MEMORANDUM

on

Kenya's Freedom of Information Bill, 2005

London
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1. Introduction

This Memorandum provides an analysis of the Kenyan draft Freedom of Information Law 2005 ("draft Law") in terms of its compliance with the standards under international law for the guarantee of freedom of expression and access to information. ARTICLE 19's analysis and comments are made within the framework of the international standards governing freedom of expression, with particular reference to Kenya's treaty obligations under the *International Covenant on Civil and Political Rights* (ICCPR).

We also prepare this Memorandum in the context of a memorandum by the Kenyan branch of the International Commission of Jurists (ICJ Kenya) on an earlier version of the draft Law, which provided extensive drafting recommendations. We note that a significant number of these recommendations have been implemented into the draft Law. As a result, the purpose of this Memorandum is to provide ICJ Kenya with additional drafting recommendations to further the draft Law's compliance with the applicable international standards.

ARTICLE 19 seeks to make a constructive contribution to the promotion and protection of freedom of expression and access to information in Kenya. The Kenyan government promulgated a first draft of the Freedom of Information Law in 2005 whose terms demonstrated a strong commitment to the implementation of the international standards of freedom of expression and access to information, and it has been responsive to the suggested amendments made by civil society organisations including ICJ Kenya. The draft Law has the potential to set an important regional benchmark in the protection of freedom of expression and access to information. It is capable of providing an impetus for the proper implementation of the freedom of information legislation in Angola and Uganda, as well as provide support for the further development of similar legislation in other countries.

We note that the ICJ Kenya memorandum draws heavily upon the progressive freedom of information models in other Commonwealth countries, including South Africa and India, and urges the Kenyan government to follow these examples. We support this view and make appropriate drafting recommendations in this Memorandum.

2. International and Constitutional Guarantees

2.1 The Importance of Freedom of Expression

The right to access information held by public bodies, often referred to as 'freedom of information', is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked.

For this reason, international bodies such as the United Nations Special Rapporteur on Freedom of Opinion and Expression[1] have repeatedly called on all States to adopt and

[1] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.

implement freedom of information legislation.[2] In 1995, the UN Special Rapporteur on Freedom of Opinion and Expression stated:

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[3]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[4] In his 1998 Annual Report, the Special Rapporteur reaffirmed that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[5]

In November 1999, the UN Special Rapporteur was joined in his call by his regional counterparts, bringing together all three special mandates on freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[6]

The right to access information held by or under the control of a public body has been guaranteed through Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted in 1948,[7] and through Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), adopted in 1966.[8] Article 19 of the UDHR, which was adopted as a United Nations General Assembly resolution, 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.[9] The ICCPR

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[2] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.
[3] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[4] Resolution 1997/27, 11 April 1997. 12(d).
[5] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.
[6] 26 November 1999.
[7] *UN General Assembly Resolution 217A (III)*, adopted 10 December 1948.
[8] *UN General Assembly Resolution 2200A (XXI),* adopted 16 December 1966, in force 23 March 1976.
[9] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction,*

is a formally binding legal treaty ratified by 154 States;[10] it ensures the right to freedom of expression and information 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. In its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, for example, the Committee stated that Azerbaijan "should introduce legislation guaranteeing freedom of information…"[11]

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"),[12] and the Declaration of Principles on Freedom of Expression in Africa ("the Declaration").[13] The first is a legally binding treaty to which Kenya is a State party; the second 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").[14] 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;

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 (1980) (US Circuit Court of Appeals, 2nd Circuit). 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.

[10] As of 27 April 2005. The ICCPR was acceded to by Kenya in May 1972.

[11] UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".

[12] 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. The Charter is also available online at http://www.achpr.org/english/_info/charter_en.html.

[13] 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. The Declaration is available online at: http://www.achpr.org/english/_doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html.

[14] The Commission is a quasi-judicial body established under the Charter to monitor its implementation and adjudicate on complaints.

- 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 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."[15]

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of freedom of information. The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

> Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.[16]

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information:

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
4. Governments should maintain and preserve records.
5. In principle, decisions to refuse access to records and information should be subject to independent review.[17]

[15] See: http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/communique/default.htm.
[16] Quoted in *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
[17] *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

The Law Ministers also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers' Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,[18] stated:

> The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.[19]

A rapidly growing number of States have now recognised the importance of freedom of information and have implemented laws giving effect to the right. In the last fifteen years, a range of countries including India, Uganda, Angola, Mexico, South Africa, South Korea, Israel, Japan, Sri Lanka, Thailand, Trinidad and Tobago, Guatemala, the United Kingdom and most East and Central European States have adopted freedom of information laws. In doing so, they join a large number of other countries that have enacted such laws some time ago, including Sweden, the United States, Finland, the Netherlands, Australia and Canada.

