

ARTICLE 19

# Kenya: Freedom of Information Bill 2012

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Legal analysis

## Executive summary

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In January 2012, ARTICLE 19 analysed the draft of the Kenya Freedom of Information Bill 2012 (Draft Bill or Bill), which is currently being discussed in Kenya. We reviewed the Draft Bill from an international and comparative law perspective in order to assess whether it is a progressive piece of legislation that will ensure the right to information in the country. In doing so, this brief draws upon standards of international law, as well as best practices of other states regarding the right to information.

ARTICLE 19 welcomes the Draft Bill as a positive step in the process of ensuring that the right to freedom of information is adequately protected and promoted in Kenya. The Draft Bill positively enshrines a number of progressive freedom of information principles, including a broad definition of the right to information, the duty to disclose information stemming not from public ownership but from its public functions, the right to seek information from private bodies, a clear and simple procedure for accessing information that takes into account language barriers and imposes minimal costs, a comprehensive proactive disclosure regime, public accountability for information officers and the protection of whistleblowers.

At the same time, the Draft Bill still contains several areas of concern, which ARTICLE 19 strongly urges the government to amend before enactment. In particular, ARTICLE 19 recommends the following changes:

- Everyone, not just citizens of Kenya, should be entitled to access information under the Bill.
- The Bill should include a provision stating that within one month of the entry of the Bill, any public authority is obliged to designate a public information officer to deal with requests for information and other issues specified in the Bill and adopt internal rules and procedures to ensure the implementation of the Bill.
- The members of the Information Commission should be appointed by the President and confirmed by two-thirds of the Parliament.
- The Bill should give powers to the National Assembly to appoint a tribunal to hear petitions requesting removal of a member of the Information Commission.
- The Bill should make the decisions of the Information Commission binding on all parties and enforceable by the High Court.
- The Bill should give powers to the Information Commission to impose penalties on public authorities who fail to comply with the obligation to report annually on their activities.
- The Bill should include sanctions for violations relating to the legal regime and give powers to the Information Commissioners to impose such sanctions.
- The Bill should provide for adequate funding of the Information Commission in view of its duties to provide education and information promoting the goals of the legislation.



ARTICLE 19 believes that adopting these and other recommendations highlighted in the analysis will significantly improve the Draft Bill and will contribute to better implementation of Kenya's international human rights obligations. We urge the Government of Kenya to support this legislation and ensure it is enacted in line with these revisions. ARTICLE 19 also calls on the state authorities and other stakeholders to promote freedom of information principles and public understanding of this important legislation.

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## About ARTICLE 19 Law Programme

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals, as well as existing laws that affect the right to freedom of expression, and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at <http://www.article19.org/resources.php/legal>.

If you would like to discuss this policy brief further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org).

## Summary of Recommendations

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- The Draft Bill should first define the right to freedom of information, and the mechanism for exercise of this right before turning to the creation, mandate and powers of the Freedom of Information and Data Protection Commission.
- The date of entry of the Bill in force should be specified directly in its text and should not be set by a minister.
- The freedom of information principles, currently established in Section 26 of the Draft Bill, should be set out in the beginning of the Bill to highlight their importance for the interpretation and implementation of the entire Bill.
- Everyone, not only citizens of Kenya, should be entitled to request access to public information under the Bill.
- The phrase “reasonably likely,” referring to the likelihood of causing harm to legitimate interests set out in Section 27, para 1 of the Draft Bill, should be replaced with “real threat” in order to present the harm test reflected in international standards.
- The Draft Bill should provide that if the information does not exist in the language in which it is requested it should be translated into that language within six weeks.
- The Draft Bill should include a provision stating that within one month of the entry of the Bill, any public authority is obliged to designate a public information officer to deal with requests for information and other issues specified in the law and adopt internal rules and procedures to ensure the implementation of the Bill.
- The Draft Bill should impose a duty on public authorities to ensure that appointed information officers are adequately trained to perform their duties.
- Section 35 of the Draft Bill should be revised to state that everyone is entitled to request the deletion of incorrect information.
- The members of the Information Commission should be selected by appointment by the President and confirmation by two thirds of the Parliament.
- The Draft Bill should require that members of the Information Commission have not been convicted of a violent crime or a crime of dishonesty, either at the time of appointment, or during their term in office.
- The professional standards for eligibility to be Chairperson or a member of the Information Commission should be lowered to 10 and 5 years respectively.
- Section 13 of the Draft Bill should be amended to allow for renewal of the term of office of the members of the Information Commission.

- The Draft Bill should give powers to the National Assembly to appoint a tribunal to hear petitions requesting removal of a member of the Information Commission.
- The Draft Bill should provide that the Information Commission is responsible for trainings public officials. The Information Commission should be granted powers to refer to the appropriate authorities cases which constitute criminal offences under the law.
- Section 36, para 2 of the Draft Bill should be amended to include a time limit of 5 days on the determination of internal reviews.
- The Draft Bill should include a provision stating that where no decision is received within the time limits set by the Bill, the complaint shall be deemed to have been rejected, and an appeal may be lodged with the Information Commission.
- The Draft Bill should make the decisions of the Information Commission binding on all parties and enforceable by the High Court.
- The appeal provision should to clarify that the burden of proof of a denial of request lies with the person or body denying the request.
- The Draft Bill should give powers to the Information Commission to impose penalties on public authorities who fail to comply with the obligation to report annually on their activities.
- The Draft Bill should provide that adequate funding is provided for the Information Commission in view of its duties to provide education and information promoting the goals of the legislation.
- The Draft Bill should include sanctions for violations relating to the legal regime and give powers to the Information Commissioners to impose these sanctions.





## Introduction

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In January 2012, ARTICLE 19 reviewed the draft of the Kenya Freedom of Information Bill 2012 (Draft Bill) for its compliance with international standards on freedom of expression and freedom of information.

ARTICLE 19's core mandate is to promote and protect the right to freedom of expression and information globally. In the past, the Law Programme has analysed numerous freedom of information laws in various countries, lending our expertise to establishment and reform processes worldwide. Furthermore, we have produced two standard-setting documents on the right to freedom of information: *the Public's Right to Know: Principles on Freedom of Information Legislation*<sup>1</sup> (ARTICLE 19 Principles), and *Model Law on Access to Information* (ARTICLE 19 Model Law).<sup>2</sup>

In Kenya, ARTICLE 19 is a member of the Freedom of Information Network and has been involved in joint advocacy efforts with other Network members to push for an adoption of a dedicated freedom of information legislation in Kenya. Those efforts continue by way of this legal analysis, which was presented to the Constitutional Implementation Committee (CIC) and other stakeholders to guide its consideration of and recommendations for this Bill for debate in the Parliament. This analysis also builds upon ARTICLE 19's numerous previous analyses of Kenyan draft and adopted legislation in the area of freedom of expression and information. These have included commentaries on the Freedom of Information Bill in 2005,<sup>3</sup> as well as commentaries on the Media Council of Kenya Bill 2006,<sup>4</sup> the Communications (Broadcasting) Regulations 2009<sup>5</sup> and 2011<sup>6</sup> and the harmonised Draft Constitution,<sup>7</sup> to name few.

The process of developing a dedicated law on the right to freedom of information has been ongoing in Kenya for almost a decade. The Kenyan Government promulgated the first draft of the Freedom of Information Law in 2005. In 2007, a Freedom of Information Bill was introduced in the Kenyan Parliament as a private members Bill; it was rejected in the first reading. In 2008, the Government drafted the Freedom of Information Bill 2008; however, this Bill was never introduced in the Parliament. In the meantime, Kenya has undergone a constitutional referendum, and the new Constitution of Kenya (promulgated on 27 August 2010) proclaims the right to an access to information.<sup>8</sup> The promulgation of the new Constitution gave a new impetus to the campaign for enactment of freedom of information legislation. The Draft Bill was thus proposed in view of

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<sup>1</sup> London: 1999, available at <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

<sup>2</sup> London: 2001, available at <http://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf>.

<sup>3</sup> ARTICLE 19, Memorandum on Kenya's Freedom of Information Bill, 2005, available at <http://www.article19.org/data/files/pdfs/analysis/kenya-foi.pdf>.

<sup>4</sup> ARTICLE 19, Statement on the Draft Media Council of Kenya Bill, March 2006, available at <http://www.article19.org/pdfs/analysis/kenya-media-council-bill.pdf>.

<sup>5</sup> ARTICLE 19, Memorandum on the Kenya Communications (Broadcasting) Regulations, 2009, November 2009, available at <http://www.article19.org/pdfs/analysis/memorandum-on-the-kenya-communicationsbroadcasting-regulations-2009.pdf>.

<sup>6</sup> ARTICLE 19, Memorandum on the Kenyan Media Bill, 2010, available at <http://www.article19.org/data/files/pdfs/analysis/kenya-media-bill.pdf>.

<sup>7</sup> ARTICLE 19, Memorandum on the Harmonised Draft Constitution of Kenya, published on 17 November 2009 by the Committee of Experts on Constitutional Review Focus, December 2009, available at <http://www.article19.org/pdfs/analysis/kenya-comment-on-the-harmonised-draft-constitution.pdf>.

<sup>8</sup> See Article 35 of the Constitution of Kenya.

Article 35 of the Constitution and aims to articulate in detail the scope and exercise of this fundamental right.

The Draft Bill will first be considered by the Constitutional Implementation Committee (CIC). Currently, the CIC has called for stakeholder input into the Draft Bill to inform its consideration and potential amendments. Following a public consultation the final Draft Bill will be forwarded to Parliament. The constitutional framework for implementation of laws does not specify a deadline for the adoption of this particular Bill. Neither the Government nor Parliament has approved a deadline for its enactment.

ARTICLE 19 considers the Draft Bill a positive step towards the effective protection of the right to freedom of information in Kenya. It sets out the principles of access to public information, determines the subjects of the law (both right holders and duty bearers) and regulates the procedure for seeking public information. The Draft Bill also establishes the Kenya Freedom of Information and Data Protection Commission and introduces an enforcement mechanism. ARTICLE 19 welcomes a number of features of the Draft Bill, and our analysis highlights how this Draft could be further improved and brought in compliance with international legal standards in this area. With its adoption, Kenya would also join eight countries in Africa that have national Freedom of Information laws, namely: Angola, Ethiopia, Liberia, Nigeria, Niger, South Africa, Uganda and Zimbabwe.

ARTICLE 19's analysis of the Draft Bill is based on international law and best practices in the field of the right to information, as summarised in two aforementioned ARTICLE 19 publications: ARTICLE 19 Principles and ARTICLE 19 Model Law. Both publications represent a broad international consensus on best practices regarding right to information legislation. They therefore provide a useful framework in which to discuss the features of access to information legislation.

This analysis consists of two parts. In the first part, we outline international principles on the right to freedom of information and the respective obligations that Kenya has when implementing domestic legislation in this area. Thereafter, we point to the problematic areas of the Draft Bill, which we discuss in detail, and then propose amendments. The copy of the latest version of the Draft Bill is reproduced in the appendix to this analysis.

## International Standards on the Right to Freedom of Expression and Information

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The right to freedom of expression and freedom of information is widely held to be a “cornerstone” right, crucial both in its own regard and for the functioning of democracy. It is a condition for engagement in public governance and in debates on issues of public interest. Without freedom of information and transparency, the public will be unable to oversee public bodies and hold them accountable for corruption or abuse of powers.

The right to freedom of expression and information is also important for the protection of other human rights. It helps reveal human rights violations and exercise other human rights. Finally, the exercise of the right to freedom of information is dependent on the creation and maintenance of public records and therefore indirectly contributes to government efficiency.

