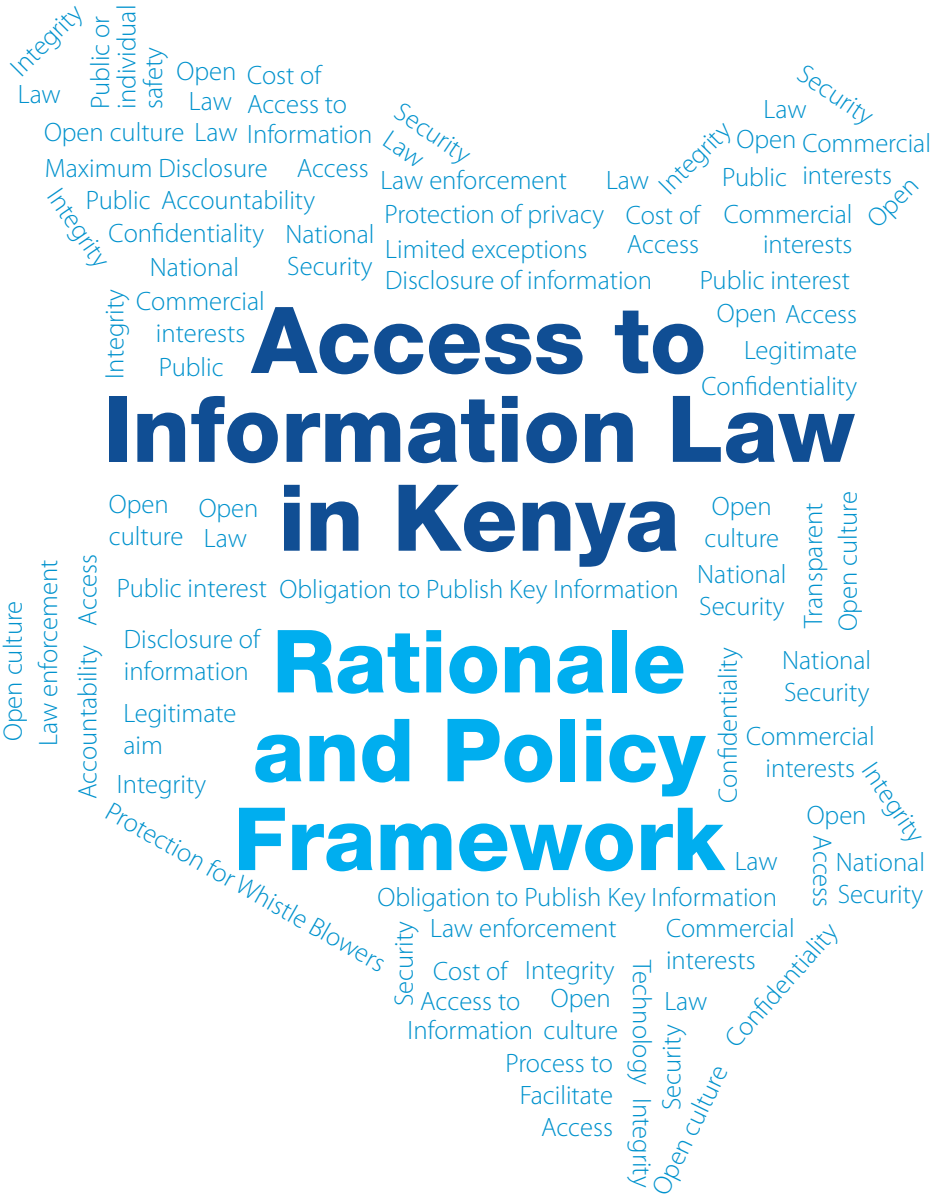

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icj International Commission of Jurists KENYAN SECTION | Since 1959

Access to Information Law in Kenya: Rationale and Policy Framework

Research Prepared for The Kenyan Section of the International Commission of Jurists (ICJ Kenya) by Dr. Collins Odote

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Table of Contents

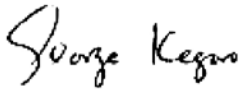
Foreword

The right to information remains one of the most fundamental rights world over. This owes largely to the central role it plays in realization of other rights and democratic principles. The promulgation of the Constitution of Kenya 2010 brought a major boost to the freedom of information campaign with the recognition of the right to information. The right is recognised and safeguarded under Article 35 of the Constitution, 2010 and in several statutory legislation key amongst them being under Section 96 of the County Government Act, 2012. Further, the Constitution of Kenya recognizes that ratified international instruments and conventions as forming part of the law of Kenya. As such, provisions on the right to information provided for in the African Charter on Human and People's Right and the International Convention on Civil and Political Rights apply in Kenya.