2.1.1 The Content of Freedom of Information

A survey of international law and best practice 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.[20]

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 *The Public's Right to Know: Principles on Freedom of Information Legislation* 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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[18] The *Durban Communiqué* (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.

[19] *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

[20] For an overview of these general principles, see ARTICLE 19's *The Public's Right to Know* (London: 1999) (ARTICLE 19 Principles). These Principles are the result of a study of international law and best practice 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). They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

> [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.[21]

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

2.1.2 Limits to Freedom of Information

One of the key issues in freedom of information law is defining when a public body can refuse to disclose information. Under international law, freedom of information may be subject to restrictions, where those restrictions meet the requirements stipulated in Article 19(3) of the ICCPR:

[21] *Ibid*. 44.

> 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) translates into a three-part test, whereby a public body must disclose any information which is holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[22]

1. Legitimate Protected Interest

Freedom of information laws must contain an *exhaustive* list of all legitimate interests on which a refusal of disclosure is based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.[23]

Exceptions should be narrowly drawn to avoid capturing information the disclosure of which would not harm the legitimate interest. Furthermore, they should be based on the content, rather than the type of document sought. To meet this standard, 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.

2. Substantial Harm

Once it has been established that the information falls within the scope of a legitimate aim listed in the legislation, it must be established that disclosure of the information would cause substantial harm to that legitimate aim. This part of the test confirms that simply because the information falls within the scope of a listed legitimate interest does not mean non-disclosure is justified. This would create a class exception that would seriously undermine the free flow of information to the public and would be unjustified since public authorities can have no legitimate reason to withhold information the disclosure of which would not cause harm to a legitimate interest. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.

3. Harm outweighs public interest benefit in disclosure

The third part of the test requires the public body 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 may concurrently undermine defence interests and expose corrupt buying practices. The latter, however, may lead to eradicating corruption and

[22] See ARTICLE 19's *The Public's Right to Know*, note 20, at Principle 4.
[23] *Ibid.*

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.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

3. Analysis of the draft Law

3.1 Overview

The draft Law seeks to provide all persons in Kenya with the right to access information held by public authorities and private bodies performing a public function. The objectives of the draft Law are outlined in the Preamble, including the general right of access to information in the government's possession, the draft Law's commitment to proactive dissemination of information and the right of all persons to have correct personal data contained in government records. The draft Law seeks to implement the principle of maximum disclosure by drawing reasonably narrow exemptions to disclosure and provides a disclosure in the public interest provision which overrides each of the exemptions.

The draft Law creates a robust access to information system and puts in place a number of safeguards to protect the proper and effective functioning of the request-based disclosure regime. We also consider that the measures created to ensure the accessibility of the regime are impressive, including the positive obligations to assist applicants in making a request, particularly in respect of illiterate or disabled applicants. In addition, the extensive provisions of the proactive disclosure regime are a particularly useful feature of the draft Law and will help develop a culture of transparency and public accountability of all public authorities.

In terms of the structure of the draft Law, public information officers are appointed at each public authority and proactive obligations are imposed on officers to facilitate the request for information procedure. Strict time limits are imposed for processing requests for information and minimal and proportionate fees apply for accessing information. The draft Law also establishes the office of the Information Commissioner to implement and oversee the access to information regime and an internal and external review procedure for disclosure-related complaints. Appropriate procedural safeguards are also put in place, including protection for whistleblowers, as well as for persons acting in good faith in the performance of functions under the draft Law. There are also a range of offences created for conduct which undermines the proper functioning of the regime, including unreasonably delaying access to information, acting in bad faith, destroying information or knowingly giving incorrect or misleading information. The accompanying penalties and sanctions for committing an offence are severe and serve to bolster public confidence in the effective operation of the regime.

3.2 Right of Access

The draft Law seeks to create a right of access for every person to all information held or under the control of a public authority (Section 4). Both 'information' and 'public authority' are defined broadly. We have some recommendations in relation to both of the definitions in order to bring these more wholly in line with international standards for freedom of expression. We also suggest inserting a definition of 'private body' for the same reason, to facilitate extending the scope of the draft Law to information held by private bodies where necessary for the enforcement of any right.

In regards to the definition of 'public authority' we recommend inserting an extra subsection between (i) and (j) to include any body "carrying out a statutory or public function, provided the body is a public authority only to the extent of their statutory or public functions". This provision completes this otherwise comprehensive definition.