### **The right to freedom of information under international, regional and constitutional law**

The right to freedom of information is an internationally recognised human right. The Universal Declaration of Human Rights (UDHR), adopted in 1948, enshrines the right to access information held by or under the control of a public body in Article 19, which states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.<sup>9</sup>

Similarly, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the same right in terms similar to the UDHR. Both Article 19 of the UDHR and Article 19 of the ICCPR have been interpreted as imposing an obligation on States to enact freedom of information laws. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws. Kenya is a party to both the UDHR and the ICCPR.<sup>10</sup>

As a State Party to the African Union, Kenya is also bound by the freedom of information obligations imposed by the African Charter on Human and Peoples’ Rights (the Charter),<sup>11</sup> and the

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<sup>9</sup> For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.

<sup>10</sup> The ICCPR was acceded to by Kenya in May 1972.

<sup>11</sup> African Commission on Human and Peoples’ Rights, *African [Banjul] Charter on Human and Peoples’ Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html).

Declaration of Principles on Freedom of Expression in Africa (the Declaration).<sup>12</sup> The first is a legally binding treaty to which Kenya is a State party; the second is an interpretative Declaration on the content of the freedom of expression guarantee contained in the Charter, adopted by the African Commission on Human and Peoples' Rights (the Commission). Article 9 of the Charter states:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Principle IV of the Declaration states:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - everyone has the right to access information held by public bodies;
  - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
  - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
  - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
  - secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

Further, the Commonwealth, of which Kenya is a member, has recognised the fundamental importance of freedom of information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that, "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."<sup>13</sup>

Most recently, in September 2011, the Pan-African Conference on Access to Information adopted the African Platform on Access to Information (APAI),<sup>14</sup> a regional declaration indicating support for right to information principles, drafted by nine African groups working on freedom of expression, access to information and the media, including ARTICLE 19. The APAI elaborates on the right to freedom of information, and sets out minimum standards for access to information at a national level. This landmark regional declaration declares that the right to know is vital for good

<sup>12</sup> African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, adopted by Resolution of the Commission at the 32nd Ordinary Session, 2002, available at [http://www.achpr.org/english/doc\\_target/documentation.html?../declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html).

<sup>13</sup> See: [http://www.humanrightsinitiative.org/programs/ai/rti/international/cw\\_standards/communique/default.html](http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/communique/default.html).

<sup>14</sup> African Platform on Access to Information, available at <http://www.article19.org/data/files/medialibrary/2740/APAI-FINAL.pdf>.

governance and a fundamental right of all people. The Declaration sets out 14 principles focusing on African-related issues which elaborate the right of access to information, include access to information by disadvantaged communities and cover issues related to health, education, aid transparency and corruption. The APAI provides guidance to countries for the enactment and implementation of access to information laws and makes requests to governments, international bodies and others on promoting the right of access to information, including formal recognition of 28 September as International Right to Information Day. The Declaration was also submitted to UNESCO and the African Union (AU) and other international bodies for adoption.

ARTICLE 19 also wishes to highlight that in 2010, the Africa Special Rapporteur on Freedom of Expression and Access to Information, in consultation with stakeholders, developed a Draft African Model Law for African Union Member States<sup>15</sup> that includes model legal provisions based on international principles and best legislative practices to guide lawmakers in the development of access to information legislation.<sup>16</sup>

Finally, the right to freedom of information is constitutionally guaranteed in Kenya. Article 35 of the 2010 Constitution states:

Every citizen has the right of access to (a) information held by the state; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

The State shall publish and publicize any important information affecting the nation.

### **The content of the right to freedom of information**

A survey of international law and best practices shows that to be effective, freedom of information legislation should be based on a number of general principles. Most important is the principle of maximum openness: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.<sup>17</sup>

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on freedom of information as published in ARTICLE 19's Principles and called on governments to revise their domestic laws to give effect to the right to freedom of information. He particularly directed States' attention to nine areas of importance:

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<sup>15</sup> Draft African Model Law for African Union Member States, adopted by the African Commission on Human and Peoples Rights at its 50<sup>th</sup> Ordinary Session held from 24 October – 7<sup>th</sup> November 2010 in Banjul, Gambia, available at <http://www.achpr.org/english/other/MODEL%20LAW%20FINAL.pdf>.

<sup>16</sup> Draft African Model Law for African Union Member States, available at <http://infojustice.org/archives/5665>.

<sup>17</sup> ARTICLE 19 Principles are the result of a study of international law and best practices on freedom of information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38).

[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.<sup>18</sup>

This constitutes strong and persuasive guidance to States on the content of freedom of information legislation.

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<sup>18</sup> *Ibid*, p. 44.

## Limitations on the right to freedom of information

Under international human rights standards, the exercise of the right to freedom of information is subject to certain restrictions. Individual requests for information from public authorities must be met unless the public body can demonstrate that the refusal falls within a limited scope of legitimate exceptions.

Under international law, freedom of information may be subject to restrictions when those restrictions meet the requirements stipulated in Article 19(3) of the ICCPR:

The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The requirements of Article 19(3) translate into a three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

- The information concerns a legitimate, protected interest listed in the law;
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public's interest in having the information.<sup>19</sup>

Each part of the three part test is further elaborated below.

### ***Legitimate Protected Interest***

Freedom of information laws must contain an exhaustive list of all legitimate interests on which a refusal of disclosure can be based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, certain commercial interests, public or individual safety and protecting the effectiveness and integrity of government decision-making processes.<sup>20</sup>

Exceptions should be narrowly drawn to avoid capturing information, the disclosure of which would not harm a legitimate interest. Furthermore, exceptions should be based on content, rather than on the type of document sought. In addition, exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.<sup>21</sup>

### ***Substantial Harm***

Once it has been established that the information falls within the scope of a listed legitimate aim, it must be established that disclosure of the information would cause substantial harm to that legitimate aim. Therefore this part of the test holds that simply because the information falls within the scope of a listed legitimate interest, does not mean non-disclosure is justified. Otherwise a class exception would be created that would seriously undermine the free flow of

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<sup>19</sup> ARTICLE 19's Principles, *supra* note 1, Principle 4.

<sup>20</sup> See for example Articles 38-45 of the Draft African Model Law for African Union Member States.

<sup>21</sup> ARTICLE 19's Principles, *supra* note 1, Principle 4.



information to the public. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.<sup>22</sup>

***Harm Outweighs Public Interest Benefit in Disclosure***

The third part of the test requires the information holder to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery and corrupt practices may concurrently undermine defence interests. However, the disclosure may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.<sup>23</sup>

If applied properly, the three part test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim may be to protect the government from harassment or exposure, to prevent the exposure of wrongdoing, to avoid the concealment of information from the public or to preclude entrenching a particular ideology.

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*



## Analysis of the Draft Bill

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### Structure of the Draft Bill

The Draft Bill is divided into parts: it contains 53 provisions and is accompanied by two Schedules and a Memorandum of Objects and Reasons. Immediately after the preliminary provisions in Part I, which concern the title of the Bill, its date of entry into force and definitions, it deals with the establishment of the Freedom of Information and Data Protection Commission (the Information Commission). The next provisions deal with the right of access to information, the procedures for obtaining information, the right to appeal against refusals to provide information, etc.

ARTICLE 19 finds the structure of the Draft Bill confusing because it appears to give a primary focus to the institutional establishment and operation of the Information Commission. We note that typically, the first parts of freedom of information laws set out the right to freedom of information, its scope, the subject of the law (right holders and duty bearers), the procedure for exercise of the right and the grounds for refusals to disclose information. Logically, it is better to define the right and the procedures for its exercise before regulating the establishment of bodies in charge of enforcement and oversight of the implementation of the law.

### Recommendations:

- The Bill should first define the right to freedom of information and the mechanism for exercise of this right before turning to the creation, mandate and powers of the Information Commission.

### Commencement of the Draft Bill

Section 1 of the Draft Bill provides that “the minister” determines the dates when the law as a whole and its different provisions come into force. Under Section 2 of the Draft Bill, “the minister” in question means the minister for the time being responsible for matters relating to information.

ARTICLE 19 is concerned about the delegation of such important powers - as the entry of the legislation into force - to a member of the government. In accordance with the constitutional practices of the democratic world and the principle of separation of powers, Parliament should determine the date for entry of the law into force. This will guarantee that the operation of the law is not postponed by the government. The latter should be responsible for providing within the timeframe of the law the necessary institutional and financial assistance for its operation.

### Recommendations:

- The Bill should specify the date when the Bill enters to force.

### Principles of access to information

Section 26, paras 4–12 of the Draft Bill define the access to information principles as follows:

[a] person has a right to access information expeditiously and inexpensively (Section 26, para 4 of the Draft Bill);

[t]his act shall be interpreted and applied on the basis of a duty to disclose (Section 26, para 6 of the Draft Bill);

[a] public body or private body shall accede to the authority of the commission in all matters relating to access of information (Section 26, para 7 of the Draft Bill);

[a]ny refusal to disclose information shall be subject to appeal (Section 26, para 8 of the Draft Bill);

[a] public body or private body shall proactively publish information (Section 26, para 9 of the Draft Bill);

[a] person shall not be subject to any sanction for releasing information under this act in good faith (Section 26, para 10 of the Draft Bill);

[t]his act applies to the exclusion of any law that prohibits the disclosure of information of a public body or a private body (Section 26, para 11 of the Draft Bill);

[n]othing in this act shall limit or otherwise restrict any other legislative requirement for a public body, relevant private body or a private body to disclose information (Section 26, para 12 of the Draft Bill).

ARTICLE 19 welcomes the inclusion of these principles. They are in compliance with international standards and should guide the interpretation of the legal provisions and implementation of the law. However, we are concerned that the Draft Bill fails to underline their importance. At present the principles are part of Section 26, proclaiming the right to information. As the principles are laid down not in the beginning of the law and in a provision with 14 paragraphs, it is difficult to understand that these principles should guide the implementation of the entire law.

#### **Recommendations:**

- The freedom of information principles which are currently in Section 26 of the Draft Bill should be set out in the beginning of the Bill to highlight their importance for the interpretation and implementation of the entire law.

#### **Right of access to information**

Section 26 of the Draft Bill creates a legally enforceable right for every citizen to access all information held by or under the control of a public authority. In addition, citizens have a right to access information held by or under control of a private body if that information is necessary for the enforcement or protection of any right. The right of access is protected from the need to provide reasons for seeking access.

Under Section 2 of the Draft Bill, the term “public authority” includes the National Assembly, the Judiciary, all government ministries, departments or agencies at all levels of Government, any body established by the President or under Parliament, any body that receives any part of revenues directly from money provided by Parliament or a levy/fee/charge authorized by an enactment, any body subject to examination by the Controller and Auditor-General, statutory corporations within the meaning of the State Corporation Act, commissions of inquiry issued under the Commission of Inquiry Act, all local authorities established under the Local Government Act, any body carrying out statutory or public functions only to the extent of its statutory or public function (provided that the body is a public authority) or any other bodies designated by the Minister as a public authority for purposes of the Draft Bill.

In addition Section 26, para 14 of the Draft Bill provides that the right to information applies to private entities that: a) receive public resources and benefits, engage in public functions; or b)

provide public services, particularly with respect to information relating to public resources, benefits, functions or services.

The definition of “information” in Section 2 includes

any documentary material regardless of its physical form or characteristics, and any copy thereof, any record, correspondence, memorandum, books, plans, maps, drawing, films, microfiche, diagram, pictorial or graphic work, data, photograph, recording, audio or video tape, machine readable material, electronic form information, letters, reports, studies, records, minutes, statistics, directives, instructions, circulars, memoranda, practice notes, opinions, decisions in writing in the form of sound/visual recordings or computerized data, recorded and stored information on any device, subsequent material derived/stored from recorded information in any form and anything that is part or a copy, in any form of the above or is a combination of two or more of the above.

Section 26, para 13 of the Draft Bill sets out that the right of access to information includes: a) both a right to request and receive information and b) an obligation on the part of public bodies and officials to disseminate essential information that the public is entitled to know, including their core functions and key activities.

