather want to help applicants, facilitate access by construing even most unclear requests benevolently than deny access with the excuse a request is manifestly frivolous or vexatious. But where an information officer resorts or relies on this ground to refuse to grant access, that officer is under compulsion of the law to demonstrate that the request is *manifestly* frivolous or vexatious.

An application that is *manifestly* frivolous or vexatious is not difficult to identify. In law, a process is said to be frivolous and vexatious when it lacks legal basis, is without any merit or not serious and therefore without any prospects of success. It is vexatious because despite it lacking any merit, it is done with improper motive or malice and intended to harass or annoy. Such are easily discernible on the face of the application and often thrown out without any hesitation by a court so its time is not wasted, and sometimes with punitive cost to the applicant to deter others.

An institution also reserves the right to discontinue processing the request for information if the applicant fails to pay the processing fee demanded for reproduction of the information. It must however inform the applicant about the decision refusing to process the application immediately it takes the decision.

In accordance with Section 72, the institution always has the burden to prove, when an appeal goes to the RTI Commission, that information it denied an applicant is exempt information or that more harm will be caused by disclosure and that the public interest in disclosing is not far more important. The applicant on the other hand has the burden to prove, when denied access, that the information requested assists in the exercise or protection of a right, and where a fee is charged, to prove that the information is in the public interest and therefore must not attract a fee or that the applicant is indigent – does not earn the minimum wage and so ought to receive it for free.

3.5 INFORMATION FREE OF CHARGE

The fact is that the law does not expect that there will be fees charged. Section 75 while requiring a scale of fees and charges approved by Parliament to cover cost of reproduction of information supplied to a person, it also makes exemptions for information to be supplied free of any fees and charges. The relevant provision is reproduced here and it commands “a fee or charge shall not be payable for:

- the reproduction of personal information of the applicant;
- the reproduction of personal information of a person on whose behalf an application is made;
- the reproduction of information which is in the *public interest*;
- information that should have been provided within the stipulated time under this Act;
- information to an applicant who is indigent;
- information to a person with disability;
- time spent by an information officer or information reviewing officer in reviewing the information requested;
- time spent by an information officer or information reviewing officer in examining whether the information requested is exempt information; or
- preparing the information for which access is to be provided.

In effect, information belonging to the above class is to be supplied free of charge. The law’s expectation is that where a fee should be charged, it must not be exorbitant but only as much as will cover the cost of photocopy or reproduction of the information. It is not and there must not be fees for whatever time spent or efforts in preparation of the requested information. It was therefore unlawful and misapprehension of the law when National Communications Authority demanded an unreasonably extortionate fee of GHC 2000 from the Media Foundation for West Africa for information that, in the first place, ought to have been supplied free of charge. Information holders and information officers must always appreciate the fact that the attitude of the law is one of enabling access to information generated with public funds.

3.6 MANNER OF ACCESS

We have noted the law’s instruction that an applicant or requester must state the form in which he or she wants the information requested to be delivered.

The purpose of receiving notifications about the processing of the request apart, this is one of the reasons an applicant is required to supply contact details when applying for access to information. The information shall be given in the manner dictated by the applicant unless it is determined that supplying the information in that particular form could be detrimental to the preservation of the information or that having regard to the physical nature of the information, it is not appropriate to grant access in the particular form the application is made. The applicant is entitled to and the institution must comply with the requirement to give reasons why it is unable to give access in the nature specified by the applicant. In such a situation, the applicant shall not be required to pay a fee greater than what he or

she would have paid had access been given in the form requested. Access may be given in several ways including the following depending on the form or nature of storage of the information:

- Inspection of the information or a copy of the information
- Listening to the sounds or viewing visual images
- Supply of a written transcript of the information
- Supply of a photocopy of the information
- Supply the information in electronic, magnetic, computer storage device, web portals
- Supply the information in any other form

But whereas Section 28 prescribes the manner in which access to information may be granted, Section 75 confirms the request could be made for information to be delivered by *translation* into a particular language, *transcription* or *media conversion of reformatting* at a reasonable cost to the applicant.

