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The Right to Access Information in the Forest sector

A briefing prepared by ClientEarth

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Introduction

Purpose of this document

This document aims to give an overview of the rights local communities and civil society have to access information in relation to forest governance. We will also look whether there are any gaps in the legal protection of the right to access information. To do so we have analyzed how access to information is protected in national Ghanaian law (including the Constitution, acts and regulations). Subsequently we analyzed international treaties and conventions ratified by Ghana to see how they protect the same right.

This legal briefing is a part of a series of five legal briefings. Each of them focusing on the legal protection of a key right that can support civil society and local community representatives in their work relating to natural resources and community rights.

Methodology

This legal briefing is based on extensive legal research into the Ghanaian national legal framework and related policy documents as well as into the international legal framework applicable to Ghana. A first draft has been developed as a reference document for a participatory training planned in November 2013. The goal of that training will be to support the sharing of legal knowledge on which it is based. The November workshop will also provide an opportunity to further improve the content of the briefing. We hope the legal analysis contained in this series of briefings will be the basis for developing strategies in support of law reform processes in the forest sector.

Law vs practice

In this document we will primarily focus on how access to information is provided for in the law. We are aware that practice often differs from this. However we hope this briefing can be a tool to understand the legal framework. Starting from a thorough understanding of the legal framework, feedback from practice (whether positive or negative) can then inspire recommendations and strategies for legal change, improved implementation and enforcement.

Link with participation and access to justice

Access to information is intimately linked with the other procedural rights we focus on in our briefings. Neither access to justice nor participation mean anything if they are not accompanied by the right to access information. This link often is so intimate that the right to access information sometimes is considered a part of certain forms of participation. E.g. the UN declaration for the Rights of Indigenous Peoples when mentioning consent always specifies this consent needs to be informed.

1 Our understanding of 'Access to Information'

Definition

The fundamental right of citizens to access information is recognized in various international conventions as well as the Constitution. Each and every citizen has a right to be informed. This right entails that public authorities must circulate information they hold. The right to information consists in giving any physical or moral entity the possibility to access any kind of information held by public authorities or on their behalf, whether it be written, visual, sonorous or digital information without needing to provide a motive.

What information are we talking about? Who circulates it?

The requested or circulated information can be information on procedures, information on decisions or technical data. Information on procedures is the totality of the various legal norms which apply in a specific area of the law (international treaties and covenants, laws, constitutions, other legal and regulatory texts, jurisprudence etc...). Information on decisions include legal, economic and financial notices (tenders, bid results, company registrations). Finally technical data refers to statistical, scientific and similar information (e.g. population density, efficiency, weather,...). The duty to make information available mainly rests on public authorities but can also apply to private entities when the nature of that information is required for the exercise or protection of a particular right.

Maximum disclosure and obligation to publish

An important principle of transparency is that of maximum disclosure. According to this principle all information should be publicly available unless there is a disproportionate risk legitimate public or private interests would be harmed by the disclosure of that particular information.

Another principle includes the obligation to publish any information of public interest in a proactive and routinely manner, even if no specific request for this information was made.

2 Access to information in National Law

2.1 The 1992 Constitution

2.1.1 The Constitution defines access to information as a fundamental right

Access to information is included amongst the fundamental human rights and freedoms in the fifth chapter of the Constitution. Everybody has the right to access information subject to such qualifications and laws as are necessary in a democratic society¹. The panel of experts that developed proposals for the 1992 Constitution noted:

“A political system in which the public surrenders these rights to a political party or government cannot hope to remain democratic. The public must, therefore, be guaranteed the right to know, the right to access information, as a basic human and constitutional right”²

Mindful of this fundamental right the Constitution continues by providing for the proceedings of Courts to be held in public unless otherwise provided by the Constitution or Law or ordered different by the court in the interest of public morality, public safety or public order³. In the same way proceedings of Commissions of inquiry have to be held in public⁴. Reports of commissions of inquiry (together with the white paper⁵) have to be published by the President within 6 months after the submission of the report⁶. If the President decides not to publish the report he has to issue a statement giving the reasons why the report is not published⁷.