ARTICLE 19 welcomes a broad scope of the right of access to information, as set up by the above-mentioned provisions of the Draft Bill. A wide range of information can be sought under the Draft Bill thanks to the broad definitions of “information” and “public authorities.” It is positive and in line with international standards that the duty to disclose information does not stem from public ownership of the subjects but from their public functions. In this regard, we welcome the right to seek information from private bodies.

At the same time ARTICLE 19 is greatly concerned that the Draft Bill grants rights under the Bill to Kenyan citizens only. The Draft Bill does not grant to foreigners, stateless persons or legal entities the right of access to public information. This provision is in conflict with international standards, which recognise that everyone regardless of citizenship or any other criteria has a right of access to public information.<sup>24</sup> We advise that the law be brought into compliance with international standards regarding this matter.

#### **Recommendations:**

- Everyone, not just citizens of Kenya, should be entitled to request access to public information under the Freedom of Information Bill.

#### **Exemption to the right of access to information**

Two provisions of the Draft Bill deal with exemptions of the right to access to information. Section 26, para 5 of the Draft Bill states that:

[a] person has a right to access to information ... subject only to such limitations as necessary for public interest.

Section 27 of the Draft Bill regulates the exemptions in detail. Paragraph 1 of this section states that information may be withheld where a public authority is satisfied that disclosure of such information is “reasonably likely” to:

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<sup>24</sup> See, for example, Article 10 of the Draft African Model Law for African Union Member States or ARTICLE 19 Principles, *supra* note 1, Principle 1.

- a) cause serious prejudice to the national security of Kenya,
- b) impede the due process of law or endanger the safety or life of a person or endangered species,
- c) involve the unwarranted invasion of the privacy of an individual other than the applicant, or the person on whose behalf an application has with proper authority been made,
- d) cause serious prejudice to the legitimate commercial or financial interests of that authority or a third party from whom information was obtained,
- e) cause serious prejudice to the ability of the Government to manage the economy of Kenya,
- f) significantly undermine a public authority's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; or
- g) damage a public authority's position in any actual or contemplated legal proceedings by revealing the legal advice which it received in anticipation of or connection with such proceedings.

Section 27, para 4 of the Draft Bill provides that notwithstanding anything contained in subsection 1, a public authority shall disclose information where the public interest in disclosure outweighs the harm to protected interests. Section 27, para 5 of the Draft Bill sets out that in defining "public interest" regard has to be given to the need to:

- a) promote accountability of public authorities to the public,
- b) ensure that the expenditure of public funds is subject to effective oversight,
- c) promote informed debate on issues of public interest relevant to this Act,
- d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment;
- e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

ARTICLE 19 notes that the interests justifying refusals to communicate information, set out in Section 27, para 1 of the Draft Bill, are in line with international standards. At the same time, this provision sets out the so called "harm test," according to which the body deciding against the disclosure of the document has to prove that the disclosure would affect legitimate protected interests. The "harm test," which is the first prong of the three-part test, outlined above in the section of this analysis relating to international standards, requires that the threat be real, not just hypothetical. We are concerned that the phrase "reasonably likely" in Section 27, para 1 is vague and therefore does not correctly present the harm test. We recommend its replacement with "real threat."

We also consider that Section 27, para 4 of the Draft Bill fails to define correctly the public interest override principle, which is one of the fundamental features of freedom of information legislation. This principle concerns the cases of conflicts between a legitimate secrecy interest of a public body and the public interest in disclosure by the public body. It requires that in these cases authorities give preference to the public interest in disclosure, i.e. the latter should prevail over the secrecy interest of public bodies.<sup>25</sup>

The principle of the public interest override is defined in view of the tendency of public officials to refuse to disclose information referring to legitimate secrecy interests. It requires that the public body refusing to provide information prove that the harm to its secrecy interest outweighs the harm to the public interest in disclosure. In contrast, the Draft Bill is silent with respect to the burden

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<sup>25</sup> The principle states that a public body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure. See Section 22 of the ARTICLE 19's Model Freedom of Information Law, *ibid.* note 2.

of proof. It rests on the assumption that public bodies will protect the public interest in disclosure even if the latter is damaging to their own interest. We believe that such an assumption is unlikely to happen in reality. Therefore it is recommended that the Draft Bill place the burden of proof on public bodies to demonstrate that the harm to their interest outweighs the public interest in disclosure.

Finally, ARTICLE 19 is concerned that the Draft Bill does not provide for the severability of information. This is in conflict with international standards, which recognise that, even if the refusal to disclose some information might be justified, the information requester should be provided with access to the remaining part of the information, for which the secrecy interest is not justified. It is recommended that the Draft Bill include a severability clause.

**Recommendations:**

- The phrase “reasonably likely,” referring to the likelihood of causing harm to legitimate interests set out in Section 27, para 1 of the Draft Bill, should be replaced with “real threat” in order to conform to the “harm test” set out in international standards.
- Section 27, para 4 of the Draft Bill should be revised to state that, notwithstanding exemptions provided in the Act, a public authority must grant a request for access to information unless it can demonstrate that there is substantial harm to a legitimate interest and that harm outweighs the public interest in disclosure.
- The Draft Bill should include a provision setting out that, if a request for information relates to a record containing information which falls within the scope of an exception, any information in the record which is not subject to an exception shall, to the extent it may reasonably be severed from the rest of the information, be communicated to the requester.

**Procedure for accessing information**

The procedure for accessing information is provided for in Sections 29-34 of the Draft Bill. Applications for information should be made in English or Kiswahili by any medium containing details and sufficient particulars that ensure officials understand what information is being requested. Oral applications may also be used and will be put into written form by the officer who receives the application. Applications can be also made in a local language if information requesters are unable to communicate in English or Kiswahili. A written notice of the receipt of an application should be given to the information requestor. Decisions on applications are to be made as soon as possible and in any event, within 15 working days from the date of receipt of the application. An exception of 48 hours is provided when the information requested concerns the life or liberty of the person. When an application is transferred to another public authority, the applicant should be informed thereof no later than 5 days from the date of receipt of the application.

Within 15 days after the receipt of the request, information requesters should be informed in writing about public bodies’ decisions to provide them with information. The notice should specify fees, method of payment, process of accessing the information and right of appeal.

Upon receipt of the requisite fee, the information should be provided to the applicant immediately. Information requested that does not exist in the language it is requested will be provided within a reasonable time in the language in which it has been applied for.

Section 31, para 3 of the Draft Bill provides that the failure of a public authority to make a decision on an application for access will be deemed a refusal, subject to internal review and appeal.

ARTICLE 19 considers that the procedure for accessing information is in compliance with international standards. It is positive that the Draft Bill takes the information requester's language into consideration and includes a written notice about the particulars of the procedure.

It is recommended that the Draft Bill specify the period for translation of information since the phrase "within a reasonable time" can be used to delay the provision of information.

**Recommendations:**

- The Draft Bill should provide that if the information does not exist in the language in which it is requested it should be translated into that language within six weeks.

**Costs**

Section 34 of the Draft Bill provides that no fee may be levied in relation to the submission of an application other than a reasonable fee not exceeding the actual costs of making copies of such information and if applicable, supplying them to the applicant. Furthermore, it provides that fees should not be so high as to defeat the objectives of the law. Public information officers may waive any fee when payment of the fee may cause financial hardship to the applicant or when the disclosure of the information is in the public interest.

This section is in compliance with international standards and ARTICLE 19 welcomes it. Costs should not hinder or deter persons seeking to enforce their rights under freedom of information laws.<sup>26</sup>

**Public information officers**

The Draft Bill provides that information officers deal with requests for information. Section 2 of the Draft Bill defines "information officers" as "any officer of a public authority designated as such for purposes of the Draft Bill who in the first instance is the chief executive of the public authority, and any delegated officer in any other instance."

ARTICLE 19 is concerned that the Draft Bill does not specify the procedure for designation or appointment of public information officers. A specifically designated public information officer dealing with access requests would greatly assist efforts towards a more effective implementation of the right to access information. Therefore, we recommend that the Draft Bill regulates the appointment of public information officers.

**Recommendations:**

- The Draft Bill should include a provision stating that within one month of entry of the Bill, any public authority is obligated to designate a public information officer to deal with requests for information and other issues specified in the Bill and adopt internal rules and procedures to ensure the implementation of the Bill.
- The Draft Bill should impose a duty on public authorities to ensure that the appointed information officers are adequately trained to perform their duties.

**Correction of personal information**

Section 35, para 1 of the Draft Bill provides that information held by a public authority that is "irrelevant" can be corrected at the request of an individual.

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<sup>26</sup> See Principle 6 of ARTICLE 19's "The Public's Right to Know Principles of Freedom of Information Legislation."

ARTICLE 19 considers that it is difficult to establish “irrelevant” personal information in public records. Therefore we recommend that “irrelevant” be deleted from this provision and replaced with “incorrect.”

**Recommendations:**

- Section 35 of the Draft Bill should be revised stating that everyone should be entitled to request deletion of incorrect information.

**The Information Commission**

Part 2 of the Draft Bill concerns the establishment and functions of the three-member Information Commission. The members (one chairman and two ordinary members) are to be appointed by the President.

Section 11 of the Draft Bill deals with the procedure for appointment of the Chairperson and the Commission members. It provides that the President will convene a selection panel to select suitable candidates for appointment as Chairperson or member of the Commission. The selection panel shall consist of one person from each of the following bodies:

- a) Office of the President
- b) Office of the Prime Minister
- c) Ministry responsible for matters relating to justice
- d) Public Service Commission
- e) Association of Professional Societies in East Africa
- f) National Council for Persons with Disabilities

This panel shall invite applications from qualified persons, interview and shortlist at least 3 persons qualified for appointment as Chairperson and 5 persons qualified for appointment as members of the Commission. These names shall be forwarded to the President for nomination in consultation with the Prime Minister. These nominees will then be forwarded to the National Assembly who can approve or reject the nominations. Should the nominations be rejected, the entire recruitment process begins again by the selection panel.

Section 13 of the Draft Bill recommends a six-year term for the Chairperson and members of the Commission, however, this term is not renewable.

Section 8 of the Draft Bill provides for the independence of the Commission by stating that it is subject only to the Constitution and the law, and is independent from the direction and control of any person or authority.

Section 10 of the Draft Bill outlines professional requirements for a Chairperson of the Commission. He/she should have 15 years of professional experience in the areas of human rights, law, data protection, transparency or public corporate governance. He/she must hold a degree and meet the Leadership and Integrity provisions of Chapter six of the Constitution of Kenya.

The Draft Bill requires that members of the Information Commission hold a degree, have 10 years experience in the same areas as provided for the position of Chairperson and have a distinguished career in their respective field.

Section 10, para 3 of the Draft Bill disqualifies anyone who is a member of parliament, county assembly, political party, local authority and/or an un-discharged bankrupt or has been removed from office for contravening the provisions of the Constitution or any other law.



ARTICLE 19 notes that the Draft Bill seeks to protect the independence of the Information Commission by preventing political influence through politically involved appointees. However, this process raises many concerns with regard to international standards:

- *First*, the public does not participate in the nomination process. Public participation is a guarantee that candidates are selected on the basis of their professional and personal qualities as opposed to their political affiliation. Furthermore, it is advisable that the law stimulates public participation because it promotes public awareness of the new regime.
- *Second*, it is problematic the President plays a key role in the selection and appointment of the candidates. ARTICLE 19's Principles specifically state:

Appointments should be made by representative bodies, such as an all party parliamentary committee, and the process should be open and allow for public input, for example regarding nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules.<sup>27</sup>

ARTICLE 19 recommends that the Parliament select the three candidates with a two-third majority of the votes cast. The president should have only a formal power to appoint the selected candidates.