EXERCISE

1. List seven requirements of a valid application for information and discuss the importance of each as found on the checklist.
2. Does the 14-day timeline or 48-hour timeline for processing a request mean an information officer must wait till the final day(s) or hour to complete his function after receiving a request?
3. List the grounds for refusal of a request for information and discuss a reason for each ground.
4. Enumerate five circumstances or classes of information that must be given free of charge.
5. If a fee must be charged, it must be an amount to cover only the cost of reproduction or photocopy and not time spent preparing the information requested. What is the rationale behind this?
6. What are the six different ways by which one may be granted access to information requested?

CHAPTER FOUR

4.1 INTERNAL REVIEW OFFICERS



If your application is not considered favourably by the information officer within the time given by the law, you may seek internal review. Heads of institutions are entrusted with the responsibility to review the decision of the information officer. A head of institution may affirm the decision declining you the information or varying the request by granting the request in part and declining it in part for reasons including that a part of the information sought is exempt information.

Checklist for the application for internal review

- It must be lodged within 31 days upon receipt of the decision of the information officer
- If it is lodged late (i.e. after the 31 days), it should be considered if good reason(s) are given for the delay
- It may be in writing and addressed to the head of institution though will be received by the information officer
- It shall state the request and decision of the information officer for which a review is being sought
- It may be made orally in which case the information officer shall reduce it into writing and give a copy to the applicant
- Information officer shall quickly submit the application to the head of institution or in any event within 5 days of receiving it
- The information officer shall submit the request together with a copy of the original application and his/her reasons for the decision for which a review is being sought

- The information officer shall then notify or inform the applicant and other persons affected by the application of the submission of the records to the head of institution
- The head of institution shall deal with the request quickly or in any event give his/her decision within 15 days
- The head of institution shall, in writing, notify or inform the applicant of his/her decision which must be in writing
- If the decision is favourable, the notice shall state whether access is granted free of charge or the fee payable and manner of access granted
- If access is refused, the notice shall state the reason(s) and the specific provision of the law relied on
- If access is refused, the notice shall inform the applicant of his/her right to appeal to the RTI Commission and process of lodging that appeal.

In reviewing the decision of the information officer, the head of institution is required to inform any person affected by the information he/she decides to release. The applicant shall not be granted access to such information unless the third party has given consent for the information to be released, or any appeal that has been lodged against the release of such information has been determined. However, if the head of institution decides to release such information despite refusal by a third party to give his/her consent, the head of institution must write to inform the affected person of his/her decision.

It is important to note that the failure of head of institution to communicate a decision on a request for internal review within the 15days deadline is deemed to be an affirmation of the original decision of the information officer. This means the aggrieved applicant can commence an appeal to the RTI Commission within 31 days from a day after the 15th day of lodging the application for internal review where no communication has been received. Appendix B is a sample of an application for internal review.

4.2 THE RTI COMMISSION

4.2.1 *The Commission as appellate body*

This is a seven-member independent Commission serving as the implementing body.

It is the second and final place to lodge a challenge before resorting to the law courts if it does not give a favourable decision. An aggrieved applicant is not given specific timelines within which to lodge an appeal to the Commission but as required by law in matters where there are no time limitations, it is advised that the appeal is lodged within a *reasonable time* of within thirty days from the date of the unfavourable decision of the internal review. The Commission is also not bound by any deadlines in dealing with the appeal and rendering its decision, but it must also be motivated by efficiency of which speed is an essential element.

The Commission is urged to use the opportunity of a Legislative Instrument (L.I) to provide for timelines for lodging an appeal to it and within which it will deal with an appeal and render a decision. The Commission could adopt the thirty or twenty-one-day window granted applicants to file for internal review and judicial review respectively. A decision to bind itself with time within which to hear and deliver a decision will be extremely useful in enhancing its efficiency in dealing with appeals. Section 44 directs the Commission to be less formal and technical in dealing with matters before it to enable it serve people and also to achieve expedition. Sections 40 – 71 i.e. thirty-one sections dedicated to the Commission, its establishment, powers, functions among others.

An application for review to the Commission is submitted the same manner as already discussed under internal review. It may be made in writing or orally to be reduced into writing. The application, apart from the exception discussed as regards *direct access*, will be entertained only after the person aggrieved by the decision of the information officer has exhausted the internal review process. Applications could also be brought by public institutions over matters the Commission has mandate to investigate, hear and render a ruling. The applicant and the head of institution are naturally constant parties.