Undoubtedly the most important constitutional provision on access to information to support work on community rights in relation to natural resources obliges the Office of the Administrator of Stool Lands and the Regional Lands Commission to make all relevant information and data available to the Stool and traditional authorities in all matters relating to the administration and development of stool land⁸.

2.1.2 The Constitutional Review Commission recommends for the Access to Information bill to be passed

The Constitution is currently under review. In January 2010 the Constitutional Review Commission (CRC) was set up to consult with the people of Ghana on the operation of the 1992 Constitution and any changes that may need to be made to it. This resulted in the publication of a comprehensive (960 pages) report titled ‘From a Political to a Developmental

¹ The Constitution, 1992, Article 21 (1) (d)

² Report of the Constitution Review Commission, 2011, Chapter 13, n° 193 – report of the Committee of experts (Constitution) on Proposals for a Draft Constitution for Ghana, (July 31, 1991) Paragraph 186

³ The Constitution, 1992, Article 126 (3)

⁴ The Constitution, 1992, Article 281 (1)

⁵ A white paper is a type of document presenting Government policy preferences

⁶ The Constitution, 1992, Article 280 (3)

⁷ The Constitution, 1992, Article 280 (4)

⁸ The Constitution, 1992, Article 267 (7)

Constitution⁹. In July 2012 the Ghanaian government released a white paper¹⁰ in which it accepts a number of the recommendations made by the constitutional review commission and explains the rejection of others¹¹. Currently the Constitution Review Implementation Committee is working to complete the process of constitutional reforms by proposing bills for amendment and preparing Ghanaians for a referendum on the changes to some entrenched provisions.

In its Chapter 12 on land and natural resources the CRC observes that it is increasingly becoming common for citizens to have a basic right to information about government activities and the use of public assets, including information on payments and revenues derived from extractive industries¹². Alongside the disclosure of information governments are required to adopt transparent processes for establishing and implementing resource policies, for awarding contracts, for collecting and managing revenues and for taking spending decisions¹³. Resource decisions involve long-term commitments and will be more credible if their rationale is understood by citizens and they are over sighted by the representations of the people in the Parliament. Mindful of these elements the CRC recommends for the various acts of parliament that deal with benefit sharing in the natural resource sector to be amended to ensure greater transparency and accountability in the use of resources within the sharing arrangement provided by the Constitution¹⁴.

In Chapter 13 the CRC treats the right to access information as a separate fundamental human right. It recommends the passage of an updated version of the right to information bill that does not contain too many claw back clauses¹⁵.

2.2 Access to information in relation to forest governance

2.2.1 Forest reserve landowners have the right to know how the Forestry Commission spends forest reserve revenue

The Forest Act allows the Forestry Commission to deduct up to one third of the gross revenue of forest reserves before paying the rest to the owners. Where this deduction is made FC is obliged to account to landowners for the expenditures it made using this money¹⁶.

2.2.2 The Forestry Commission needs to submit a yearly report

⁹ <http://www.ghana.gov.gh/index.php/information/reports/2573-report-of-the-constitution-review-commission>

¹⁰ A white paper is a type of document presenting government policy preferences

¹¹ <http://www.ghana.gov.gh/index.php/information/reports/2572-white-paper-on-the-report-of-the-constitution-review-commission-presented-to-the-president>

¹² Report of the Constitution Review Commission, 2011, Chapter 12, n° 141

¹³ Ibid, Chapter 12, n° 142

¹⁴ Ibid, Chapter 12, n° 161

¹⁵ Ibid, Chapter 13, n° 194

¹⁶ Forest Act , 1927 (CAP 157), Section 18 (2)

The Forestry Commission needs to submit a yearly report to the Minister of Lands and Natural Resources. This report needs to deal with the general activities of the FC and needs to be submitted to the Parliament by the Minister within three months¹⁷.