In addition we note that the Draft Bill contains no requirement related to moral qualities of the candidates. In view of Chapter Six on Leadership and Integrity of the Constitution of Kenya, we recommend that the law require that candidates have not been convicted of a violent crime or a crime of dishonesty, either at the time of appointment or during their term in office.

Next, the professional standards required in Section 10 of the Draft Bill are unreasonably high in terms of years of experience. We recommend that the threshold be lowered to expand the range of suitable candidates applying for the positions of Chairperson and member to 10 and 5 years, respectively.

Section 13 of the Draft Bill restricts the tenure of office for Chairperson and members to 6 years. While 6 years is a good term length for the reasons stated above, there is no reason why the term should not be renewable. We propose that the tenure be extended to a maximum of two terms in office. This will create continuity and build expertise and experience of those in office should they be re-appointed. This will in turn promote the efficiency of the Information Commission as well as provide a good institutional memory to be passed down to successors.

#### **Recommendations:**

- The members of the Information Commission should be appointed by the President and confirmed by two thirds of the Parliament.
- The Draft Bill should require that members of the information commission have not been convicted of a violent crime or a crime of dishonesty, either at the time of appointment or during their term in office.
- The professional standards for eligibility of Chairperson or a member should be lowered to 10 and 5 years, respectively.
- Section 13 of the Draft Bill should be amended to allow for renewal of the term of office of the members of the Information Commission.

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<sup>27</sup> *Ibid.*



## Removal of the Information Commissioner

Section 15 of the Draft Bill provides that a person may be removed from holding the office of Commissioner before the expiry of their term only for serious violations of the Constitution of Kenya (including provisions on leadership and integrity), gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy. Additionally, a person desiring the removal of a member of the Commission must file a petition with the National Assembly setting out the alleged facts constituting grounds for removal. On consideration of the petition, the National Assembly shall forward the petition to the President who will either suspend the member while the proceeding is pending or appoint a tribunal to investigate the matter. The decision of the tribunal may be appealed before the Court of appeal.

ARTICLE 19 considers that the grounds outlined in Section 15, para 1 of the Draft Bill to be well drafted and commends the express appeal provision in Section 15, paras 5 and 7. However, we are concerned that again the Draft Bill delegates power to the President.

Referring to our concerns set out in the previous section, we consider that the power of the President to remove information officers conflicts with the independence of the Information Commission. It is recommended that the removal of commissioners process be left to the Information Commission and National Assembly.

### Recommendations:

- The Draft Bill should empower the National Assembly to appoint a tribunal to hear petitions for cases of removal of a member of the Information Commission.

## Powers of the Information Commission

The functions of the Information Commission are provided in Section 5 of the Draft Bill. The Information Commission shall:

- investigate complaints;
- inspect public authorities and make appropriate recommendations to them;
- inform and educate the public on their rights under the Bill;
- recommend to public authorities effective measures to promote access to information under international treaties and conventions;
- ensure public authorities comply with their obligations under the Bill;
- hear and determine complaints and appeals;
- approve information dissemination procedures;
- ensure data protection as provided under the law relating to data protection; and
- perform any other functions necessary for the promotion of access to information.

Generally, the functions of the information commissions comply with international practice in that international standards relating to monitoring, reporting, recommendations for reform, publicizing the law and the rights of individuals under it and the hearing of complaints and appeals are met.

ARTICLE 19 recommends that the Information Commission be entrusted with training information officers. The Information Commission should be also given powers to refer to the appropriate authorities cases which reasonably disclose evidence of criminal offences under the law. These recommendations bring the Draft Bill in line with international standards in this area.

### Recommendations:

- The Draft Bill should provide that the Information Commission is responsible for training public officials. The Information Commission should be granted powers to refer to the appropriate authorities cases which constitute criminal offences under the Bill.

## **Appeal Procedure**

### ***Internal Review of Decisions***

Sections 36-39 of the Draft Bill provide for internal review of decisions of information officers. An applicant may request a review of a refusal to grant access to information, failure to grant all requested information, a purported but not actual grant of access, deference of provision of access, an imposition of a charge or the amount of a charge, issues relating to the remission of an application fee, denial of access to an unqualified person, refusal to amend a record of personal information and refusal to annotate a record of personal information.

Decisions on review shall be given to the applicant in a notice that states adequate reasons for the decision.

ARTICLE 19 observes that internal review provisions provide for an efficient, clear and enforceable review mechanism. However, we note that Section 36 does not provide time limits for the determination of an application for review, which is a very important component of the procedure. We recommend a time limit of 5 days for the determination of an application for review. If left too long, the regime would be rendered useless.

Additionally, to strengthen the provisions of this part, we also recommend that Section 20, para 3 of the 2005 Draft Bill be retained in Section 39(b) of the current Draft. We observe, that 2005 Draft stated the following:

Where no decision is received within the time limits set by this Act, the complaint shall be deemed to have been rejected and an appeal may be lodged with the Information Commissioner.

ARTICLE 19 notes that this was a positive provision and should be retained for the final Draft Bill.

### **Recommendations:**

- Section 36, para 2 of the Draft Bill should be amended to include a time limit of 5 days on the determination of internal reviews.
- The Draft Bill should include a provision stating that where no decision is received within the time limits set by this Bill, the complaint shall be deemed to have been rejected and an appeal may be lodged with the Information Commissioner.

### ***Commission Review Procedure***

The Draft Bill sets out a procedure for appeal to the Commission. Section 39(b) states that an appeal may be lodged with the Information Commission against the outcome of an internal review within 30 days of such an outcome. A person wishing to lodge a complaint can do so orally or in writing to the authorized person in the Information Commission. Upon receipt of a complaint the Information Commission may call for information or a report regarding the complaint from the public authority or any other body within a timeframe specified by the Information Commission. If on receipt of the information the Information Commission is satisfied either that no further action is required or that the required action has been initiated by the public authority, the Information Commission shall take no further action and inform the complainant accordingly.

Section 23 of the Draft Bill gives the Information Commission power to issue summons or other orders requiring attendance of any person before the Information Commission and to compel production of relevant documents, to question any person regarding any subject-matter under investigation and to require any person to disclose any information within such person's knowledge relevant to the investigation by the Information Commission.

When the Information Commission finds an infringement, it may order the release of any information withheld unlawfully, the payment of compensation or any other lawful remedy or redress. An order of the Commission may be filed in the High Court in the prescribed manner. A person or authority dissatisfied with an order made by the Information Commission may appeal to the High Court within 21 days from the date the order was made. If no appeal is filed, a person may apply ex-parte to the Information Commission for leave to enforce an order or decree.

A person is guilty of an offence and liable for a fine or imprisonment for a maximum of six months for failure to attend the Information Commission, refuse to be sworn or make affirmation, knowingly give false or misleading information or cause an obstruction/disturbance.

ARTICLE 19 considers that the provisions for the appeal to the Information Commission are comprehensive and in line with international standards. We recommend that the Draft Bill makes the decisions of the Information Commission binding to all parties and enforceable by the High Court. The appeal provision also needs to specify that the burden of proof of a denial of request is on the person or body that denied the request.

#### **Recommendations:**

- The Draft Bill should make the decisions of the Information Commission binding on all parties and enforceable by the High Court.
- The appeal provision needs to clarify that the burden of proof of a denial of request is on the person or body that denied the request.

#### ***Appeals before courts***

Section 23, para 3 of the Draft Bill provides that a person or authority may appeal to the High Court a decision of the Information Commission relating to the lawfulness of the withholding of information, the payment of compensation or any other lawful remedy or redress. The appeal should be made within 21 days from the date the order was made.

ARTICLE 19 observes that in line with international standards the Draft Bill provides for appeals before courts. We welcome and support this proposal.

#### **Measures to promote open government**

Section 28 of the Draft Bill requires proactive disclosure of information by public authorities. In this section, a public authority shall no later than 12 months after the commencement of the law publish the particulars, functions and duties of the organization, powers and duties of employees, procedure followed in its decision-making process including channels of supervision and accountability, norms set for the discharge of its functions, any guidance used by it in relation to its dealing with the public or other bodies (including rules, regulations, manuals, records, etc.) and a guide sufficient to enable any person wishing to apply for information to identify the class of information held by it or the subjects to which they relate and the location of any indexes to be consulted as needed. Following this publication during each year is the obligation to publish statements updating the information contained in previous statements.

Section 28 of the Draft Bill obliges public authorities to publish facts that inform policies, decisions which affect the public, reasons for decisions taken by it and details of all contracts

entered into, as well as to allow members of the public to attend meetings unless there are good reasons to the contrary.

ARTICLE 19 observers that the Draft Bill has a comprehensive, proactive disclosure regime and welcome these measures.

### **Public accountability of information officers and the Information Commission**

Section 46 of the Draft Bill obliges public authorities to submit to the Information Commission annual reports with information on the number of requests for information received, the number of determinations made not to comply with requests for information, the number of applications for review and the result of such applications, the average number of days to process requests, the total amount of fees collected, the number of full-time staff devoted to processing requests for information and monies spent in processing such requests, the number of full-time staff of the public authority devoted to processing request for information and the total amount expended by the authority for processing such requests.

ARTICLE 19 notes that this section secures public accountability of information officers in line with international standards. However, it is recommended that the law give powers to the Information Commission to impose penalties on public and relevant private bodies who fail to comply with the annual reporting obligation.

#### **Recommendations:**

- The Draft Bill should give powers to the Information Commission to impose penalties on public authorities who fail to comply with the obligation to report annually on their activities.

### **Public education**

Section 6, para 1(c) of the Draft Bill provides that one of the functions of the Information Commission is to inform and educate the public as to their rights under this Act by means of a continuing programme of research, publication, lectures and symposia and by such other means as the commission may deem fit.

ARTICLE 19 recalls that international standards of the right to information provide that at the minimum, freedom of information legislation should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. We consider that the duty of the Information Commission to inform and educate the public as to their rights under the freedom of information act is in line with international standards. Information commissions in other countries have similar duties. However, the Information Commission will be unable to perform this duty unless it has adequate funding; therefore, we recommend that the law provide for adequate funding of the commission for training, education and information campaigns.

#### **Recommendations:**

- The Draft Bill should provide that adequate funding is granted to the Information Commission in view of its duties to provide education and information promoting the goals of the legislation.

### **Protection of whistleblowers**

Section 47, para 1 of the Draft Bill creates protection for persons making disclosure of information obtained in confidence in the course of their activities. These persons shall not be penalized in relation to any employment, profession, voluntary work, contract, membership in an organization or any holding of an office as a result of making a disclosure of information if the disclosure is of public interest.

Section 47, para 2 of the Draft Bill provides that a disclosure which is made to the police or appropriate public authority should be deemed to be made in the public interest. The information for which the protection is given should relate to violations of the law, including human rights, mismanagement of funds, conflict of interest, corruption, abuse of public office and dangers of public health, safety and the environment. The protection provided under Article 47 includes protection against dismissal, discrimination, reprisal or other forms of adverse treatment or denial of appointment, promotion or advantage that otherwise would have been provided.

Section 47, para 3 of the Draft Bill states that a person shall make a disclosure where he or she has reasonable belief in the veracity of the information. Section 47(6) provides that in the proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information, it shall be a defence to show that, in the circumstances, the disclosure was in the public interest and that the accused person had, before making the disclosure, complied with the provisions of Section 47, para 3.

ARTICLE 19 considers that the provisions concerning disclosure of information in the public interest that has been obtained in confidence provide adequate protection to whistleblowers.

### **Offences and penalties**

Section 50 of the Draft Bill provides for fines for up to five hundred thousand shillings or imprisonment for a term not exceeding two years for altering, defacing, blocking, erasing, destroying or concealing any record with the intention of preventing the disclosure by that authority of all or any part of the information provision to which the applicant would have been entitled.