The Commission's hearings are generally and a matter of right open to the general public unless the Commission decides otherwise owing to the special circumstances of a matter that it is best to hold a hearing behind closed doors – in camera.

The Commission will invite all parties including third parties affected by a matter before it and give them a reasonable opportunity in accordance with the rules of natural justice so they may also be heard. It is empowered by section 34(3) to dispense notifying third parties but the decision is left to its discretion when it deems it fit.

Persons attending a hearing of the Commission may do so with legal representation (their lawyers) or experts. Appendix C is a sample of an appeal to the Commission.

4.2.2 Binding orders, decisions and directives

The Commission shall make orders and recommendations on matters it has dealt with and its decision shall have binding effect. In other words, affected parties are under a legal obligation to comply with the decisions, orders and directives of the Commission. It may affirm the decision of an information holder, vary it or nullify it. It can make orders or give directives for purposes of ensuring that the necessary steps are taken by an information holder to comply with obligations under the law. It may order for recourse to negotiation, conciliation and arbitration to resolve a complaint. An institution that fails to comply with an obligation under the law may be slapped with an administrative fine to pay to the Commission.

The Commission is bound by the law to render its decisions in a manner that is professionally structured by laying out the statement of facts, findings and reasoning or explanations for the decisions or conclusions it reaches on the matters it deals with. Copies of its reasoned decisions must be available to the parties free of charge.

4.2.3 Commission with powers of High Court

The Commission has the powers, rights and privileges given to the High Court or Justice of the High Court. These powers are however limited to empowering the Commission to compel witnesses to attend upon it and to be examined on oath, affirmation or otherwise. It is this power that enables the Commission compel persons or institutions connected with a matter they are dealing with to produce documents to assist the process. If a person required to serve as a witness is abroad and unable to attend, for instance by reason of ill-health, this is the power with which the Commission can attend to the person and take his or her testimony. This also implies disregard for or disobedience to the summons of the Commission to attend upon it or order to produce a document places a person in the line of being punished for contempt of court by imprisonment and/or payment of a monetary fine. One may consider the fact that putting up such conduct against the summons or orders of a lower court attracts up to six months in jail and/or GHC 600.00, is an indication a High Court may do more than that not having been given a ceiling in the jail time or fine to impose on a person found guilty of contempt.

4.2.4 The Commission as RTI implementing agency

The primary function of the Commission is fourfold and it is in the *promotion, monitoring, protection and enforcement* of the right to information granted to a person under the law. Though it is under the ministry of information, it is independent and in the nature of independent constitutional bodies like the Electoral Commission and the Commission on Human Rights and Administrative Justice, not subject to the direction and control of any person or authority in the performance of its functions. This is the same autonomy granted the Office of Special Prosecutor and it is expected that it will not allow this independence to be weakened or cede it to politicians in the way some politically exposed persons appointed to such offices act to serve a political party's parochial interests instead of the interests of the general public.

The Commission can guard against this sad and dangerous phenomenon while working with the Minister of Information as supervising ministry, or with the Minister of Finance to submit its budget through the minister to Parliament each year. It is expected that this Commission whose members are appointed on the basis of expertise to do a full-time job and who are prohibited from keeping any other office of profit, and must not “engage in any partisan political activity” will live up to full and absolute compliance with the law. The first members of the Governing Board of Right to Information Commission as sworn into office by the President on 19th October 2020 are:

- Mr. Justice K.A. Ofori-Atta – Chairman
- Mrs. Elizabeth Asare - Deputy Chairperson
- Ms. Victoria D. E. Susuawu – Member
- Dr. Edith Dankwa – Member
- Nana Kwame Duah –Member
- Mr. David Oppon-Kusi – Member
- Mr. Yaw Sarpong Boateng - Executive Secretary

The Executive Secretary is entrusted with the responsibility of the day-to-day operations of the Commission, and he is answerable to the Board in the performance of his functions. He is allowed to delegate some functions to an officer of the Commission except that he takes ultimate responsibility for the performance of the functions so delegated.