Despite that there has been tremendous progress made by the Government to realize the right, the lack of a comprehensive policy and legislative framework devoted to effectualise the right is a major setback to its effective realization. In the absence of enforcing legislation, there is also an absence of legally ordained procedural mechanisms for enforcing the right. As a result, it remains unclear how a citizen can initiate a request for information, how the relevant government departments should deal with requests for information that they may receive, or how grievances about delay or refusal to provide information requested for may be handled.

Through this research, ICJ Kenya seeks to lay a policy foundation and rationale for the enactment of an access to information law in Kenya through highlighting the existing constitutional and statutory frameworks in the country and also provide comparative lessons from select jurisdiction on their existing legislative frameworks that govern the right.

It is ICJ Kenya's pleasure to avail this publication as a contribution to the field of access to information and the ongoing advocacy efforts for the enactment of an access to information legislative framework in Kenya.



George Kegoro
Executive Director

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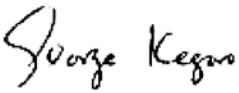

George Kegoro
Executive Director

Executive Summary

Principal Findings of the Study

The right to access information held by public bodies, is now widely recognized as a fundamental human right. However its recognition and adoption in domestic legislation has been slow in realization. The Constitution does not out rightly provide for enactment of the right as has been done with other right and this has been seen to contribute to the non-prioritization for development of a legislative framework. However, the County Government Act, 2012, the key legislation providing for devolved governance, makes provisions requiring County Government to enact legislation on the right under Section 96. Within the African Continent, Article 9(1) of the African Charter on Human and People's Rights provides for the right. Kenya has ratified the Charter and therefore has obligations under Article 1 of the Charter to adopt legislative frameworks to realize its enshrined rights and freedoms. Further, the African Commission on Human and People's Rights, established under the Charter has developed a model legislation that countries can consider adopting to provide the framework for realization of the Right to Information at the national level.

Although that there exists several other statute legislation in Kenya that acknowledge and promote the right to information, there also exists others that have provisions that restrict the right to information in the country. Examples of such legislation that have provisions that may restrict the right include, the Officials Secrets Act Chapter 187, Evidence Act Chapter 80, and Preservation of Public Security Act, Chapter 57.

The campaign for enactment of a legislative framework on freedom of information in believed to have begun in the year 2000. Informed by this campaigns, there have been groups that have argued that instead of one law, provisions on access to information should be provided in in all other legislations while others have preferred development of a single law devoted to the right. This report advocates for both a stand-alone access legislation and inclusion of access provisions in other sectoral legislations.

Recommendations

Some of the key recommendations from the study are as follows:

- The process of enacting access to information should be seen in the larger context of operationalizing the Constitution, a process that requires development of new ethos amongst all segments of society, both public and private.
- It is necessary to have campaigns to promote a culture of openness and transparency alongside efforts for enactment of the law. This would require public officials to be trained and socialized to move away from their previous attitude of secrecy to realizing that information that they hold is held in Public trust and that citizens have a right to seek and access such information.
- Public education and awareness needs to be continuously conducted so as to reduce apathy and ensure that they make use of the access and transparency guarantees to seek information to enable them to fully participate in governance, hold their leaders to account and take advantage of government services and opportunities.
- An effective information access regime is predicated on the existence of an effective record management system. There is need for the country to review and improve its record keeping and retrieval systems. Unless we do so, then information access and its guarantee will continue to be theoretical since most information will not be easily accessible due to poor record management and retrieval. This is becoming a challenge too as related to electronic records.
- There is need to review all the other laws and ensure that they are in tune with access to information law. The inclusion of transparency provisions in laws dealing with public finances, procurement, environment and other aspects of public administration will also be necessary. Special focus needs to be paid to the Official Secrets Act. While there is continued need to keep certain Government information secret, especially in the error of increased terrorism threat, the reverse is also true. An effective fight against security threats and terror require availability of information and cooperation of citizens, an issue that requires access to information. It is therefore necessary that the Official Secrets Act be amended to bring it in line with the need for accessing information.
- The balance between access to information and protection of personal privacy is another critical issue that as a country we have to grapple

