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Judge Orders Disclosures Based on Ghana Constitution

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In the absence of a national freedom of information law, a High Court of Justice court in Ghana has ordered the disclosure of documents based on an article in the Constitution.

“Until the RTI Act is passed, This is it!” said one of the winning lawyers, Kofi Bentil, in a Facebook message.

Justice Anthony Yeboah said that the right to information is a human right and a constitutional one.

“No one [must be allowed] to benefit from his own wrong, the State ought not to be allowed to benefit from the failure to pass a Freedom of Information Act by using the nonexistence of such an Act as a ground for refusing to disclose the requested information,” the judge wrote in his **ruling**

(<https://www.dropbox.com/s/cv9yshx4x2zo9bw/BUS%20BRANDING%20JUDGMENT%20-%2013TH%20APRIL%202016.pdf?dl=0>).

The requested documents concern a controversial contract to “brand” buses with photos of the current and past presidents.

“The individual does not need a Freedom of Information Act to enjoy the right to information in Ghana,” the judge declared. (See **article** (<https://www.ghanabusinessnews.com/2016/04/14/155734/>) by Emmanuel Odonkor in Ghana Business News.

The ruling states: “... under Article 21(1)(f) of the Constitution, persons including the Applicants are entitled to access public information that is in the custody or possession of the Government upon a request, and where appropriate and lawful.” The ruling quotes from numerous applicable international cases.

Ghana has yet to adopt a FOI law, although a bill is now pending in the Parliament. Debate has begun, but was interrupted by a recess. (**See previous FreedomInfo.org report.**) (<http://www.freedominfo.org/2016/03/ghana-parliament-takes-up-consideration-of-rti-bill/>)

The group Citizen Ghana requested the documents about the contract between the Ministry of Transport and Smarty’s Productions and brought the case, represented by Bentil and Nana Akwasi Awuah. For background on the alleged overcharges, see an **article** (<http://www.newsghana.com.gh/release-smarrttysgovernment-contract-documents-ag-orders/>) in NewsGhana.

Bentil, Vice-President of IMANI Ghana, said the ruling “constitutes the right to information law in this country,” according to an [article \(http://www.myjoyonline.com/news/2016/April-13th/smarttys-saga-high-court-ruling-constitutes-right-to-information-law-kofi-bentil.php#sthash.JaAx9Vje.dpuf\)](http://www.myjoyonline.com/news/2016/April-13th/smarttys-saga-high-court-ruling-constitutes-right-to-information-law-kofi-bentil.php#sthash.JaAx9Vje.dpuf) in MyJoyLine.

The judge rejected government arguments that the right to information as captured in Article 21 (1)(f) of the 1992 Constitution is “subject to such qualifications and laws as are necessary in a democratic society.”

Yeboah decided that the government had not demonstrated that release of the information would be “offensive to the national interest, public order, national security or public morality.”

His order nevertheless says that the disclosure should be made unless specific “factors counsel otherwise: national defense and foreign relations information; information that is prohibited from disclosure by another law, trade secrets and other confidential business information; inter-agency and intra-agency communications protected by legal privileges, information involving matters of personal privacy; certain types of information compiled for law enforcement purposes.”

The Ministry of Transport and the Attorney General were told to make the contract available to the seven in 14 days. “Other documents relating to the contract are however to be made available subject to prohibition of their disclosure by other laws and the propensity of such disclosures to cause harm,” Ghana Business News reported.

“The court also ordered that the respondents answer in writing, whether or not the award of the contract was done in adherence to the Public Procurement Act 2003 (Act 663), whether or not the contract procurement was competitive or sole sourced, and whether or not there were other alternatives to the contract,” the paper said.

In reaction, lawyer Samson Lardy Anyenini says it is wrong to argue that a FOI law is not still needed, according to an [article \(http://www.ghanaweb.com/GhanaHomePage/NewsArchive/High-court-s-full-disclosure-ruling-not-substitute-for-RTI-Lawyer-430909\)](http://www.ghanaweb.com/GhanaHomePage/NewsArchive/High-court-s-full-disclosure-ruling-not-substitute-for-RTI-Lawyer-430909) in GhanaWeb. He said, “This decision is a real big deal for the fight for access to information and the constitutional right of and to assert same, but not a substitute for an RTI Law which will be binding on all including the courts.”

RTI Coalition Issues Statement

Below is the text of a [statement \(http://www.newsghana.com.gh/bus-branding-judgement-and-relevance-of-the-rti-law/\)](http://www.newsghana.com.gh/bus-branding-judgement-and-relevance-of-the-rti-law/) from the Coalition on the Right to Information

The Relevance Of The Right To Information Law In The Wake Of The Bus Branding judgement by the Human Rights Court

The Coalition on the Right to Information (RTI) welcomes the judgement delivered by the High Court of Justice (Human Rights Division 2) presided over by His Lordship

Anthony K. Yeboah on 13th April 2016, which ordered the Attorney General and Ministry of Transport to furnish the applicants in the suit with the relevant information relating to the branding of the 116 Bus Rapid Transit (BRT) buses.

Specifically, the Coalition would like to commend Citizen Ghana Movement (CGM) for supporting the RTI advocacy by taking the bold step to initiate this suit.