We also note that subsection (j) of the 'public authority' definition encompasses "any other body which employs more than four persons and which has custody or control of information required for the exercise or protection of any right". We would recommend that this should be drafted more clearly. In particular, there should be unambiguous recognition of the right of access to *privately-held* information which is necessary for the *enforcement* of any right. As ICJ Kenya have advocated for, it would be a significant addition to the draft Law to have a right to access privately-held information necessary for the enforcement of any right, such as the right appears in the South African freedom of information legislation.[24] This empowers individuals to request information concerning a broad range of issues, including socio-economic rights such as the right to housing, clean air or water. We also note that in the South African freedom of information legislation, decisions of private bodies are appealable to the courts following an internal review,[25] and we advocate this review mechanism to be inserted alongside the provision.

Accordingly, we recommend that subsection (j) should be redrafted as a separate provision, as a positive statement of the right to access information necessary for the enforcement of any right, including privately-held information. We recommend this could be inserted as a subsection of section 4, as follows:

> s 4(2): Every person has the right to access information held or under the control of a public authority or private body, which is necessary for the enforcement or protection of any right.

To facilitate the inclusion of this provision, we propose that subsection (j) of the 'public authority' definition is deleted, and that a definition of 'private body' is inserted into Part I of the draft Law. We suggest the following definition of 'private body':

> 'private body' includes any body, excluding a public body, that: –
> (a) carries on any trade, business or profession, but only in that capacity; or
> (b) has legal personality.

[24] *Promotion of Access to Information Act* 2000, s 50.
[25] *Ibid*, s 78.

Our concern in regard to the definition of "information" is the restricted scope of this definition. We recommend inserting a definition of "record" into the draft Law to supplement the provisions relating to "information". A public authority should be under an obligation to disclose not only the information but also the record in which the information is contained. This obligation to disclose is an essential safeguard against attempts to doctor or otherwise alter records within public authorities. Accordingly, subjecting not only the information but also the record to the obligation to disclose helps to protect the integrity of records maintenance systems. We note that the South African and Ugandan freedom of information laws use the operative term "record". Similarly, the Angolan legislation uses the term "document" rather than "information". We propose the following definition of "record", drawn from the ARTICLE 19 Model Freedom of Information Law, to be inserted into Part I of the draft Law:

> For the purposes of this Act, a record includes any recorded information, regardless of its form, source, date of creation or official status, whether or not it was created by the public authority that holds it and whether or not it is classified.[26]

In some instances a reference to information will be broader than just a single record. This is the case, for example, when the information requested is spread throughout several records. As a result, both operative terms should be included in the draft Law and the right of access phrased in terms of a right of access to information. The definition of "record" as containing information will serve to supplement the application of the definition of "information".

Further, we recommend imposing an obligation on public authorities to confirm whether or not it holds the information which is requested. Knowing whether or not the information requested exists is critical to enforcing the right to access information. When making an appeal against a denial of a request for information, it is often critical to know whether or not the information in question – or a record pertaining to the information – is held by a public authority. Accordingly, we would recommend inserting the following provision as a subsection of s 4 of the draft Law. The second part would be applicable to the right of access to privately-held information necessary for the enforcement of any right:

> (1) Any person making a request for information to a public authority shall be entitled, subject only to the provisions of Parts II and IIII of this Act: –
>
> (a) to be informed whether or not the public authority holds a record containing that information or from which that information may be derived; and
>
> (b) if the public authority does hold such a record, to have that information communicated to him or her.
>
> (2) Any person making a request for information to a private body which holds information necessary for the exercise or protection of any right shall, subject only to the relevant provisions of Parts II and IV of this Act, be entitled to have that information communicated to him or her.

Finally, as the ICJ Kenya memo notes, the transfer of applications outlined in section 11 of the draft Law should be drafted in terms of 'shall' rather than 'may'. It is nonsensical, and antithetical to the guiding principles of maximum disclosure and the promotion of open

[26] ARTICLE 19, *Model Freedom of Information Law* (London, 2001), s 7.

government, to make the transfer of an application discretionary where the information is indeed held by another public authority.

Recommendations

- We recommend amending the definition of "public authority" to include "any body carrying out a statutory or public function, provided the body is a public authority only to the extent of their statutory or public functions";
- We also recommend that a definition of "private body" is inserted into the draft Law, and suggested drafting is outlined above;
- We recommend advocating for an express right to access information, held by a public authority or private body, which is necessary for the enforcement of any right. We outline possible drafting above;
- We consider that the definition of "information" should be supplemented with a definition of "record" outlined above, in order to help protect record maintenance;
- We recommend inserting an obligation on a public authority to confirm whether it holds the information requested. The drafting for this obligation is outlined above; and
- Finally, we recommend further advocating for the redrafting of Section 11 to require a public authority to transfer an application where the information is held by another public authority.