with and ensure. Both protection of personal information and access to information are important pursuits for the country and one should not be sacrificed for the other.

- Once access to information laws are enacted in both the national and county levels, citizens must ensure that the law is faithfully implemented through testing the laws and that information once accessed is used.
- There should be a recognition that the right to information is not just an end in itself, it is also a means to ensuring that we create a more prosperous, equitable and developed Kenya one that fights corruption and security threats and that is progressive, inclusive and equitable. This is because access to information alone does not automatically translate to increased accountability or increased awareness of released information.

CHAPTER

1

Background

The 21st century can correctly be described as the information century. It has and continues to be characterized by tremendous revolution in the information sector from the development of computers, mobile phones to the internet. These developments have made communication much faster and information more easily accessible. However, *"although we live in an age of information, where knowledge can be accessed and shared at the click of a button, and span the globe in an instant, a lack of information continues to frustrate people's ability to make choices, participate in governance and hold governments accountable for their actions."*[1] Many countries and governments still hold on to the age where the official mantra of government was secrecy. Such approaches to government made public information restricted in their circulation and availability.

In a democracy, however, access to information is both a fundamental rights issue as well as a practical sense question. From a governance perspective, an operational representative democracy is one where the public are involved in governance and help shape public policy and public decision-making. To do so requires information so that the participation is informed and meaningful. An uninformed public participates in governance based on rumours and guesswork. This is inimical to democracy. On the other hand an informed society makes governance more enlightened and people-focused. This is because Knowledge educates and empowers. Knowledge forms the basis for the full development of the human personality, enabling people to form opinions, to make informed decisions and to participate fully in public decision making from a position of equality. As Francis Bacon once said, *"Knowledge is power."*[2]

1 Commonwealth Human Rights Initiative, Our Rights: *Our Information, New Delhi, India, 2007 page 10.* Available at *http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf.*

2 The Latin phrase 'Ipsa Scientia Potestas Est' can be found in Bacon's Meditationes Sacrae (1597) quoted at *http://www.quotationspage.com/quotes/Sir_Francis_Bacon.*

Theoretical arguments for the right of access to information derive from the whole idea of representative democracy. In a democracy, government exists to serve the people. The Kenyan Constitution captures this through article 1 on sovereignty of the people. Consequently, decisions and actions that government take are as a result of sovereign power granted to them by the people through the Constitution. In the process of governing, governments collect and stores information. Such information is a public good and should be available to the public. *"In democracies, the government exists only to represent and act on behalf of the people. The information it gathers is done for the public benefit, with public funds, for public purposes. The collection, use, storage and retrieval of information are all carried out for the sake of the wider public good. People have a right to have access to that information; to seek it and also to receive it."*[3]

Against this reality, access to information has been recognized in international Conventions, national Constitutions and national laws, initially as part of Freedom of Expression and more recently as a stand-alone human right. The first nation to recognize the right in its legal system was Sweden, which in 1776 enacted a law guaranteeing the right of the Press to seek, obtain and publish information held by Government. The passage of the law in Sweden, largely motivated by Parliament's interest in access to information held by the King was followed by Finland in 1951, followed by the United States, which enacted its first law in 1966, and Norway, which passed its laws in 1970. Since Sweden's actions, the right to information invariably referred to as freedom of information, access to information or right to know has gained worldwide international recognition. As of September 2013, at least 95 countries had nationwide laws establishing the right of and procedures for the public to request and receive government-held information.[4] In January 2014, Maldives signed into law the Right to Information Act, becoming the 99th Country to do so.[5] Of these 99 countries, 14 are in Arica.[6]