ARTICLE 19 considers that Section 50 of the Draft Bill is in line with international standards. However, it is recommended that the law include sanctions for other violations relating to the legal regime and give powers to the Information Commissioners to impose these sanctions.

### **Recommendations:**

- The Draft Bill should include sanctions for violations relating to the legal regime and give powers to the Information Commission to impose these sanctions.

# Annex: Kenya: Freedom of Information Bill 201

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## THE FREEDOM OF INFORMATION BILL, 2012 ARRANGEMENT OF CLAUSES

### *Clause*

#### **PART I—PRELIMINARY**

- 1— Short title and Commencement
- 2— Interpretation.
- 3 – Objects of the Act.

#### **PART II – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE COMMISSION**

- 4– Establishment of Commission
- 5 – Conduct of business of Commission
- 6 – Functions of the Commission
- 7 – Guiding objects and principles
- 8 – Independence of the Commission
- 9 – Membership of the Commission
- 10 – Qualifications for appointment of chairperson and members.
- 11 – Procedure for appointment of chairperson and members.
- 12– Powers of the chairperson.
- 13– Tenure of office.
- 14 – Vacancy of office of chairperson and members.
- 15– Removal of commissioners.
- 16–Committees of the Commission.
- 17 – Terms and conditions of service of the Commissioners
- 18 – Secretary to the Commission
- 19– Removal from office.
- 20 – Oath of Office
- 21 – Staff of the Commission
- 22 – Inquiry into complaints
- 23 – Commission to have powers of court
- 24 – Powers relating to investigation
- 25 – Common seal of the Commission

#### **PART III—RIGHT TO INFORMATION**

- 26 – Right to information
- 27 – Exempt information
- 28 – Proactive disclosure

#### **PART IV—ACCESS TO INFORMATION**

- 29 – Application for access
- 30 – Processing of application
- 31 – Transfer of applications
- 32 – Providing access to information
- 33 – Rejection of application
- 34 – Fees
- 35 – Correction of information

#### **PART V—INTERNAL REVIEW OF DECISIONS**

- 36 – Review of decisions
- 37 – Application for review

- 38 – Notice to interested parties
- 39 – Decisions on review

**PART VI—FINANCIAL PROVISIONS**

- 40 – Funds of the Commission
- 41 – Financial Year
- 42 – Annual estimates
- 43 – Accounts and audit
- 44 – Bank accounts

**PART VII – MISCELLANEOUS**

- 45 – Annual reports
- 46 – Reports by public authorities
- 47 – Protection of person making disclosure
- 48 – Records management
- 49– Electronic records.
- 50 – Offence of alteration, defacement, blocking, erasure, etc
- 51 – Defamatory matter in information released
- 52 – Regulations
- 53 – Consequential amendments

**FIRST SCHEDULE – PROVISIONS AS TO THE CONDUCT OF AFFAIRS AND BUSINESS OF THE COMMISSION**

**SECOND SCHEDULE – OAT/AFFIRMATION OF THE OFFICE OF A COMMISSIONER/SECRETARY**

**THIRD SCHEDULE – CONSEQUENTIAL AMENDMENTS**

**A BILL FOR**

**AN ACT of Parliament to provide for the establishment of the Kenya Freedom of Information Commission; to provide for access to information in the possession of public authorities; to provide for proactive publication and dissemination of information; and for connected purposes**

**ENACTED** by the Parliament of Kenya as follows –

**PART I—PRELIMINARY**

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| Short title and commencement. | <b>1.</b> (1) This Act may be cited as the Freedom of Information Act, 2012, and shall come into operation on such date as the Minister may, by notice in the Gazette appoint, and different dates may be appointed for different provisions  |
| Interpretation.               | <b>2.</b> In this Act unless the context otherwise requires;<br><br>“Commission” means the Freedom of Information and Data Protection Commission established by section 4;<br>“commissioner” means a member of the Commission appointed under section 9;<br>“edited copy” in relation to a document, means a copy of a document from which exempt information has been deleted;<br>“exempt information” means information withheld by a public authority in accordance with section 27;<br>“Committee” means the Parliamentary Departmental Committee responsible for information and communications;<br>“information” includes any documentary material regardless of its physical |

form or characteristics, and any copy thereof, any record, correspondence, memorandum, book, plan, map, drawing, film, microfiche, diagram, pictorial or graphic work, data, photograph, recording, audio or video-tape, machine readable material and any other information held in electronic form whether on computer disk or tape or in the memory of a computer or other device, anything that contains information, letters, reports, studies, records, minutes, statistics, directives, instructions, circulars, memoranda, practice notes, opinions, decisions in writing whether in form of sound, visual recordings or computerized data, any material recorded or stored by any means including tape, computer, or other device and any material subsequently derived from information so recorded or stored whether manually, mechanically or electronically and anything that is part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing;

“information officer” means any officer of a public authority designated as such for purposes of this Act who in the first instance is the chief executive of the public authority, and any delegated officer in any other instance;

“Minister” means the Minister for the time being responsible for matters relating to information;

National Security” means security or defence of the State means–

- (a) military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression, or curtailment of subversive or hostile activities;
- (b) intelligence relating to the defence of the State; the detection, prevention, suppression or curtailment of subversive or hostile activities;
- (c) methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to above;
- (d) the identity of a confidential source and any other source of information related to intelligence gathering, the quantity, characteristics, capabilities, vulnerabilities or deployment of anything being designed, developed, produced or considered for use as weapons or such other equipment.

“personal information” means information about an identifiable individual, including, but not limited to:-

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
  - (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
  - (c) any identifying number, symbol or other particular assigned to the individual;
  - (d) the address, fingerprints or blood type of the individual;
  - (e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a person for a grant, an award or a prize to be made to another individual;
  - (f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
  - (g) the views or opinions of another individual about the individual;
- and



- (h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual;

“public authority” includes –

- (a) the National Assembly, including members of Parliament and staff of the National Assembly;
- (b) the Judiciary;
- (c) all Government ministries, departments or agencies at all levels of Government;
- (d) any body which -
  - i is established by virtue of the President’s powers or by or under an Act of Parliament or an Order made under an Act of Parliament or which is established in any other way by a Minister of the government or by a government department or public authority;
  - ii receives any part of its revenues directly from money provided by Parliament or from a levy authorized by an enactment or fee or charge of any other description so authorized;
- (a) any body or authority subject to examination and audit by the Controller and Auditor - General;
- (b) a statutory corporation within the meaning of the State Corporations Act;
- (c) a commission of inquiry issued under the Commissions of Inquiry Act;
- (d) all local authorities established under the Local Government Act;
- (e) any body carrying out a statutory or public function, provided that the body is a public authority only to the extent of its statutory or public function; or
- (f) any other body or authority designated by the Minister as a public authority for purposes of this Act.

Cap 446 “public officer” has the same meaning as assigned to it under Article 260 of the Constitution;

Cap 102 “public record” includes any writing containing information relating to the conduct of the public’s business, including but not limited to court records, mortgages and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics;

Cap 265 “service commission” means the Public Service Commission, the Parliamentary Service Commission or the Judicial Service Commission.

Objects of the Act.

**3.**The objects of this act are–

- (a) to give effect to the citizen’s right of access to information as provided under Article 35 of the Constitution;
- (b) to give effect to the citizen’s right of access to information– held by or on behalf of public authorities, or to which public authorities are entitled by law to have access, including information relating to national security matters, subject only to specific and limited exemptions necessary to prevent identifiable harm to legitimate state interests or to the private and business interests of persons whose information is collected and held by public authorities;
- (c) to require public bodies to proactively disclose information that they hold and to provide information on request;
- (d) to create a right of access to information held by private bodies if those bodies are public contractors or if such bodies hold

- information required for the exercise or protection of any right protected by the Constitution and the laws of Kenya;
- (e) to bar public authorities from imposing sanctions on employees or members of the public for releasing information of compelling public interest in good faith.

## **PART II – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE COMMISSION**

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|-----------------------------------|--|
| Establishment of Commission       | <p><b>4.</b> (1) There is established a commission to be known as the Freedom of Information and Data Protection Commission</p> <p>(2) The Commission is a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of –</p> <ul style="list-style-type: none"> <li>(a) Suing and being sued;</li> <li>(b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;</li> <li>(c) borrowing or lending money; and</li> <li>(d) doing or performing all such other things or acts for the proper performance of its functions under, and for furtherance of the provisions of, this Act which may be lawfully done or performed by a body corporate.</li> </ul> <p>(3) The headquarters of the Commission shall be in Nairobi.</p>   |
| Conduct of business of Commission | <p><b>5.</b> The business and affairs of the Commission shall be conducted in accordance with the First Schedule.</p>  |
| Functions of the Commission       | <p><b>6.</b> (1) The functions of the Commission shall be to –</p> <ul style="list-style-type: none"> <li>(a) investigate, on its initiative or upon complaint made by any person or group of persons, the violation of the provisions of this Act;</li> <li>(b) inspect public authority with a view to assessing and evaluating the collection, processing and dissemination of information to the public and making appropriate recommendations therein;</li> <li>(c) inform and educate the public as to their rights under this Act by means of a continuing programme of research, publication, lectures and symposia and by such other means as the Commission may deem fit;</li> <li>(d) recommend to all public authorities effective measures to promote access to information;</li> <li>(e) act as the chief agent of the Government in ensuring that all public authorities comply with its obligations under international treaties and conventions on access to information;</li> <li>(f) hear and determine complaints and appeals;</li> <li>(g) approve information dissemination procedures including publication schemes for proactive disclosure of information by all public authorities;</li> <li>(h) data protection as provided under the law relating to data protection;</li> <li>(i) perform such other functions as the Commission may consider necessary for the promotion of access to</li> </ul> |

information.

(2) The Commission shall have all the powers necessary for the performance of its functions under this Act.

(3) The decisions of the Commission shall be binding on both levels of government.

(4) The Commission may enter into association with such other bodies or organizations within and outside Kenya as the Commission may consider desirable or appropriate and in furtherance of the purpose for which the Commission is established.

Guiding objects and principles.

**7.** In the performance of its functions under this Act the Commission shall

–

- (a) accommodate the diversity of the Kenyan people;
- (b) observe the principle of impartiality and gender equity;
- (c) protect the sovereignty of the people;
- (d) secure the observance by all state organs of democratic values and principles;
- (e) promote constitutionalism;
- (f) have regard to all applicable international information management and dissemination standards and;
- (g) ensure that public authorities provide adequate safeguard for personal information.

Independence of the Commission

**8.** (1) Except as provided under this Act or any other law, the Commission shall exercise its functions without any political bias or interference and shall be wholly independent and separate from the Government, any political party, nominating authority or any person or body.

(2) The Commission is–

- (a) subject only to the Constitution and the law; and
- (b) independent and not subject to the direction and control by any person or authority.

Membership of Commission

**9.** (1) The Commission shall consist of –

- (a) a chairperson who shall be appointed by the President in accordance with section 10; and
- (b) two commissioners appointed by the President in accordance with Section 10

(2) The commissioners shall, at their first meeting, elect a vice-chairperson from amongst the commissioners appointed under subsection (1) (b)

Qualifications for appointment of chairperson and members

**10.** (1) A person shall be qualified for appointment as the chairperson of the Commission if the person–

- (a) has knowledge and at least fifteen years experience in matters relating to human rights, law, data protection, transparency or public and corporate governance;
- (b) holds a degree from a university recognized in Kenya; and
- (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person–

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters

relating to any of the following fields-

- (i) law;
  - (ii) data protection;
  - (iii) human rights;
  - (iv) management; or
  - (v) transparency or public and corporate governance;
- (c) has had a distinguished career in their respective fields; and  
 (d) meets the requirements of Chapter Six of the Constitution.
- (3) A person shall not be qualified for appointment as the chairperson or a member of the Commission if such person—
- (a) is a member of Parliament or a County Assembly;
  - (b) is a member of the governing body of a political party;
  - (c) is a member of a local authority;
  - (d) is an undischarged bankrupt; or
  - (e) has been removed from office for contravening the provisions of the Constitution or any other law.