2.2.3 The Forestry Commission needs to notify public of forest reserve or TUC intentions

Where the FC intends to create a new forest reserve¹⁸ or when it intends to identify a new area for timber exploitation off-reserve¹⁹ it needs to publish notifications of these intents. For areas on-reserve that are proposed for the grant of timber rights the FC just needs to inform the people of the area²⁰.

2.2.4 Transparent Timber Validation Division and Forest Plantation Development Fund

The Timber Validation Committee needs to monitor and ensure the Timber Validation Division performs its functions in a credible, transparent and independent manner²¹.

The Forest Development Fund Act, 2000 (Act 583) obliges the Board to select a Fund Management Bank in a transparent manner²² and to publish criteria for disbursement of the fund²³.

2.3 The 2012 Forest and Wildlife Policy

From the very start the new forest and wildlife policy recognizes transparency as one of the challenges of the forest sector. It says the framework for collecting, recovering and redistributing revenues accruing from natural resources between resource owners and state users is ambiguous, inequitable and lacks transparency. The policy concludes there is a need to restructure and make natural resource revenues going to the state, local government administrators and local resource owners more transparent²⁴.

The forth the policy objective of the 2012 Forest and Wildlife policy is to promote and develop mechanisms for transparent governance, equity sharing and peoples participation in Forest and Wildlife resource management²⁵. The policy foresees to institute transparency and equity and to legalize public participation in sustainable forest and wildlife management²⁶. To do so legislation will be enacted to support allocation of resources

¹⁷ Forestry Commission Act, 1999 (Act 571), Section 28 (2)

¹⁸ Forest Act, 1927 (CAP 157), Section 3

¹⁹ Timber Resource Management Regulation, 1998, (L.I. 1649), Regulation 3

²⁰ Timber Resource Management Regulation, 1998, (L.I. 1649), Regulation 2 (6)

²¹ Timber Resources (Legality Licensing) Regulations, 2012 (L.I. 2184), Regulation 4 (a)

²² Forest Plantation Development Fund Act, 2000 (Act 583), Section 8 (1)

²³ Ibid, Section 9

²⁴ Forest and Wildlife Policy 2012, paragraph 2.2, n° 2.14 (h)

²⁵ Ibid, paragraph 5.4

²⁶ Ibid, paragraph 5.4.1, strategic direction 4.1

through transparent competitive bidding and to ensure increased institutional transparency, consistency and credibility²⁷.

Under the fifth policy objective (promoting training, research, and technology development that supports sustainable forest management) updating infrastructure for research education and training is said to include updating a forest information database to monitor sustainable forest management which can be accessed by research and academic institutions as well as civil society²⁸.

²⁷ Ibid, paragraph 5.4.1, strategic direction 4.1, n° 4.1.2

²⁸ Ibid, paragraph 5.5.1 strategic direction 5.1, n° 5.1.1 (c)

3 Access to information in International Law

Contrary to some of the other focus rights included in our legal briefings, there are only few binding treaties which include the right to access to information. This does however not mean there is no international interest for the protection of access to information. The Universal declaration on Human rights, the Rio Declaration, the OECD guidelines for Multinational Enterprises and the wide international support and country participation in the Extractive Industries Transparency Initiative all are proof of an increasing emphasis on the right of the public to access information in relation to natural resource governance.

In this section we have handpicked some of the most relevant treaties and provisions included within them that focus on access to information.

3.1 African Charter on Human and Peoples' Rights

This international instrument was created to protect the human rights and freedoms of people living in Africa. In its article 9, the African Charter establishes that everyone should have access to information

The African Charter creates the African Commission²⁹ to promote human rights by developing and formulating principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms. As part of its mission, the African Commission has developed non-binding instruments which focus on the objectives of the African Charter and the content of certain rights enshrined within them.

Based on the right of every individual to receive information included in article 9 of the African Charter, the African Commission has prepared a document entitled "Model Law for Africa on Access to Information." This document provides guidance on the form and content a national law should have to comply with Article 9 of the Charter.