With the passage of the Constitution in 2010, Kenya joined the list of countries that recognize and guarantee the right of access to information. The inclusion of the right in the Constitution is a useful first step. There is need for supportive policy and legislative framework. The desire for an access to information law is, however, one that predates the adoption of the Constitution. Constitutional

3 Supra, note 1.
4 See *http://www.right2info.org/access-to-information-laws.*
5 See *http://freedominfo.org/documents/Countriesaccesslist.pdf.*
6 These include: Angola, Ivory Coast, Ethiopia, Guinea, Liberia, Namibia, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, Tunisia, Uganda and Zimbabwe.

guarantee only serves to give impetus to those efforts that have been spearheaded in the past by several stakeholders in the country including the Ministry of Information, the media, Civil Society, private sector and religious bodies.

Against the above background this publication seeks to lay a policy foundation and rationale for the enactment of an Access to Information Law in Kenya. The publication is divided into eight sections. Section two discusses the international legal framework guaranteeing access to information, followed by a brief highlight of the Kenyan legal and Policy framework in Section three. In Section four, the publication looks at the experience of four countries with access to information law. Section five then provides a rationale for an access to information law for Kenya while section six summaries the key provisions that should go into that law while section eight concludes the publication.

CHAPTER

2

International Framework and Standards

The right to freedom of information, commonly understood as the right to access information held by public bodies, is now widely recognized as a fundamental human right.[7] However its recognition and adoption in domestic legislation has been slow in realization. This is despite the inclusion of access to information as part of the Freedom of Expression. When the *Universal Declaration of Human Rights* was adopted in 1948, access to information was captured in Article 48 of the Declaration thus:

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

This was an affirmation of a resolution in 1946 by the United Nations General Assembly at its first session when it resolved that:

> "*Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated.*"[8]

The inclusion of access to information in Article 19 was given binding recognition in 1966 with the adoption of the International Covenant on Civil and Political Rights (ICCPR). The wording of the Article in the ICCPR is similar to that in the Universal Declaration on Human and People's Rights (UDHR). It provides that:

7 Mendel. T. Freedom of Information: A Comparative Legal Survey (UNESCO, 2003) available at *http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf.*

8 Resolution 59(1), UNGA, 14th December 1946.

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

While Article 19 of both the UDHR and ICCPR principally focus on freedom of expression, subsequent clarifications have provided that access to information is not just an appendage of freedom of expression but a distinct right on its own. This point has been made over the years by the UN Special Rapporteur on Freedom of Opinion and Expression. The Rapporteur was appointed by the UN Human Rights in 1993.[9] in the 1998 Annual Report, The Special Rapporteur made the case for freedom of information as a distinct right by providing that *"(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. …"*[10] This view was endorsed by the Human Rights Commission.[11] In The Annual Report for 2000, the Special Rapporteur further elaborated on the right to information, including detailing principles that should be included in legislation at the national level dealing with the right to information.[12]

Within the African Continent, Article 9(1) of the African Charter on Human and People's Rights provides that *"every individual shall have the right to receive information."* This was elaborated on by the African Commission on Human and People's Rights in 2002, when it adopted A *Declaration of Principles on Freedom of Expression in Africa.*[13] The Declaration underscored that *"public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information."*[14] It then details what is expected in ensuring that the right to information is protected in states party to the Charter in the following terms:

"The right to information shall be guaranteed by law in accordance with the following

9 Resolution 1993/45, 5 March 1993.

10 Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression,UN Doc. E/CN.4/1998/40, 28 January 1998, Para. 14.

11 Resolution 1998/42, 17 April 1998, Para. 2.

12 Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, Para. 42 and Annex 2.