The RTI Coalition believes that the judgement is a victory for Ghanaians and for citizens' right to Access Information in particular. The judgement reinforces the need for the passage of an access to information legislation in Ghana and most importantly for the speedy consideration of the proposed amendments by Parliament on the Right to Information Bill.

The RTI Coalition would like to draw the attention of the public to the fact that the judgement of the High Court has strongly buttressed the need for a Right to Information legislation in Ghana. The Coalition is fully aware and has always been of the view that citizens have a right to access information and this right is primarily inherent in the person as a human being and is also a constitutional right. In fact, His Lordship Justice Anthony Yeboah puts it more succinctly and the Coalition agrees with him when he said 'it is not the legislation that vests the right to the individual; the individual has the right to information as both human right and a constitutional right'. However a Right to Information legislation provides the various mechanisms by which citizens and indeed all persons can easily enjoy the constitutional right to access information. An RTI law sets out clear obligations for duty bearers in terms of granting access, including the time frame within which requests for information should be granted, in what format the information should be provided, the fees to be paid, sanctions for the breach of the law as well as the review/appeal processes to be followed where such a request is denied.

It is true that one does not need an RTI legislation to be able to go to court to enforce the right as specified under Article 21(1) (f); however, without the Right to Information law, the court becomes the ONLY option for Ghanaians, including the less privileged and indigent persons. This in itself is a DETERRENT

because access to justice comes with huge financial implications in addition to the delays associated with the justice delivery system. Given the time sensitive nature of most information requests, where court litigation is left as the only option, what may happen is that the information may no longer be relevant or even available after judgement is delivered. Furthermore, any delay in the court proceedings may also provide an opportunity for such sensitive information to be tampered with or destroyed. With the Right to Information Law, citizens would have a hierarchy of administrative procedures to follow where a request is denied leaving the court as the last option.

The Coalition would like to reiterate that a robust RTI legislation is still very relevant and necessary for Ghana today. His Lordship confirmed this when he said “Even in the absence of a freedom of information legislation, ... prudence demands that we learn from existing freedom of information legislation in other jurisdictions and use them as a guide to help us decide whether it is prudent to give in to the demand of the applicants where they request that ‘all information relative to the contract be disclosed’”.

An effective Right to Information Law addresses all issues relating to exemptions as His Lordship alluded to and specifies under what circumstances information disclosure will be exempted. Such legislation also requires public institutions to proactively disclose information and itemizes the kinds of information that ought to be proactively disclosed which is lacking in the current judgement.

We humbly submit that Ghana as a beacon of democracy should be working towards ensuring the passage of progressive legislation such as a right to information law that conforms to the African Union Model Law and International Best Practice.

Specifically, the Bus Branding judgement addressed the issues brought before the court which is the disclosure of information relating to the branding of the BRT buses. The judgement did not address the mechanics of accessing information generally from public institutions and what the responsibilities of the public officials would be in granting access, meaning that legislation is still needed to flesh out these details.

The general principle governing Right to information laws is that a requester does not need to justify why he or she is seeking the information requested because it is a fundamental human right.

It would be as absurd as requiring that to exercise one's right to free expression, one must first give the reason why one wishes to exercise that right! Best practice principles however require that where a requester requires the information for the exercise of a fundamental human right to physical safety, liberty etc. and therefore the time line for providing the information is to be drastically reduced from the norm, the requester ought to indicate the purpose for which he/she requests the information. This is simply to aid a more rapid and urgent disclosure process.

Otherwise, a person is under no obligation to give the reason why he/she requires the information as a basis for the disclosure of the information. Indeed, the proposed amendments to the Bill currently before Parliament upholds this principle. Again, where the information is in the custody of a private person, some right to information legislation require that the requester provides reason for the request.

In the Branded Bus's case the applicants had to demonstrate why they were seeking for the information. This is contrary to well-established principles governing request of information from public bodies under a democratic right to information legal regime. Furthermore, another aspect of the otherwise progressive judgment of the High Court was the order that the Applicants pay as much as GHC1, 000.00 for the information requested. This fee was not determined by an examination of the volume of documents that were to be given to the applicants by the state.

The principle governing fees for information requested is ancillary to the fact that right to information is a fundamental human right. Accordingly, the scale of fees for access to information ought to be the minimum possible so that a person's financial circumstances, as far as possible do not become an obstacle to his/her access to information. It is for this reason that most right to information legislation provide that the fee to be charged should simply be what is required to reproduce the information sought. In our candid view therefore the amount of GHC1, 000.00 seems with respect to be unduly excessive.

Perhaps, the Court could have ordered that the Applicants pay so much, for instance 15 pesewas for every page of the information requested for. With a Right to Information law in place, public institutions would be expected to charge only a minimal fee, related to the cost of reproducing the information requested for.

While we commend the High court for this ground breaking decision, we wish to urge our Parliamentarians to speed up the consideration processes for the passage of the RTI Bill and to pass the Bill, with the critical amendments proposed by the Select Committee on Constitutional, Legal and Parliamentary Affairs before November 2016. Indeed it has become even more urgent for government to ensure that the Right to Information Bill is passed now, and we could not agree more with the Court when it stated ‘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 and what is off-limits...’

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