Quick reference

Full name: African Charter on Human And Peoples' Rights

Common Name: African Charter

Year: 1981

Ratification by Ghana: 1989

Entered into force: 1986

Legal status: legally binding

Box 1: A model law on access to information for African states

The African Commission in collaboration with the Centre for Human Rights in the University of Pretoria, has developed a model law for African States on Access to Information. The Commission points out in the preliminary provisions of this document that the model is a tool for advocacy and can highlight the importance of access to information in each national context and the need for each country to adopt a law on the subject.

One of the key principles of the Act the presumption of disclosure. Any information detained by public bodies and information that may assist in the exercise or protection of any right

²⁹ African Charter on Human and Peoples' rights, 1981, article 45

held by private bodies should be accessible expeditiously and inexpensively. Non-disclosure is only permitted in exceptionally justifiable circumstances³⁰.

Information holder have the obligation to create, keep and organize and maintain information³¹. Some of this information must be proactively published within 30 days or in annual reports³². When the information holder fails to do so the unpublished information cannot prejudice the public³³

Public officers should assist those asking for information in drawing up their official request and a maximum delay of 21 days (single extension for 14 additional days possible) for making information available is included in the act. This maximum delay can be reduced to 48 hours in case the information is needed to preserve life or liberty of a person³⁴. The act continues by prescribing forms of access, language and fees³⁵.

Only a limited number of reasons can justify the refusal of access to information. Refusing access on the grounds of an overriding public interest is only justified if the harm done by release would demonstrably outweigh the interest in releasing the information³⁶. In addition access to information cannot be refused just based on its classified status³⁷. Other possible justification for refusing access to information are explicitly mentioned.

The act further provides for the creation of an independent and impartial oversight mechanism³⁸ comprised of information commissioners for the purposes of the promotion, monitoring and protection of the right of access to information. The oversight mechanism has the mandate to promote awareness, but more importantly, someone who has been denied access to specific information may apply to the oversight mechanism for a review of any decision of an information holder.

Source: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf

Apart from the model law, the Commission also sees aspect of access to information in other obligations for states included in the Charter. The so-called Ogoni case³⁹ is an example of this. In this case the Commission decided that Government compliance with the spirit of Article 16 (right to health) and Article 24 (right to environment favorable to their development) of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed

³⁰ Model Law on Access to Information, Art. 2

³¹ Ibid, art. 6

³² Ibid, art. 7

³³ Ibid, art. 9

³⁴ Ibid art. 15 & 16

³⁵ Ibid art. 21, 22 & 23

³⁶ Ibid art. 25

³⁷ Ibid, art 26

³⁸ Ibid, part V

³⁹ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, 155/96, Source: <http://www.achpr.org/communications/decision/155.96/>

to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

3.2 African Union Convention on Preventing and Combating Corruption

Several articles of this Convention cover access to information. However the wording is vague which makes it difficult to determine which information must be disclosed to the public.

Article 3 of the convention requires member states to comply with certain principles including transparency and accountability in the management of public affairs. States must adopt legislative and other measures to give effect to the right of access to any information to help the fight against corruption and related offenses⁴⁰. In addition, states are required to create an environment enabling civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs⁴¹.

Finally, Article 22 sets up an Advisory Committee on Corruption of independent experts. Its roles are multiple and include ensuring monitoring of the Convention. States must submit annually a report on the progress of the implementation of the Convention.

3.3 Maputo Convention

In a report on the development of a strategy to guide the promotion of the ratification of the Maputo convention Ghana is said to have acceded the convention because of the rapid depletion of its natural resources. Ghana sees the Maputo Convention as a means to “reverse the trend”⁴² of environmental degradation.

Even if the Maputo Convention needs 8 more ratifications before entering into force, its ratification by Ghana shows the country’s is willingness to implement the different provisions of the Convention.

One article is of particular relevance. Article 16 is entitled procedural rights and obliges Ghana to adopt legislative and regulatory measures necessary to ensure to ensure timely and appropriate dissemination and access of the public to environmental information. The article further refers to participation and access to justice.