Procedure for appointment of chairperson and members

**11.** (1) The President shall, within fourteen days of the commencement of this Act convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively—

- (a) Office of the President;
- (b) Office of the Prime Minister;
- (c) Ministry responsible for matters relating to justice;
- (d) Public Service Commission;
- (e) the Association of Professional Societies in East Africa; and
- (f) the National Council for Persons with Disabilities.

(3) The selection panel shall, subject to this section, determine its own procedure and the Ministry responsible for Public Service shall provide it with such facilities and other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall, within seven days of receipt of applications under subsection (4), consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and five persons qualified for appointment as members of the Commission, and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and two persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved

nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel specified under subsection (2) (b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

Powers of the chairperson	<p><b>12.</b> (1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.</p> <p>(2) The chairperson shall—</p> <p>(a) preside over all meetings of the Commission;</p> <p>(b) be the spokesperson for the Commission; and</p> <p>(c) supervise and direct the work of the Commission.</p> <p>(3) If the office of chairperson become vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.</p>
Tenure of office	<p><b>13.</b> (1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.</p> <p>(2) The chairperson and members of the Commission shall serve on a full-time basis</p>
Vacancy of office of chairperson and members	<p><b>14.</b> (1) The office of the chairperson or a member of the Commission shall become vacant if the holder—</p> <p>(a) dies;</p> <p>(b) by notice in writing addressed to the President resigns from office;</p> <p>(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution</p> <p>2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.</p>
Vacancy of office of chairperson and members	<p><b>15.</b>(1) A member of a commission (other than an <i>ex officio</i> member), or the holder of an independent office, may be removed from office only for—</p> <p>(a) serious violation of this Constitution or any other law, including a</p>

	<p>contravention of Chapter Six;</p> <p>(b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;</p> <p>(c) physical or mental incapacity to perform the functions of office;</p> <p>(d) incompetence; or</p> <p>(e) bankruptcy.</p>
Vacancy of office of chairperson and members.	<p>(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.</p>
Removal of commissioners	<p>(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.</p> <p>(4) On receiving a petition under clause (3), the President—</p> <p>(a) may suspend the member or office holder pending the outcome of the complaint; and</p> <p>(b) shall appoint a tribunal in accordance with clause (5).</p> <p>(5) The tribunal shall consist of—</p> <p>(a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;</p> <p>(b) at least two persons who are qualified to be appointed as High Court judges; and</p> <p>(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.</p> <p>(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.</p> <p>(7) A person aggrieved by the decision of the tribunal under subsection (6) may appeal before the Court of Appeal.</p> <p>(8) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.</p>
Committees of the Commission.	<p><b>16.</b> (1) The Commission may, from time to time establish, committees for the better carrying out of its functions.</p> <p>(2) The Commission may—</p> <p>(a) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Commission;</p> <p>(b) hire such experts or consultants as are necessary for the functions of the Commission.</p>
Terms and conditions of service of the commissioners Secretary to the Commission.	<p><b>17.</b> The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.</p> <p><b>18.</b> (1) The appointment of the secretary to the Commission under Article 250 (12) of the Constitution shall be through a competitive recruitment process.</p> <p>(2) A person shall be qualified for appointment as a secretary to the Commission if the person –</p> <p>(a) is a citizen of Kenya;</p>

- (b) holds a degree from a university recognized in Kenya;
- (c) has had at least ten years proven experience at management level; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.

(4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

Removal of secretary.

**19.** (1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for—

- (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
- (b) gross misconduct or misbehavior;
- (c) incompetence or neglect of duty;
- (d) violation of the Constitution; or
- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given—

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

Oath of office.

20. The chairperson, the commissioners and the Secretary shall each make and subscribe before the Chief Justice the oath of affirmation set out in Second Schedule.

Staff of the Commission

21. The Commission may appoint such officers or servants as are necessary for the proper discharge of the functions of the Commission under this Act or any other law, upon such terms and conditions of service as the Commission may determine.

Inquiry into complaints

22. (1) A person wishing to lodge a complaint under this Act shall do so orally or in writing addressed to the Secretary or such other person as may be duly authorized by the Commission for that purpose.

(2) A complaint lodged under subsection (1) shall be in such form and contain such particulars as the Commission may, from time to time, prescribe.

(3) Upon receipt of a complaint under subsection (1), the Commission may

- (a) call for information or a report regarding such complaint from the public authority or any other body within such reasonable time as may be specified by the Commission:

Provided that –

- (i) if the information or report is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report;
- (ii) if on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by the public authority, the Commission



Commission to  
have powers of a  
court

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shall, in writing, inform the complainant accordingly and take no further action.

(b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

23. (1) In the performance of its functions under this Act, the Commission shall have the powers of a court to –

(a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;

(b) question any person in respect of any subject matter under investigation before the Commission;

(c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission

(2) The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order –

(a) the release of any information withheld unlawfully;

(b) the payment of compensation; or

(c) any other lawful remedy or redress

(3) A person or authority dissatisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.

(4) An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.

(5) If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

(6) A person who –

(a) fails to attend before the Commission in accordance with any summons or order issued under subsection (1)(a); or

(b) having attended before the Commission, refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse, to answer any question or to produce any information; or

(c) knowingly gives any false or misleading statement or information to the Commission; or

(d) causes an obstruction or disturbance in the course of any proceedings before the Commission,

commits an offence and shall, on conviction, be liable to a fine not exceeding three hundred thousand shillings, or to imprisonment for a term not exceeding six months, or to both.

(7) Public bodies, relevant private bodies, and private bodies are obliged to provide such reports as required by the Act to the Commission.



- (8) The Commission shall, in consultation with the public, develop and publicize guidelines detailing the reporting requirements including the manner, means and timeframes that apply to public bodies, relevant private bodies and private bodies.
- (9) The Commission has the discretion to request any further information from the public body, relevant private body or private body to facilitate and enhance monitoring at any time and may issue an order compelling the provision of such further information.
- Powers relating to investigation.
24. (1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, utilize the services of any public officer or investigation agency of the Government and where the a public officer is so utilized under this subsection, the Commission shall pay such public officer or agency for the service rendered.
- (2) For the purpose of investigating any matter pertaining to an inquiry, a public servant or agency whose services are utilized under subsection (1) may, subject to the direction and control of the Commission—
- (a) summon and enforce the attendance of any person for examination;
  - (b) require the discovery and production of any information; and
  - (c) subject to the provisions of this Act, requisition any public records or copy thereof from any public servant.
- (3) The provisions of section 23 shall apply in relation to any statement made by a person before any public officer or agency whose services are utilized under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.
- (4) The public officer or agency whose services are utilized under subsection (1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf;
- (5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry, including the examination of any person or persons who conducts or assists in the investigation, as it deems fit.
- The common seal of the Commission
25. (1) The common seal of the Commission shall be kept in such custody as the Commission may direct and shall not be used except on the order of the Commission.
- (2) The Common seal of the Commission shall, when affixed to a document and duly authenticated be judicially noticed and unless and until the contrary is proved, any necessary order or authorization by the Commission under this section shall be presumed to have been duly given.
- (3) The affixing of the common seal of the Commission shall be authenticated by the signature of the chairperson of the Commission and the Secretary:
- Provided that the Commission shall, in the absence of either the chairperson or the Secretary, in any particular matter, nominate one commissioner to authenticate the seal of the Commission on behalf of either the chairperson or the Secretary.
- Right to
26. (1) Every citizen has a legally enforceable right to access information

information held by, or under the control of, a public authority, in accordance with this Act.

(2) Subject to this Act, every citizen has the right to access information held by, or under the control of a private body where that information is necessary for the enforcement or protection of any right.

- (3) Subject to this Act, a person's right to access information is not affected by -
- (a) any reason the person gives for seeking access as the right to access of information is independent of a person's interest; or
  - (b) the public authority's belief as to what are his reasons for seeking access
- (4) A person has the right to access information of a public body or private body expeditiously and inexpensively;
- (5) A person has a right of access to information generated, received and or held by public bodies, subject only to such limitations as are necessary for public interest;
- (6) this Act shall be interpreted and applied on the basis of a duty to disclose. Non disclosure shall be permitted only in exceptionally justifiable circumstances;
- (7) A public body or private body shall accede to the authority of the Commission in all matters relating to access to information;
- (8) any refusal to disclose information shall be subject to appeal;
- (9) A public body or private body shall proactively publish information;
- (10) A person shall not be subject to any sanction for releasing information under this Act in good faith.
- (11) This Act applies to the exclusion of any law that prohibits the disclosure of information of a public body or a private body.
- (12) Nothing in this Act shall limit or otherwise restrict any other legislative requirement for a public body, relevant private body or a private body to disclose information.
- (13) The right of access to information includes—
- (a) both a right to request and receive information; and
  - (b) an obligation on the part of public bodies and officials to disseminate essential information that the public is entitled to know including their core functions and key activities;
- (14) The right of access to information applies to private entities that—
- (a) receive public resources and benefits, engage in public functions; or
  - (b) provide public services, particularly in respect of information relating to the public resources, benefits, functions or services;

Exempt information.

27. (1) Notwithstanding section 26(1) information, hereinafter referred to as "exempt information", may be withheld by a public authority where the public authority concerned is satisfied that disclosure of such information is reasonably like to –
- (a) cause serious prejudice to the national security of Kenya;
  - (b) impede the due process of law or endanger the safety of life of any person or the safety of a rare or endangered species;
  - (c) involve the unwarranted invasion of the privacy of an individual other than the applicant or the person on whose behalf an application on has with proper authority been made;
  - (d) cause serious prejudice to the legitimate commercial or financial interests of that authority or third party from whom information was obtained;
  - (e) cause serious prejudice to the ability of the Government to manage the economy of Kenya.
  - (f) significantly undermine a public authority's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; or

(g) damage a public authority's position in any actual or contemplated legal proceedings by revealing the legal advice which it received in anticipation of or connection with such proceedings.

(2) Notwithstanding the generality of subsection (1) (a), information relating to national security includes –

- (a) military plans ,weapon systems or operations;
- (b) foreign government information;;
- (c) intelligence activities,sources, methods or cryptology;
- (d) foreign relations or foreign activities;
- (e) scientific,technology or economic matters relating to national security;
- (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security.

(3) Subsections (1) (d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

(4) Notwithstanding anything contained in subsection (1), a public authority shall disclose information where the public interest in disclosure outweighs the harm to protected interests.

(5) For the purposes of subsection (4), in considering the public interest, particular regard shall be had to the need to –

- (a) promote accountability of public authorities to the public;
- (b) ensure that the expenditure of public funds is subject to effective oversight;
- (c) promote informed debate on issues of public interest relevant to this Act
- (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
- (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

(6) Unless the contrary is proved by the public authority, information is presumed not to be exempt if the information is more than thirty years old.

Proactive disclosure

28. **(1)** A public authority shall –

- (a) as soon as practicable after the commencement of this Act but not later than twelve months after the commencement thereof, and in a form approved by the Commission, publish –
  - i the particulars of its organization, functions and duties;
  - ii the powers and duties of its officers and employees;
  - iii the procedure followed in the decision making process, including channels of supervision and accountability;
  - iv the norms set by it for the discharge of its functions;
  - v any guidance used by it in the relation to its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; and
  - vi a guide sufficient to enable any person wishing to apply for

information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be consulted by any person;

- (b) during the year commencing on first January next following the publication, in respect of the statement under paragraph (a), that is, the first statement published under that paragraph, and during each succeeding year, cause to be published statements bringing up to date the information contained in the previous statement or statements published under that paragraph;
- (c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public; and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;
- (d) provide to any person the reasons for any decision taken by it in relation to that person;
- (e) unless there are good reasons to the contrary, allow members of the public to attend its meetings at which decisions affecting them are made and shall give adequate notice of such meetings;
- (f) upon signing, public authorities shall publish all contracts entered into include –
  - (i) the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference;
  - (ii) the contract sum;
  - (iii) the name of the provider, contractor or individual to whom the contract has been granted and
  - (iv) the periods within which the contract shall be completed.