3.3 Restrictions on Access – Exempt Information

The exemption regime outlined in the draft Law has been substantially improved by the recommendations contained in the ICJ Kenya memorandum which has been adopted by the relevant drafting committee. We have some further recommendations to make, primarily to ensure the thresholds contained in the exemptions regime meet the requirements of the 'substantial harm' test outlined in the applicable international standards.

As a preliminary note, we recommend that Section 4 should be amended to reflect that the right of access is restricted by the exemptions regime in the draft Law. We recommend inserting the following subsection (3) into Section 4:

> s 4(1): Every person has the right of access to information held or under the control of a public authority;
> s 4(2): Every person has the right of access to information held or under the control of a public authority or private body where that information is necessary for the enforcement or protection of any right; and
> s 4(3): The right of access outlined in ss 4(1) and 4(2) above are subject only to the limited and specific exceptions outlined in Part I of the Act.

We will address each of the subsections of Section 6 which we consider need some amendment in order to better conform with the international standards for freedom of expression. Section 6(a) is a significant provision in terms of formulating an appropriate substantial harm test. At present, Section 6(a) is drafted too broadly to be an appropriate restriction on the basis of national security. In order to be in accordance with international standards, Section 6(a) should be redrafted as "to cause serious prejudice to the national security of Kenya". We consider that "clear and present danger" is a test which is specific

to standards governing freedom of expression in particular and less meaningful in the context of freedom of information.

In relation to Section 6(c), to comply with international standards, this exemption should be expressed as referring to a 'natural third party' and as subject to the restrictions which are outlined in Section 29 of the ICJ Kenya memo, namely:

> Subsection (c) does not apply if: -
> (i) the third party has effectively consented to the disclosure of the information;
> (ii) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party;
> (iii) the third party has been deceased for more than 20 years; or
> (iv) the individual is or was an official of a public authority and the information relates to his or her function as a public official.

We note that subsection (iv) does not appear in the ICJ Kenya memorandum and we urge for its inclusion in your advocacy on the draft Law. Such information should always be publicly available in order to effectively monitor the proper functioning of government and the uncovering of any corruption or improper practices.

We recommend some redrafting of Section 6(d) to bring it in closer alignment with the standards under international law. We advocate for drafting which is in accordance with the terminology of the test at international law, namely to restrict the exemption to disclosure which "causes serious prejudice to the legitimate commercial or financial interests of a public body", rather that "cause unreasonable damage to the competitive or negotiating position of a public authority…", which may encompass information which should legitimately be subject to disclosure. We consider that to seriously prejudice legitimate interests is qualitatively different from causing unreasonable damage, and imposes a higher threshold test.

The drafting of Section 6(e) is very cumbersome and difficult to measure in practical terms. The provision also potentially incorporates matters which are appropriate for disclosure and public discussion. We advocate for a much simpler formulation which also encompasses an appropriate threshold test and the requisite causal connection:

> (e) cause serious prejudice to the ability of the government to manage the economy of Kenya.

It is critical that both Sections 6(d) and 6(e) are subject to an overriding requirement of disclosure where the information reveals a serious public safety or environmental risk. We advocate for the inclusion of a further subsection in Section 6, ideally above Section 6(2), in the following terms:

> (2) Sub-clauses (d) and (e) do not apply insofar as the request relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

Section 6(f) requires a higher threshold test, from 'damage' to 'significantly undermine'. Given the significance of such deliberations, it is essential that as much information as

possible is available to the public, short of seriously damaging a public authority's ability to conduct its affairs. A risk of serious harm is the standard under international law and any exemption must meet this standard. Any restriction on freedom of information needs to be drafted in the least restrictive manner and be closely linked to the likelihood of harm. A mere threat of some damage, however small, to a public authority's ability to fulfil its functions is not sufficient.

In relation to Section 6(g), we recommend rewording the provision more clearly to incorporate the legal privilege test. This is the appropriate scope of protection for such information and it strengthens the provision, and the draft Law overall, to apply the judicial standard. We propose the following drafting drawn from the ARTICLE 19 Model Freedom of Information Law:

> A public authority may refuse to indicate whether or not it holds a record, or refuse to communicate information, where the information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.