13 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, the Gambia. Available at *http://www.achpr.org/sessions/32nd/resolutions/62/.*

14 Ibid

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 principle."*[15]

In addition the Commission has developed a model legislation that countries can consider adopting to provide the framework for realization of the Right to Information at the national level.[16] Right to information is also recognized within the context of anti-corruption initiatives in the continent. Towards this end, the African Union's Convention on Preventing and Combating Corruption, provides that every State adopt: *"legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences."*[17]

The Right is also recognized in regional Conventions in Europe, Asia and the Americas. Within the Commonwealth, The Right to information has been held for long to be a fundamental human right starting from the Declaration in 1980 by, the Commonwealth Law Ministers through a communiqué in Barbados that *"public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."*[18] Further, in 1999 following the work of an expert group put together by the Commonwealth, the Commonwealth Law Ministers at a meeting in 1999, in Trinidad and Tobago adopted Principles and Guidelines on Freedom of Information, providing that:

15 Ibid.

16 For the content of the Model Law on Access to Information for Africa see *http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.*

17 Article 9, African Union (2003) Convention on Preventing and Combating Corruption, 11 July, *http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf.*

18 See *http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards.htm.*

"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."[19]

In addition the Commonwealth Secretariat has developed a model law on freedom of information to guide countries that have yet to enact laws providing for access to information.

One of the ground-breaking regional instruments on access to information has been adopted by Europe, and is called the *Arhus Convention.* Although dealing with access to information in environmentally matters only, the regional instrument provides a useful model for the rest of the world. Adopted in 1998, by the Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union the legally binding Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)[20] the Convention is the first legally binding instrument which sets out clear standards on access to information. It deals with both public response to request for information and proactive disclosure of environmental information.

Internationally, therefore, access to information has grown in its recognition, initially as part of Freedom of expression to a distinct right and originally as a civil and political right to the foundation for the realization of all other rights.

19 Communiqué, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
20 UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the *"Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.*

CHAPTER

3

Kenyan Legal and Policy Context for Access to Information

(a) Constitutional Context

The policy foundation for a Right to information is the Constitution adopted in 2010. The overriding focus of the Constitution is the need for a society built on the foundations of democracy and the rule of law. This is evident from the manner in which these ideals transcend all the chapters of the Constitution. The preamble of the Constitution, whose purpose is to signal the impetus and goal of the Constitution, stresses that the Constitution is adopted out of the desire by Kenyans to ensure that government is based on the values of human rights, equality, freedom, democracy, social justice and rule of law. This underscores the place of the Bill of Rights in the entire scheme of the constitutional arrangements. In addition, Article 10 of the Constitution on the values and principles of governance restate the place of adherence to the rule of law and respect for human rights.

As stated, access to information is not only part of human rights guaranteed to individuals in democratic societies but also a fundamental right necessary for the enjoyment of the rest of the rights. The Constitution recognizes this fact and expressly recognizes the right to access information as a distinct right in tune with modern trends and not just as aright subsumed under the provision on Freedom of Expression as was the case with the country's previous constitution.

Article 35 of the Constitution stipulates that :

"***35(1) 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.***

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

(3) The state shall publish and publicize any important information that affects the person."

The above article signals the desire of the country to ensure accessibility of information as an essential aspect of democratic governance in Kenya. Information access is expanded to include not just those in the hands of the state, but those in private hands, the only limit being that for those in private hands, to be accessed they must be necessary for the protection of a right or a fundamental freedom. The caveat aptly demonstrates the internationally recognized importance of the access to information as a basis of the enjoyment of all the rights and freedoms in society.

The importance of access to information is also evident from the directions given to courts by Article 20(4) of the Constitution to ensure that in interpreting the Constitution they ensure that they do so in a manner that is consistent with an open and democratic society. An open society is one where access to information and transparency are basic and guiding hallmarks. In essence the Constitution signals Kenya's commitment to access to information. This is further buttressed by Article 10 on national values and principles of governance that commits all to the rule of law, democracy, participation, good governance transparency and accountability. Right to information is also a requirement and value of the Public Service. All those who serve in the Public Service are required by Article 232 of the Constitution to abide by the value of *"transparency and the provision to the public of timely, accurate information."* This underscores the fact that in implementing Article 35 of the Constitution, the Public Service has to ensure that access to information by citizens is facilitated in a timely manner and that the information that is given out is accurate and not false or misleading. Devolution too captures the aspects of access to information with its object of promoting democratic and accountable exercise of power. A reading of the Constitution affirms the fact that the words accountability and transparency flow through all chapters of the Constitution, an affirmation of the importance of access to information for the implementation of the Constitution and the entrenchment of a democratic culture in Kenya. It is at the heart of the new Kenya that the Constitution ushered in in August 2010.