(2) Information shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used.

(3) At a minimum, the material referred to in subsection (1) shall be made available -

- a for inspection by any person without charge;
- b by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made, and
- c on the Internet, provided that the materials are held by the authority in electronic form.

#### **PART IV – ACCESS TO INFORMATION**

Application for  
access

29. (1) An application to access information shall be made in English or Kiswahili by email, fax, post, telephone or by any other medium, and the

applicant shall provide –

(a) contains details; and

(b) sufficient particulars for the public officers or any other official to understand what information is being requested.

(2) A public officer who receives an oral application shall, subject to section 25, reduce the application to writing, including the officer's name and designation, and shall give a copy thereof to the applicant.

(3) Notwithstanding subsection (1), an application may, if the applicant is unable to communicate in English or Kiswahili, be made in any other local language in use in Kenya, and in such event the public officer to whom the application is made shall arrange for a translation of the application to English or Kiswahili.

(4) Where an application to access information does not comply with subsection (1), the public officer who receives the application shall, subject to section 30, render such reasonable assistance, free of charge, as may be necessary to enable the application to comply with that subsection.

(5) An application referred to in subsection (4) shall not be deemed to have been rejected while assistance is being rendered.

(6) A public authority may not inquire into a person's identity on account of an application to access any information, or inquire as to the purpose of the person's application.

(7) A public authority may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

(8) A public authority which receives an application to access information shall provide the applicant with a receipt documenting the application.

Processing of application.

30. (1) Subject to section 31, a public officer shall make a decision on an application as soon as possible, but in any event, within fifteen working days of receipt of the application;

Provided that where the information sought concerns the life or liberty of a person, the information shall be provided within forty-eight hours of receipt of the application:

Provided further that where an application is especially complex or relates to a large volume of information, the public officer may request the Commissioner for an extension of time of no more than fifteen working days.

(2) The public officer may seek the assistance of any other public officer as the officer considers necessary for the proper discharge of the officer's duties and such other officer shall render the required assistance.

Transfer of applications

31. (1) A public information officer may, not later than five days from the date of receipt of an application, transfer the application, or any relevant part of it, to another public authority, if the information requested is held by that other public authority.

(2) Where an application is transferred under subsection (1), a public information officer shall inform the applicant immediately but in any event no later than five days from the date of receipt of the application,

about such transfer.

(3) A public authority to which an application is referred by a public information officer under subsection (1) shall make a decision on the application within fifteen days from the date that the application was first made, failing which the request shall be deemed to have been rejected.

Providing access to information.

32. (1) Where a decision is taken to provide the information applied for, a public officer shall send the applicant a written notice within fifteen working days of receipt of the application, advising –

- (a) that the application has been granted;
- (b) that the application has been granted from the provision of an edited copy
- (c) the details of any fees or further fees to be paid for access, together with the calculations made to arrive at the amount of the fee;
- (d) the method of payment of such fees;
- (e) the proposed process of accessing the information once the payment is made; and
- (f) that an appeal may be made to the Commission in respect of the amount of fees required or the form of access proposed to be provided.

(2) Subject to section 32, upon receipt of the requisite fee, a public officer shall provide the information to the applicant or permit the relevant inspection immediately but in any event no later than two working days from the date of receipt of such payment.

(3) Any information which may be made accessible to an applicant shall be produced forthwith at the place where it is kept, for inspection; to any person who desires to have access to it; and in such a manner as it can be read, listened to, or otherwise comprehended, in the form in which it is held unless the applicant requests that it be made available in another form and it is practicable to do so, and such information may also be copied, reproduced, or used for conversion to a sound transmission.

(4) Where information is to be provided under this section, and the applicant requests that access be given in either English or Kiswahili, the information shall be given to the applicant in that language –

- (a) forthwith, if the information already exists in that language; or
- (b) within a reasonable time if the information does not exist in the language in which access has been applied for.

Rejection of application

33. (1) A public body or private body may refuse to grant access to information if the information is exempted from disclosure in this Act.

(2) Where an application is fully or partially rejected on the basis that the information requested is exempt information, the public officer concerned shall send the applicant a written notice within fifteen working days of receipt of the application, specifying-

- (a) the name and designation of the person making the decision;
- (b) the reasons for the decision, including the relevant provisions of the Act relied upon, findings on any material questions of fact and the material on which those findings were based;
- (c) the applicant's rights with respect to review of the decision,

including the particulars of the Commission, time limits and the procedure.

(3) Where any information applied for has not been provided within the specified period under this Act, the application therefor shall be deemed to have been refused.

#### Fees

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34. (1) No fee may be levied in relation to the submission of an application.

(2) A public authority from which an application for information has been made shall not levy any fee on an applicant for the provision of the information other than a reasonable fee for access, which shall not exceed the actual costs of making any copies of such information and if applicable, supplying them to the applicant.

(3) Any fees imposed should not be so high as to defeat the objectives of this Act.

(4) A public information officer may waive any fee where payment of the fee may cause financial hardship to the applicant or where the disclosure of the information is in the public interest.

(5) Notwithstanding anything in this section, the person making an application for information shall be provided with the information free of charge where a public authority fails to comply with the time limits in this Part.

(6) The fee regime for all public authorities shall be prescribed in Regulations made by the Minister.

#### Correction of information.

35. (1) At the request of the applicant a public authority shall, at its own expense correct any personal information held by it relating to the applicant which is inaccurate, incomplete or irrelevant.

(2) A request under this section shall be made in writing to the public authority responsible for the maintenance of the record system containing the inaccurate, incomplete or irrelevant information and shall –

- (a) state that it is a request to amend certain personal information relating to the applicant;
- (b) specify the personal information that is to be amended indicating how such information is inaccurate, incomplete or irrelevant, and how it is adverse to the applicant's interests; and
- (c) specify the remedy sought by the applicant.

### **PART V – INTERNAL REVIEW OF DECISIONS**

#### Review of decisions.

36. (1) Subject to subsection (2), where a decision has been made in relation to a request to a public authority, being –

(a) a decision refusing to grant access to information in accordance with an application;

(b) a decision granting access to information but not granting access to all information to which the application relates;



- (c) a decision purporting to grant, in accordance with an application relates, but not actually granting that access;
  - (d) a decision to defer the provision of access to information;
  - (e) a decision relating to imposition of a charge or the amount of a charge;
  - (f) a decision relating to remission of an application fee;
  - (g) a decision to grant access to information only to a qualified person;
  - (h) a decision refusing to amend a record of personal information in accordance with an application made under section 35; or
  - (i) a decision refusing to annotate a record of personal information in accordance with an application made under section 35,
- the applicant may, by application in writing to the public authority, request a review of the decision
- (2) An application under subsection (1) shall be made within thirty day, or such further period as the public authority allows, after the day on which the decision is notified to the applicant.

Application for review.

37. An application for internal review shall –
- a) be made in a prescribed form within thirty days after the notice is given to the applicant, or, if notice to the applicant is not required, after the decision is taken;
  - b) be delivered or sent to the information officer of the public authority concerned on his address, fax number or electronic e-mail address;
  - c) identify the subject of review and give reasons for the review, and may include any other information known to the applicant.

Notice to interested party

38. If a public authority is considering an internal review against the refusal of an application to access information as contemplated in section 36, the public authority shall inform the third party to whom or which the information relates, unless the necessary steps to locate the third party have been unsuccessful.

Decisions on review.

39. (1) The relevant public authority shall, immediately after a decision on internal review has been made, give notice of the decision to the applicant and every third party involved.
- (2) The notice shall state -
- (a) adequate reasons for the decision including the provisions of this Act relied upon;
  - (b) that the applicant, third party, or requester, as the case may be, may lodge an appeal with the Commission against the outcome of the internal review within thirty days of such outcome.

#### **PART VI - FINANCIAL PROVISION**

Funds of the Commission

40. (1) The funds of the Commission shall on an annual basis be appropriated by Parliament for that purpose.

(2) The Commission may receive grants and donations from any other source provided that such grants and donations shall not be made or received for purposes of influencing the decision or ability of the Commission in any way and shall be disclosed in the annual report of the Commission.

Financial year. 41. The financial year of the Commission shall be a period of twelve months ending on the thirtieth June in each year.

Annual estimates 42. (1) At least three months before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of that financial year.

(2) The annual estimates shall make provision for all estimated expenditure of the Commission for the financial and in particular shall provide-

- (a) the payment of the salaries, allowances and other charges in respect of the staff of the Commission and the Commissioners;
- (b) for the payment of the pensions, gratuities and other charges in respect of retirement benefits payable to the members of staff of the Commission;
- (c) the maintenance of the buildings and grounds of the Commission;
- (d) the maintenance, repair and replacement of the equipment and other property of the Commission;

(3) The annual estimates shall be submitted to the Minister for approval before the commencement of the financial year to which they relate, and once approved, the sum provided in the estimates shall not be increased without the prior consent of the Minister.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

(5) The Minister shall make a decision without delay and where approval is denied the Minister shall provide reasons in writing for denial.

(6) The Minister shall, in determining whether to approve or disapprove the annual estimates, consider only the feasibility of the financial proposals and not the appropriateness of the purpose to which the funds are proposed to be applied.

Accounts and audit. 43. (1) The Commission shall cause to be kept proper books and records of accounts of the income, expenditure, assets and liabilities.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General or to an auditor appointed under subsection (3), its accounts in respect of that year together with –

- (a) a statement of income and expenditure during that financial year; and
  - (b) a statement of the assets and liabilities of the Commission on the last day of the financial year.
- No. 12 of 2003
- (3) The accounts of the Commission shall be audited and reported upon by the Controller and Auditor-General, or by an auditor appointed by the Commission with the written approval of the Controller and Auditor-General in accordance with the provisions of the Public Audit Act, 2003.
  - (4) Notwithstanding subsection (3), the Commission's accounts may be audited by other persons as the Commission may from time to time authorize.
- Bank Account
44. (1) The Commission may open and maintain such bank accounts as may be necessary for the performance of its functions.