In regards to Section 6(2), we note ICJ Kenya's successful advocacy for the inclusion of an overriding disclosure in the public interest provision, which is one of the most essential features of an access to information regime. We also note that a broad formulation of the public interest in disclosure test has been implemented, which is commendable. The test is formulated in terms of the overriding "democratic interest" in disclosure and matters such as promoting informed public debate (Section 6(3)(c)) and promoting accountability of public authorities are explicitly included (Section 6(3)(a)).

Recommendations

- We recommend inserting a further subsection into Section 4 to expressly recognise that the right of access is subject only to the limited and specific exceptions outlined in Part I of the draft Law;
- We consider that Section 6(a) should be redrafted as "to cause serious prejudice to the national security of Kenya";
- We recommend that Section 6(c) should be expressed as referring to a "natural third party" and as subject to the restrictions which are outlined above;
- We also recommend Section 6(d) should be redrafted to restrict the exemption to disclosure to information which "causes serious prejudice to the legitimate commercial or financial interests of a public body";
- We consider Section 6(e) is cumbersome and difficult to apply in practice. We recommend the redrafting in the following terms: "cause serious prejudice to the ability of the Kenyan government to manage the economy of Kenya";
- We consider that Sections 6(d) and 6(e) must be subject to an overriding disclosure in the public interest provision, where the information concerned reveals a serious public safety or environmental risk;
- We consider that Section 6(f) requires a higher threshold test, from "damage" to "significantly undermine"; and
- We recommend that Section 6(g) should be redrafted to more clearly incorporate the legal privilege test.

3.4 Procedures for Accessing Information

3.4.1 Public Information Officers

The deeming provision in Section 8(2) is a strong provision bolstering the public information officers component of the draft Law. In our opinion, Section 8 is a well structured provision and we do not consider there are any amendments necessary to bring the provision into compliance with standards at international law. We do recommend a slight restructuring of Section 8, to enhance the accessibility of the provision. We would recommend moving Section 8(4) to above Section 8(2), and swapping Section 8(5) with Section 8(6).

3.4.2 Providing Access to Information

While we may not be aware of the whole range of factors contributing to the drafting of Section 12(4)(b), we consider this provision to be of some concern. In order to promote maximum disclosure of information we would presume that all information requested should be available in either English or Kiswahili, as the Kenyan official languages. From the range of provisions in the draft Law, it appears that its working basis is English and Kiswahili (see Sections 9(1) and (3), 12(4)(a)); however, Section 12(4)(b) undermines this. We recommend that Section 12(4) is redrafted to reflect that all information should be available in Kiswahili and/or English and the translation of information is not left to the discretion of the head of the concerned public authority.

3.4.3 Fees

Section 15 is a strong provision of the draft Law, imposing minimal fees for access to information. We recommend some redrafting of Section 15(4) to make the provision clearer and extend its scope to waiving fees payable for accessing personal information. Further, we recommend that where the accessing of the information is in the public interest, the fee exemption should be mandatory rather than discretionary. Payment of a fee should be determined on principle (that is, requests in the public interest should not be subject to a fee) rather than determined on the substantive value of the particular information requested. One particular aspect of Section 15(4) which needs to be amended to reflect this is the substitution of "disclosure" for "request". We recommend the following overall drafting for Section 15(4):

> Payment of a fee to access the information shall not be required for requests for personal information, and requests in the public interest. A public information office may waive the any fee where the payment of the fee may cause financial hardship to the applicant.

We suggest the insertion of the following definition of "personal information" into the definition section to accompany the redrafting of Section 15(4):

> "personal information" means information which relates to a living individual who can be identified from that information.

In the interests of clarity, we would recommend clarifying that Section 15(5) applies only to requests for information which have been granted. This would avoid unnecessary disputes on the basis that a request which has not been considered within the time limits might be subject to the information being disclosed free of charge. While this would be an

impractical reading of the provision, there is some argument to be raised, as there are a range of time limits within the relevant Part, including the time limits applying to the processing of requests. Accordingly, we recommend the following redrafting of Section 15(5):

> (5) Notwithstanding anything in this section, a successful applicant shall be provided with the information free of charge where the public authority fails to comply with the time limits in this Part.

3.4.4 Correction of Personal Information

Maintaining the integrity of public records is one of the key objectives of an access to information regime and this is reflected by the express reference to this in the Preamble of the draft Law. Records containing personal information should be correct and not misleading, and every person should have the right to inspect records to ensure this is the case.[27] The justification for ensuring that there is no "irrelevant" personal information contained in public records is, however, less clear. It is more difficult to establish that irrelevant personal information in public records is significantly adverse to the individuals' interests. Furthermore, it places an onerous burden on public authorities to ensure that all personal information contained in records is not only correct but also relevant.