Quick reference

Full name: African Union Convention on Preventing and Combating against Corruption

Year : 2003

Ratification by Ghana : 2007

Entered into force: 2006

Legal status: legally binding

Quick reference

Full name: Revised African Convention On The Conservation Of Nature And Natural Resources

Common Name: Maputo Convention

Year: 2003

Ratification by Ghana: 2007

Entered into force: yet to enter into force (8 more ratifications needed)

Legal status: future legally binding

⁴⁰ African Union Convention on Preventing and Combating against Corruption, art. 9

⁴¹ Ibid, Art. 12

⁴² Response to questionnaire by Deputy Director, Human Resource Management/Legal Affairs, Ministry of Environment, Science and Technology, Ghana see Annex II to Report presented at the Validation workshop

3.4 United Nations Declaration on the Rights of Indigenous People

The Universal Declaration on the Rights of Indigenous Peoples makes reference to Free Prior and Informed Consent (FPIC) on numerous occasions. FPIC guarantees a certain level of access to information in order for indigenous communities to be 'informed' before consenting. FPIC applies to situations of resettlement, use of indigenous lands, storage or disposal of hazardous material and protection of culture.

Quick reference

Full name: United Nations Declaration on the Rights of Indigenous People

Common Name: UNDRIP

Year: 2007

Endorsement by Ghana: Ghana voted in favor of the declaration during the General Assembly of the UN in 2007

Legal status: not legally binding

Information should be in the appropriate form (e.g. language)⁴³ and Article 28 reaffirms the right to redress and restitution where FPIC has not been guaranteed.

3.5 Voluntary Partnership Agreement between the EU and Ghana (FLEGT)

Contrary to other Voluntary Partnership Agreements (VPA) negotiated by the EU with various countries, the VPA with Ghana does not include a 'published information' annex⁴⁴. Nevertheless, there are a number of other provisions which protect the right to information. The most important of which is Article 20, stating that Parties will ensure the workings of the JMRR are transparent through public aide memoires and reports. The JMRR will also record Ghana's level of transparency in the sector and will publish a yearly report including relevant information. Article 22 does however state that some information can be regarded as confidential.

Quick reference

Full name:

Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest law enforcement, governance and trade in timber products into the Community

Common Name: VPA

Year: 2009

Legal status: legally binding

An independent monitor (IM)⁴⁵ should guarantee that the process for establishing 'legal timber' is transparent and accountable. This IM will collect data at various stages including timber supply chains and at processing facilities, and use this information to produce reports. Article 16 obliges the EU to hold regular consultations with stakeholders and to take into account the standards for access to information included in the Aarhus Convention on access to information, participation and access to justice in environmental matters.

⁴³ United Nations Declaration on the Rights of Indigenous People, Art. 16

⁴⁴ See for example Annex X to the VPA conducted between the EU and the Republic of Congo, titled; "Published Information" (2011)

⁴⁵ Ghana – EU Voluntary Partnership Agreement, article 10 and annex VI

In its legality assurance system⁴⁶ the VPA notes that the Timber Validation Division (TVD) should respect principles of independence, transparency and credibility. The Timber Validation Committee has the role to ensure the TVD respect these principles.

⁴⁶ Ibid, Annex V

Conclusions

In spite of the recognition of the right to information in the Constitution and various international treaties signed and ratified by Ghana, very little provisions make this right operational and enforceable. The absence of a long awaited general access to information bill only adds to the lack of legal protection of this fundamental right.

Like recommended by the Constitutional Review Committee, one can only hope that the Access to Information bill will be passed soon without to many claw-back clauses. In addition to this general access to information law forest specific provisions are needed. The recent new Forest and Wildlife Policy has recognized this need and promises to promote and develop mechanisms for transparent governance. According to the policy legislation will be enacted to support allocation of resources through transparent competitive bidding and to ensure increased institutional transparency, consistency and credibility.

ClientEarth is a non-profit environmental law organisation based in, London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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