Its central role as implementer of the law requires the Commission to publish guidelines which, among others, will assist institutions in training personnel and in putting together their manuals to be published each year.

It has the duty to promote and sustain awareness, and through working with others to educate the public on the right to information. The Commission is also a place where applicants and institutions may be assisted on interpretation of the law. It provides guidance for institutions and monitor compliance with the law. It is responsible for resolving complaints. Institutions found to be in default of the law or directives of the Commission may suffer sanctions including administrative fines. Committees set up by the Commission to assist the performance of its functions should be useful, but it ought to be meeting at least once in a fortnight other than the “at least once every three months” stated by the law especially with the members engaged in a full-time job.

4.3 HIGH COURT

A party to an appeal who is dissatisfied with the outcome at the Commission has the chance to file an application for judicial review in the High Court. The application must be filed in Court within twenty-one days after the decision of the Commission. Judicial review is the power of the Court to examine the decisions of administrative bodies or institutions of state and declare them as having been properly made or overturn them and make fresh orders which the erring-institution must obey. Article 23 of the Constitution of Ghana sets the tone for this with the provision that “[a]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal”.

It is the power the Constitution in Article 141 gives the High Court to exercise supervision over public institutions with regards to their decisions and actions. In dealing with application brought before it, the court is empowered to order an institution to produce information it has denied an applicant for it to scrutinise and decide if it ought to be given to the applicant. The assistance of a lawyer is required to prosecute a case at this level. It may demand original documents, enter an institution and inspect documents or invite persons connected with information being sought to question them on oath in seeking to establish the facts about a case. The court proceedings are to be held in camera and publication of information relating to the proceedings may be prohibited by the court.

It is actually under obligation by Section 37(3) not to disclose exempt information to any party except the representative of the institution involved and the Attorney-General. It is mandatory for the court, when it decides a case in favour of an applicant, to dictate the specific time within which an institution must comply with its orders and grant access to the information sought by the applicant.

EXERCISE

1. An application for internal review must be lodged within 31 days of receipt of the decision of the information officer. Describe the review process in full.
2. List five of the functions of the RTI Commission.
3. Explain the RTI Commission's role as an appellate body and as an implementer of Act 989.
4. What are some of the special powers of the RTI Commission for effective performance of its functions?
5. What sanctions can the RTI Commission apply and under what circumstances?

CHAPTER FIVE

5.1 EXEMPT INFORMATION



Some people give the impression they have an expectation of a no-exemptions regime but that is most unrealistic and perhaps a misunderstanding of the concept of the right to information. It is in the interest of the larger citizenry that law enforcement agencies will not have to be compelled to disclose intelligence they are pursuing over a terrorist threat. A country will have no friends if it discloses information that can damage or prejudice relations between it and another country or cannot keep confidential communication affecting its international relations.

The twelve plus one sections (5-17) dedicated to exempt information may look and suggest too much information is exempt information. Critics even contend this is a case of giving with the right hand and taking away with the left hand. But that is not the case when the exempt provisions are read carefully. There are no blanket exemption provisions in the law but each is carefully skillfully qualified to an extent not much information may be caught in that category if those who will deal with request for information and those will undertake internal reviews will keep fidelity to the law and their roles to facilitate access.

Similarly, the Commission whose primary mandate requires it to be pro-applicants and grant access to information will be guided and not become an unnecessary protector of information holder institutions affirming decisions made by information officers or head of intuitions in the name of exempt information. Consequently, information for the President, Vice President or Cabinet is not exempt unless it has been submitted for *consideration* and contains matters which if disclosed will *reveal* opinion, advice, deliberation, recommendation, minutes or consultation and a disclosure is *likely* to undermine the deliberative process, prejudice national security, formulation of policy or frustrate the success of a policy.

In other words, information to these offices may contain and reveal opinion etc but will not be exempt if a disclosure does not have the potential to undermine deliberations, prejudice security etc. Information containing factual or statistical data for these offices is not exempt and again these officers can elect to disclose exempt information on their own volition. It is instructive to note that advice, opinion or recommendations rendered for consideration is not a matter of policy until a decision is taken on same. It is therefore fair not to subject such to the rules of general disclosure.