Accordingly we recommend that "irrelevant" is deleted from Section 16(1).

Also, we consider that there should not be a requirement that the information is not only incorrect or incomplete, it is also adverse to the individual's interests (Section 16(1)). It is sufficient that the information is incorrect or incomplete. We recommend this requirement is deleted from Section 16(1).

Recommendations

- We recommend re-ordering some of the subsections of Section 8 to make the provision more accessible – we recommend moving Section 8(4) to above Section 8(2), and swapping Section 8(5) with Section 8(6);
- We also recommend that Section 12(4)(b) should be redrafted to reflect that all information should be available in Kiswahili and/or English and this should not be left to the discretion of the head of the concerned public authority;
- We propose that Section 15(4) should be redrafted to make the provision clearer and extend its scope to waive fees payable for accessing personal information. Suggested drafting for Section 15(4) is outlined above;
- We recommend clarifying Section 15(5) to apply only to successful requests for information;
- We recommend deleting "irrelevant" from Section 16(1); and
- We recommend deleting the requirement from Section 16(1) that the incorrect or incomplete information is adverse to the individual's interests.

[27] This is expressly stated in Principle IV of the Declaration, as discussed at Section 2.1.

3.5 The Information Commissioner

3.5.1 Appointment of the Information Commissioner

We consider the proposed system of appointment has a number of serious flaws which must be redressed. The system fails to incorporate any participation by the public in the nomination process, which is highly desirable in order to engender public awareness and confidence in the access to information regime. Ideally, also, following the public consultation period, the nomination of a candidate should be reached by a two-thirds majority vote of Parliament, and only then should the candidate by appointed by the President. Presently, the appointment systems affords the President a very wide range of political discretion in selecting a candidate and the subsequent approval process by Parliament is couched in broadly-drafted terms which arguably make it difficult for Parliament to challenge the President's choice.

Accordingly, we propose the appointment system is reversed and a period of public consultation and the publication of a shortlist of candidates precedes this. The appointment of the Information Commissioner is absolutely fundamental to the success or otherwise of the access to information regime. As noted in Principle 5 of ARTICLE 19' *The Public's Right to Know: Principles on Freedom of Information Legislation*, the independence of the oversight body charged with monitoring the access to information regime is critical to the proper functioning of the regime. This independence must be guaranteed formally as well as through the process by which its head and/or board is appointed.[28] Principle 5 also states that, in relation to the appointment of the head of the oversight body, such as the office of the Information Commissioner:

> 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.[29]

At the absolute minimum, we recommend that the draft Law is amended to require the President, at the very least, to provide a shortlist of candidates for Parliament's consideration.

In the Angolan law, there is a system of nominations and appointments from civil society organisations for the central disclosure body. In the South African law, the Human Rights Commission, which is an independent organisation, is responsible for the oversight of the freedom of information legislation. Both of these mechanisms do not engage significant political discretion of the President, as is presently the case in the draft Law.

We consider that Section 17(2)(c) needs to be drafted more narrowly in order to protect the tenure of the Information Commissioner. We agree that it is important that any candidate has not been convicted of a crime of dishonesty or violent crime, either at the time of his or her appointment or during the term of office. Other than this, we recommend the provision should be redrafted to remove criminal charges pending against him or her. Only a

[28] ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999), Principle 5.
[29] *Ibid*, Principle 5.

conviction for a crime of dishonesty, proved in accordance with internationally accepted legal principles, should be grounds for disqualification or removal from office. As outlined below, we also consider that a breach of the requirements of Section 17(2) could legitimately be grounds for removal. These are the base requirements for no conflicts of interest and ability to perform the role of Information Commissioner. Finally, it is feasible that criminal charges are brought against the Information Commissioner as a means of ending his or her term of office, which raises the possibility of political interference with the independence of the office of the Information Commissioner. Accordingly, we recommend the following redrafting of Section 17(2)(c):

> has not been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime and/or a crime of dishonesty or theft, for which he or she has not been pardoned;

In regards to Section 17(4) we recommend advocating for an increased length of tenure for the Information Commissioner, from three years to seven years. Seven years is the standard term we recommend in the ARTICLE 19 *Model Freedom of Information Act*. We recommend this length of office for two reasons. Firstly, it is a safeguard against each successive Parliament appointing a new Information Commissioner who they favour. Secondly, it is a reasonable period for the Information Commissioner to achieve results in terms of building up the requisite expertise, establishing and running an effective monitoring of the access to information regime, and completing any independent investigations needed for breaches of the regime. We consider that a three year term is not sufficient to achieve this.