#### **PART VII – MISCELLANEOUS**

- Annual reports
45. (1) The Commission shall submit an annual report to the National Assembly through the Minister, and may at any time submit special reports to the Minister on any matter relating to any of its functions.
- (2) The annual report submitted by the Commission under subsection (1) shall include an overall assessment by the Commission of the performance of the Government with regard to access to information during the period under review.
- (3) The Minister shall lay the annual report of the Commission before the National Assembly within two months of receipt thereof, with any comments thereon which the Minister considers necessary.
- (4) The Minister shall be required, in every year, to report to Parliament the steps which the Government has taken in implementing recommendations made in the Commission's reports.
- Reports by public authorities.
46. (1) On or before the first day of February of each year, every public authority shall submit to the Commission a report covering the proceeding year, which shall include -
- (a) the number of requests for information received by the authority and the number of requests processed;
  - (b) the number of determinations made by the authority not to comply with the requests for information under section 27, and the reasons for each such determination;
  - (c) the number of applications for review made by persons under section 36, the result of such applications, and the reason for the action upon each application that results in a denial of information;
  - (d) the average number of days taken by the authority to process different types of requests;

- (e) the total amount of fees collected by the public authority while processing requests;
- (f) the number of full-time staff of the public authority devoted to processing requests for information and the total amount expended by the authority for processing such requests.
- Protection of person making disclosure.
47. (1) A person shall not be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is one which is in the public interest.
- (2) For purposes of subsection (1), a disclosure which is made to the police or to an appropriate public authority shall be deemed to be made in the public interest.
- (3) A person shall make a disclosure under subsection (1) and (2), where the person has reasonable belief in the veracity of the information.
- (4) Disclosure of information under subsection (1) and (2) includes information on—
- (a) violations of the law, including human rights violations;
  - (b) mismanagement of funds;
  - (c) conflict of interest;
  - (d) corruption;
  - (e) abuse of public office; and
  - (f) dangers to public health, safety and the environment
- (4) For the purpose of this section, a person is penalized if the person is dismissed, discriminated against, made the subject of reprisal or other form of adverse treatment or is denied any appointment, promotion or advantage that otherwise would have been provided or any other personnel action provided under the law relating to whistle blower, and the imposition of any such penalty in contravention of this section shall be actionable as a tort.
- (5) Any term of any settlement arising from a claim under this section, insofar as it purports to impose an obligation of confidentiality on any party to the settlement in respect of information which is accurate and which was or was proposed to be disclosed, shall be unenforceable.
- (6) In any proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information, it shall be a defence to show that, in the circumstances, the disclosure was in the public interest, and where the offence is alleged to have been committed by a public officer or Government contractor and involves the disclosure of information obtained by the person in the person's position as such, that the defendant had, before making the disclosure, complied with the provisions of subsection (3).
- Management of records
48. (1) In this section—
- (a) "records" means a document or other source of information compiled, recorded or stored in written form or film by electronic process or in any other manner;
  - (b) records shall be accurate, authentic, have integrity and useable.

(2) Every public authority shall keep and maintain its records in a manner which facilitates the right of access to information as provided for in this Act.

(3) At a minimum, to qualify to have complied with the duty to keep and maintain records under subsection (1), every public authority shall –

- a create and preserve such records as are necessary to document adequately its policies, decisions, procedures, transactions and other activities it undertakes pertinent to the implementation of its mandate;
- b ensure that records in its custody, including those held in electronic form, are maintained in good order and condition; and

within no more than three years from the date that this Act begins to apply to it, computerize its records and information management systems in order to facilitate more efficient access to information

Electronic records.

**49.** Every public authority or private body shall operate and maintain digital records.

Offence of alteration, defacement, blocking, erasure etc

**50.** (1) Where an application to access information has been made to a public authority under section 29 of this Act and the applicant would have been entitled, subject to payment of any fee, to provision of any information in accordance with that section, any person to whom this section applies commits of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information provision of which the applicant would have been entitled.

(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person convicted of an offence under this section shall be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years, or both.

Defamatory matter in information released.

**51.** Where any information provided by a public authority to an applicant under section 29 was supplied to the public authority by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice.

Regulations.

**52.** (1) The Minister may, by regulations, and upon consultations with the Commission, prescribe anything which may be prescribed under this Act including –

- (a) the designation of any private body or authority or class of bodies or authorities, to be a public authority or public authorities for the purposes of this Act;
- (b) the manner in which applications under this Act are to be made;
- (c) the form in which information requested under this Act is to be supplied;
- (d) the making of applications for personal information by

- representatives of the individual to whom the information relates;
- (e) the measures which public authorities shall take in order to assist persons in exercising their rights under this Act;
  - (f) the measures which public authorities shall take to ensure that adequate records are created and maintained by public authorities;
  - (g) the procedures that should be followed by a complainant in asking authority to review any decision or failure to act before a complaint may be made to the Commission;
  - (h) a public authority to consult with a third party before giving access to information obtained by it from that party;
  - (i) procedures requiring a public authority to ensure that personal information is accurate;
  - (j) compensation to be sought by an individual who has suffered damage as a result of the holding of inaccurate information about the individual's personal affairs by a public authority;
- (k) the records that public authorities shall be required to keep.

(2) The Minister may, upon consultation with the Commission, make regulations generally for the better carrying into effect the provisions of this Act.

Consequential amendments.

**53.** The written laws identified in the Third Schedule are amended in the manner identified therein.

## FIRST SCHEDULE

(S.4)

## PROVISIONS AS TO THE CONDUCT OF AFFAIRS AND BUSINESS OF THE COMMISSION

- |                  |  |
|------------------|--|
| Tenure of office | <p>1. Unless the appointment of the chairperson or commissioner is termed earlier under this Act, a person appointed as the chairperson or as a commissioner shall hold office for a term of five years from the date of appointment and shall be eligible for appointment for a further and final term of five years:</p> <p>Provided that in the case of the initial commissioners, the commissioners shall, at the first meeting of the Commission, elect from amongst their number –</p> <ul style="list-style-type: none"> <li>(a) four commissioners whose terms of office shall expire at the end of three years; and</li> <li>(b) four other commissioners whose term shall expire at the end of five years from the date of appointment.</li> </ul>         |
| Vacancy          | <p>2. The office of a person appointed as a chairperson or commissioner shall become vacant if the person –</p> <ul style="list-style-type: none"> <li>(a) dies;</li> <li>(b) resigns from office by writing under his hand addressed to the President through the Minister;</li> <li>(c) is convicted of an offence and sentenced to imprisonment for a term of three months or more without the option of a fine;</li> <li>(d) is unable to discharge the function of his office by reason of physical or mental infirmity as certified by two registered medical practitioners</li> <li>(e) is absent from three consecutive meetings of the Commission without good cause; or</li> <li>(f) if declared bankrupt by a court of competent jurisdiction.</li> </ul> |
| Meetings         | <p>3. The Commission shall meet at such times and places as the Commission shall deem appropriate but shall meet at least once in every month.</p> <p>(2) Subject to this Act the Commission may regulate its own procedure and formulate its own rules.</p> <p>(3) The quorum for any meeting of the Commission shall be five commissioner.</p> <p>(4) All orders and decisions of the Commission shall be authenticated by the chairperson or any other commissioner authorized in writing by the chairperson in that behalf.</p>  |
| Minutes          | <p>4. The Commission shall cause minutes of all proceedings of its meetings to be entered in books kept for that purpose.</p>  |



Majority decision 5. The decisions of the Commission shall be that of the majority and shall be signed by the members thereof agreeing thereto.

SECOND SCHEDULE (s.14)

OATH/AFFIRMATION OF THE OFFICE OF A COMMISSIONER/SECRETARY

1 ..... having been appointed (a commissioner/the Secretary to) the Kenya Freedom of Information Commission under the Freedom of Information Act 2008, do solemnly (swear/ declare and affirm) that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said.....

before me this ..... Day of.....

..... Chief Justice.

SECOND SCHEDULE (s.46)

CONSEQUENTIAL AMENDMENTS

Records Disposal Act

Cap 14 1. (1) This paragraph amends the Records Disposal Act. (2) Section 2 of the Act is amended by deleting the words "Chief Archivist" wherever they appear and substituting therefor the expression "Kenya Archives and Documentation Service and the Kenya Freedom of Information Commission".

Public Archives and Documentation Service Act

Cap. 19 2. (1) This paragraph amends the Public Archives and Documentation Service Act.

(2) Section 5A of the Act is amended by inserting the following new proviso immediately after the word "public" appearing in the last line of subsection (1)

"Provided that the restriction from circulation shall only relate to exempt information provided for in section 21 of the Freedom of Information Act 2008."

(3) The Act is amended in section 6 by deleting subsections (2) and (3).

(4) Section 7 of the Act is amended by inserting the expression "in consultation with the Kenya Freedom of Information Commission and" immediately before the words "with the approval of the Minister".



Cap 187

***Official Secrets Acts***

3. (1) This paragraph amends the Official Secrets Act.
- (2) Section 3 of the Act is amended by deleting subsections (3), (4), (5), (6) and (7).

No. 4 of 2003

***Public Officer Ethics Act 2003***

4. (1) This paragraph amends the Public Officer Ethics Act, 2003.
- (2) Section 41 of the Act is amended by inserting the following proviso immediately after the word “both” appearing in the last line –

“Provided that the provision of this section as to divulging of information without lawful excuse shall only apply to exempt information provided for in section 21 of the Freedom of Information Act, 2008.”

No. 4 of 2006

***Statistics Act 2006***

5. (1) This paragraph amends the Statistics Act, 2006.

- (2) Section 11 of the Act be amended by inserting the following new proviso immediately after the word “Act” appearing in the last line –

“Provided that the provision of this section as to secrecy shall only apply to exempt information provided for in section 21 of the Freedom of Information Act 2008.”

## MEMORANDUM OF OBJECTS AND REASONS

The Ministry of Information and Communications has formulated the Bill herein with a view to enhancing access to information held by Government Ministries and other public authorities. The Bill recognizes access to information as a right bestowed on the Kenyan people, and seeks to promote proactive publication, dissemination and access to information by the Kenyan public in the furtherance of this right. It also spells out the mechanisms for ensuring public access to information, as well as the factors that may hinder the right to this access. The Bill is borne of the realization that access to information held by the Government and public institutions is crucial for the promotion of democracy and good governance.

**Part I** of the Bill contains preliminary provisions.

**Part II** contains provisions on the establishment, powers and function of the Kenya Freedom of Information Commission, which shall enjoy the status of a body corporate with all the attributes pertaining thereto. Membership of the Commission is provided for in **clause 9**. **Clause 6** thereof lays down the functions of the Commission while the objects and principles guiding the Commission in the discharge of its functions are set out in **clause 7**. **Clause 8** confers the Commission with independence from the Government and other entities, and requires the Commission to carry out its mandate without any political bias or interference. **Clause 10** lays down the elaborate procedures for appointment of commissioners while **clause 18** provides for the appointment of Secretary to the Commission.

**Part III** contains provisions on the right of access to information. **Clause 26** accords every person the right to access information in the domain of a public authority while **clause 27** contains provisions on information which is exempted from disclosure to the public. **Clause 28** obliges a public authority to publish in the public interest information in its possession (proactive disclosure).

**Part IV** contains provisions on access to information. **Clauses 29 and 30** details the manner in which an application for information is to be made and the manner in which such an application is to be processed. **Clause 31** provides for the transfer of an application for information from one public authority to another when it becomes apparent that the information applied for is not in the domain of the public authority to which the application is initially made but is in the possession of another authority.

**Clause 33** provides for rejection of an application for information. **Clause 34** provides that no fee will be levied in respect of information applied for as a general rule, but a public authority is allowed to levy some fee to cater for incidental cost of availing the information applied for, for example, cost of making and supplying copies to an applicant. Under **clause 35**, it is provided that a person can make an application to a public authority to correct inaccurate personal information in its possession regarding such person .

**Part V** contains provisions on internal review of decisions made by a public authority with **clause 36** thereof providing for instances in which an application for such review can be made. The manner of making such application is laid down in **clause 37** and communication of a decision thereon is to be made in the manner detailed in **clause 39**

**Part VI** contains financial provisions with **clause 40** thereof setting out the sources of funds of the Commission. **Clause 42** provides for the preparation of the annual estimates of the Commission and the details to be contained in the estimates while **clause 43** provides for the auditing of the accounts of the Commission by the Controller and Auditor General or an auditor appointed thereunder.

**Part VII** contains miscellaneous provisions and **clause 45** thereof imposes an obligation on the Commission to prepare annual reports on its functions for the laying before the National Assembly. Similarly, public authorities are obliged, under **clause 46** to prepare and submit to the Commission reports on various aspects of access to information. **Clause 47** accords protection to a person making

disclosure of information in the public interest while **clause 48** obliges public authorities to keep their records in a manner that facilities the right of access to information. **Clause 50** provides for various offences and penalties while **clause 52** empowers the Minister to make regulation, in consultation with the Commission, for the better carrying into effect the provisions of the Bill once enacted into law.

The enactment of this Bill will occasion additional expenditure of public funds to be provided through the estimates.

Dated the....., 2012.

SAMUEL POGISHO,  
Minister for Information and Communications