Information about the economy and security of the state are exempt simpliciter unless their disclosure has the potential to interfere with prevention and detection of crime or violation of law. Personal tax information, personal information or privileged communication such as between a parishioner and priest, doctor-patient, husband and wife are not exempt once the individual involved gives consent.

5.2 THE HARM'S TEST

Information seekers, those who process the requests and particularly the Commission must take special note of Section 17. It is such an important provision and its proper appreciation and application by pro-facilitation of access officers, Commission and Court will ensure a realization of the full intended benefits to give fuller meaning to the new regime. It destroys the perception and argument that the law has a wide exemptions regime making a bad law that takes away rather that facilitate access to information. The section 17-rule, it must be noted may rather work to remove the exemptions blockade. By it, despite information being labeled as exempt information, it will be disclosed if the disclosure of such information will reveal evidence of:

- a contravention of, or a failure to comply with law;
- an imminent and serious threat to public safety, public health or morals, prevention of disorder or crime or the protection of or freedoms of others;
- a miscarriage of justice;
- an abuse of authority or neglect in the performance of an official function; or
- any other matter of public interest

The permission and power to disclose even exempt information if the disclosure will reveal evidence of the above is civic, patriotic and lawful duty and qualified by a further examination of that information against the harm's test. By *the harm's test*, the consideration required to disclose exempt information, and not be liable to any sanction, is for the person disclosing or authorizing the disclosure to satisfy themselves that benefit of disclosure clearly outweigh the harm or danger the disclosure will cause. The benefits of disclosing information about infectious disease so people can take precaution clearly outweigh the harm or danger to be caused by the attendant potential panic and fear by a government that announcing the outbreak of the infectious disease will mean recourse to measures that might impact negatively on the economy. The disclosure, where a political administration is hesitant, will help people take caution, seek early treatment and engage in practices to avoid or reduce a spread and attendant consequences on people's health, the healthcare system, livelihoods, the economy, etc.

The benefit in disclosing information about the crime of systemic corruption in the judiciary clearly outweigh the harm or threat the disclosure causes in reducing faith in justice delivery and the attendant consequences locally and internationally. It is far better and in the collective interest to make the disclosure and take early steps, including punishing offenders, to reform the system. The harm's test was invoked by Justice Anthony K. Yeboah in his pre-Act 989 seminal judgment in the *Lolan Sagoe* to grant access and compel the State to release documents on the infamous bus *branding saga* in 2016.

Summarily put, the section 17-rule emphasizes that exempt information is subject to disclosure where the disclosure will reveal evidence of contravention or failure to comply with law, imminent and serious threat to public safety, public health, morals, the prevention of disorder or crime or the protection of the rights or freedoms of others, miscarriage of justice, abuse of authority or neglect in the performance of official function, or any other matter of public interest provided the benefits of disclosure clearly outweigh the harm or danger that the disclosure will cause.

5.3 INDEMNITY, IMMUNITY, SANCTION

The information officer has immunity from civil or criminal liability and this important assurance and insurance is intended to enable them confidently carry out their work without fear of sanction. Sections 17(2) and 74 provide wide protections for the information officer in the exercise of his or her duties in facilitating access to information. There is therefore no sound reason to be caught in the bad public service attitude of a lazy default mode of bouncing people with false excuse of information being exempt, not available or a request being manifestly frivolous or vexation.

The law indemnifies and grants those dealing with the applications immunity by providing that they are not liable in criminal or civil proceedings for disclosing or authorizing the disclosure of information whose disclosure they determine to be for the protection of public interest.

The law in Section 74 specifically immunizes or frees the information officer against, from “any action, claim, suit or demand whether criminal or civil”. It is instructive to note that the immunity is not only in respect of actions taken in the course of duty, but the information officer cannot be made to face any action even for omissions committed while discharging the duties imposed by the law.

To give the information officer and any others connected with processing information greater confidence and security, the immunity is extended to cover decisions taken to give information being acts not constituting defamation or breach of confidence in law when there is publication of the information released to the applicant by the authorization or approval given.