3.5.2 Office of the Information Commissioner

In the express protection of the Information Commissioner's autonomy in Section 18(1), we recommend the usage of the phrase "operational and administrative autonomy" as an appropriate safeguard of his or her functions. Accordingly we recommend the following drafting:

> The Information Commissioner shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies.

We also consider that there should more explicit protection of the baseline functioning of the office of the Information Commissioner. Firstly, we suggest the following provision drawn from the ARTICLE 19 Model Freedom of Information Law be inserted after Section 18(1):

> The Information Commissioner shall have all powers, direct or incidental, as are necessary to undertake his or her functions as provided for in this Act, including full legal personality, and the power to acquire, hold and dispose of property.[30]

Secondly, we recommend inserting a 'General Activities' section for the office of the Information Commissioner in Part IV of the draft Law. This will serve to ensure that the Information Commissioner is empowered to undertake the range of functions necessary to properly implement and monitor the access to information regime. It also strengthens the perception and reality of the access to information regime as one which is enforceable –

[30] ARTICLE 19 Model Freedom of Information Law, s 35(2).

that there is proactive review and audits taking place of public authorities, and positive measures being taken to change existing workplace culture and bureaucracy. We recommend the following drafting from the ARTICLE 19 Model Freedom of Information Law:

> In addition to any other powers and responsibilities provided for in this Act, the Commissioner may: –
> (a) monitor and report on the compliance by public bodies with their obligations under this Act;
> (b) make recommendations for reform both of a general nature and directed at specific public bodies;
> (c) co-operate with or undertake training activities for public officials on the right to information and the effective implementation of this Act;
> (d) refer to the appropriate authorities cases which reasonably disclose evidence of criminal offences under this Act; and
> (e) publicise the requirements of this Act and the rights of individuals under it.

3.5.3 Removal of the Information Commissioner

We consider that the grounds for removal outlined in Section 19(1) for the removal of the Information Commissioner are currently too broadly drafted. At the very least, we recommend "proved misbehaviour", requiring a judicial standard of proof, and further, we recommend that the scope of "misbehaviour" is given greater clarity to ensure that the Information Commissioner is only removed for conduct which is reasonably considered inconsistent with the holding of such office.

"Inability to exercise the functions of the office" is a reasonable requirement for the removal of the Information Commissioner. "For any other cause" introduces an uncertain aspect into the provision, however, suggesting that the Information Commissioner could be removed for what is considered a conflicting interest, such as holding a directorship on a company board or other such position. We consider removal is too extreme a reaction for such a scenario. It would be more appropriate to call for the Information Commissioner to take appropriate action to remove the conflicting interest and only then should failure to do so result in removal.

Also, we consider making a breach of the requirements of Section 17(2) to be legitimate grounds for the removal of the Information Commissioner, and we recommend inserting a subsection into Section 19(1) to reflect this.

In regards to the appointment of the Tribunal under Section 18(3), we have some concern about the threshold in 3(ii), namely persons qualified to be appointed as judges of the High Court. This appears to us to be a very broad group, potentially anyone who is legally qualified. If this is the case, we would recommend the removal of this provision, leaving only 3(i) as the qualifying criteria. This would be an appropriate restraint on the President's otherwise extensive discretion in selecting the members of the Tribunal.

Recommendations

- We recommend amending the proposed process for the appointment of the Information Commissioner in Section 17 to include a period of public consultation, a shortlist of candidates and voting by the Parliament;

- We also recommend amending Section 17(2) to better protect the tenure of the Information Commissioner;
- We consider Section 17(4) should be amended to increase the length of tenure of the Information Commissioner from three to seven years;
- We recommend expressly referring to the "operational and administrative autonomy" of the office of the Information Commissioner in Section 18(1);
- We recommend inserting an additional subsection in Section 18(1) to better protect the baseline functioning of the office of the Information Commissioner. Suggested drafting is outlined above;
- We recommend inserting a "General Activities" section for the office of the Information Commissioner in Part IV of the draft Law. Suggested drafting is outlined above;
- We recommend amending Section 19(1) to clarify the circumstances under which an Information Commissioner can be removed from office, including "proved misbehaviour" and the removal of "for any other cause", as well as inserting a provision allowing the removal of the Information Commissioner if any of the provisions of Section 17(2) are not met; and
- We recommend considering the deletion of Section 18(3)(ii) to restrict appointment of members of the Tribunal to present or past judges.