An applicant is liable to suffer a fine of between GHC 3000 – GHC 6000 or 1-3 years in prison or both the fine and prison sentence upon conviction by a court for seeking to gain access to the personal record of another person under false pretences or for willfully making a false statement to gain access or by misleading another to gain access to information. An information officer is liable to suffer similar

sanctions for intentionally destroying, damaging, altering or concealing a document or making a false entry in a document so as to deny an applicant's right to information.

An information officer commits the offence of gross misconduct if found to have failed or neglected to perform a function required by the law and where he willfully discloses exempt information, he is liable to same amount in fine but prison term of between 6 months - 3 years. Information that is exempt from disclosure does not however remain exempt forever but for a period of thirty years after which it ceases to be classified as exempt information.

EXERCISE

1. Read the exempt information sections 5-17 of Act 989 and make a list of the classes of information exempt from disclosure generally.
2. Enumerate the features of information exempt from disclosure.
3. Discuss the words and expressions used in qualifying exempt information.
4. How do the words/expressions and features identified in (3) and (2) above assist you in easily indentifying exempt information?
5. What is the harm's test and its purpose?
6. The harm's test almost makes nonsense of the exemption regime, discuss.
7. List the offences and sanctions that applicants and information officers may face.
8. What are the indemnities/immunities enjoyed by information officers and why?

ANNEXURES

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THE INFORMATION OFFICER
NATIONAL LOTTERY AUTHORITY (NLA)
FORTUNE HOUSE
JOHN EVANS ATTA MILLS HIGH ST.
ACCRA
10TH OCTOBER, 2020

Dear Madam,

REQUEST FOR INFORMATION

I write pursuant to the Right to Information Act, 2019 (Act 989) to request for all documents covering the contracts awarded to Rams Kitchen by the NLA.

I am a student at the Nkrumah-Mandela College of Leadership. I attach a copy of my ID Card.

I would like to receive the requested information by email to the email address above or photocopies to be delivered to my residential address.

Please do not hesitate to call me if need be.

Thank you.

.....
AHMED SULE TAGOE

AHMED SULE TAGOE
H/NO. 4 RIDGE ESTATES
GHANA POST GPS GA-000-011
ACCRA
TELEPHONE NO.:0677777777
EMAIL: AHMEDSULE@GOMAIL.COM

THE CHIEF EXECUTIVE OFFICER
THRU THE INFORMATION OFFICER
NATIONAL LOTTERY AUTHORITY (NLA)
FORTUNE HOUSE
JOHN EVANS ATTA MILLS HIGH ST.
ACCRA
30TH OCTOBER, 2020

Dear Madam,

REQUEST FOR INTERNAL REVIEW

I write pursuant to the Right to Information Act, 2019 (Act 989) to request a review of the decision by the information officer refusing grant of access to my request.

Please find attach a copy of my original application and the reason(s) given for the refusal to grant access.

The claim that the information I seek is a matter already addressed by the NLA in the media is no legal basis to decline my request. I am entitled to receive all the 11 separate contract documents which are not exempt from disclosure.

I would like to receive the requested information in the manner sought in the original application.

Please do not hesitate to call me if necessary.

Thank you.

.....

AHMED SULE TAGOE

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THE EXECUTIVE SECRETARY
RIGHT TO INFORMATION COMMISSION
H/NO.
ACCRA
21ST NOVEMBER, 2020

Dear Madam,

APPEAL FOR REVERSAL OF DECISION REFUSING TO GRANT ACCESS TO
INFORMATION

I write pursuant to the Right to Information Act, 2019 (Act 989) to appeal for a review of the decision by the Head of Institution at the National Lottery Authority (NLA) refusing to grant access to my request.

Please find attach a copies of my original application, request for internal review and the reasons given for the refusal to grant access.

The claim that the information I seek is a matter already addressed by the NLA in the media is no legal basis to decline my request. The Head of Institution who is in a conflict of interest situation in the matter having been accused of violating procurement procedures to award the contracts to his sister-in-law has affirmed the decision of the information officer. He also disputes my assertion that the information I seek is not exempt from disclosure without showing any legal basis that it is exempt information.

I insist that I am entitled to receive all the 11 separate contract documents and that they are exempt from disclosure.

I would like to receive the requested information in the manner sought in the original application.

Please do not hesitate to call me if necessary.

Thank you.

.....
AHMED SULE TAGOE

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