3.6 Appeals and Oversight

3.6.1 Internal Review

This is a strong provision of the draft Law and provides a clear, enforceable and efficient review mechanism. Our only recommendation is to articulate more clearly in Section 20(2) that the appellate authority is required to give written reasons for denying the appeal, and set out in a notice of refusal the applicant's right of further review and any applicable time limits.

3.6.2 Appeal to the Information Commissioner

Again, this is a good provision of the draft Law and our main recommendations are procedural ones. Firstly, we recommend that the draft Law explicitly specifies in s 21(2) that the right of review re-arises after Section 20 has been complied with. We also recommend that perhaps under Section 20(2) the Information Commissioner should be able to request an extension of time before the matter is automatically open to appeal to the High Court, as per Section 20(12). In relation to Section 20(8), it would be useful to note that decisions of the Information Commissioner are not only binding on all parties, but are also enforceable by the High Court. Finally, it may be useful to note in Section 20(11) that the Minister does not have the power to veto Rules drafted by the Information Commissioner.

3.6.3 Appeal to the High Court

It may be helpful to explicitly state in Section 22 that the High Court considers appeals *de novo* rather than being limited to points of law.

3.6.4 Offences and Penalties

In Section 24(1)(e) no indication is given whether an offence falls under sub-category (i) or (ii), this needs to be redrafted.

In Section 25(1), we strongly urge the redrafting to ensure that only a court is able to impose criminal liability on an individual or body, rather than granting such a power to the Information Commissioner or an appellate authority, who are both merely bureaucratic bodies. The Information Commissioner and an appellate authority must be limited to referring potential cases to the state prosecution service.

Recommendations

- We recommend amending Section 20(2) to require the appellate authority to give written reasons for denying the appeal and set out the applicant's further right of review and applicable time limits;
- We recommend redrafting Section 21(2) to expressly note that the right of review re-arises after Section 20 has been complied with;
- We recommend considering amending Section 20(2) to allow the Information Commissioner to request an extension of time before the matter is automatically open to appeal to the High Court;
- We recommend considering amending Section 20(11) to expressly state that the Minister does not have the power to veto Rules drafted by the Information Commissioner;
- We recommend considering amending Section 22 to expressly state that the High Court considers appeals *de novo* rather than being limited to points of law;
- We recommend amending Section 24(1)(e) to indicate whether an offence falls under sub-category (i) or (ii); and
- We recommend deleting the provisions in Section 25(1) which purport to grant the appellate authority and the Information Commissioner to impose criminal liability on an individual or organisation.

3.7 Measures to Promote Open Government – Obligation to Publish

We note that ICJ Kenya has successfully advocated for a strong and comprehensive proactive disclosure regime in Section 7 of the draft Law. Our main recommendation is that Section 7(1)(xvii) should be amended to anonymise the applications data. There is no reason why this information should necessarily be made public and there no public interest justification in its disclosure. Rather, it represents an unjustified incursion on the right to privacy of persons making requests for information, and may undermine the efficacy of the disclosure regime if applicants know their requests will be made public.

Recommendations

- We recommend amending Section 7(1)(xvii) to anonymise the data concerning requests for information.

3.8 Protection of Whistleblowers

Section 26 outlines a detailed mechanism for the protection of whistleblowers. This is a particularly strong provision of the draft Law. We particularly welcome Subsections (3),

(4), (5) and (6), which provide strong legal protection to all 'whistleblowers'. Our main recommendation is that it might be helpful to add an interpretative paragraph to provide examples of when a release is in the public interest. Such a paragraph could provide that the release of information that discloses evidence of wrongdoing or a serious threat to health, safety or the environment will always be deemed to be in the public interest. So long as this interpretative provision is couched in illustrative terms, and not used as an exclusive list, it could provide important assistance in the understanding of whistleblower protection.

Second, we doubt whether it is right that an information release can be protected only if the information was obtained 'in confidence'. This seems like an unnecessary restriction and we recommend that it is removed from the draft Law.

Recommendations

- Consideration should be given to adding an interpretative paragraph elaborating when the release of information will be in the public interest.
- Whistleblower protection should not be limited to information obtained in confidence.

3.9 Miscellaneous

3.9.1 Protection of bona fides actions

In relation to the protection of bona fides actions under Section 27, we recommend inserting a requirement that the person acted both reasonably and in good faith. We also recommend expressly noting that no person should be subject to any employment detriment as a result of their actions.

Recommendations

- We recommend amending Section 27 to insert a requirement that a person is only protected if he or she acted both reasonably and in good faith; and
- We recommend amending Section 27 to include that a persons should not be subject to any employment detriment as a result of their actions.