The Right to information is captured in Article 35 after two related rights of expression and the media. For long, the right to information was seen as part of that of expression. In addition the media plays a very critical role in disseminating information to the public hence the link. As some authors have correctly pointed out in regard to Article 35 of the Constitution, *"The right to information is closely linked to the freedom of speech and expression because the prerequisite for enjoying the latter rights is knowledge and information."*[21]

A Key debate relates to limitations to the right to information. The extent of exceptions to access as a rule is subject to international discussions, with consensus that limitations must be clearly stated in law and narrow in scope. In the Kenyan context, Article 24 is instructive. It provides that the right of access to information, like all the rights in the Bill of Rights, can be limited by law, only to the extent that that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation;(c) the nature and extent of the limitation;(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. What this means in practice will require clear elaboration in statute.

The implementation of the Bill of Rights requires several measures including legislative, policy and administrative action. It is in this light that an assessment of the current legislative and policy framework on access to information has to be undertaken so as to ensure that it is facilitative and not counter to the constitutional dictates.

(b) Legal and Policy Framework on Information Access

Kenya does not currently have a dedicated law on Access to information. This means that the only solid foundation for access rights is the Constitution. There are other laws that have provisions that touch on process of and position relating to accessing public information. A summary of these and their content help to make the case for enactment of an Access to information Act.

21 Lumumba, PLO and Franceschi, L., *The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press, Nairobi, 2014) at page 176.

Kenya still has in its statute books the *Official Secrets Act*.[22] The intention of the legislation, as the name suggests was not access to information but its restriction. The preamble of the Act, provides that it is *"An Act of Parliament to provide for the preservation of state secrets and state security."*[23] The Act in its language and intent focuses on protection of disclosure of information held by the state and not on facilitating access. So much so that it has been stated that *"it elaborates on the Constitutional exception to the right …..as opposed to an endorsing legislation."*[24] Part II of the Act titled Protection of the safety and interests of the Republic contains provisions which make it an offence for anyone to disclose information in a variety of circumstances. Forming the bulk of the statute, the law ends up being one focused on promoting non-disclosure and not promoting disclosure. Being the main legislation, the upshot of the legislation is to turn the approach of government to one of restricting and not facilitating the right of access to information. This mantra is augmented by the undertaking that all public servants sign on employment, an undertaking whose import is to promote secrecy in the interests of public safety, public security and public interest, terms that are not fully elaborated on in the Act.

The culture of restrictions of access to information is further carried through in several other laws found in our statute books. A sampling of a few of them will suffice. Section 4(2) (d) of the Preservation of Public Security Act[25] allows the President to make regulations for the preservation of Public Security on several grounds including *"the censorship, control, prohibition of the communication of any information, or any means of communicating or of recording ideas or information including any publication or document, and the prevention of the dissemination of false reports."* The Act, therefore gives the government wide powers to restrict the circulation of information which is in the custody of the State. Section 52 of Penal Code empowers the Minister of Internal Security to ban the importation or production of any publication on grounds of, inter alia, national security.

As regards limitation on grounds of public policy, Sections 131-133 of the Evidence Act, for example, give officials wide discretion to decide whether (or not) the release of any information that they hold could be prejudicial to public policy. If the response is in the affirmative, this information will not be released.

22 Chapter 187, Laws of Kenya.
23 Ibid, Preamble.
24 ICJ (Kenya Section, *The State of Freedom of Information in Kenya, (*Nairobi, 1999) page 14.
25 Chapter 57, Laws of Kenya.

Remarkably, there are no requirements for appeal or review, nor are the officials required to assign any reason for their decision. Besides, Sections 9, 11, 12 and 13 of the Films and Stage Plays Act place restrictions on those who intend to make movies, run exhibitions or display posters in the sense that all these activities can be stopped by a police officer or the Board of Censors. Like the Evidence Act, this legislation does not contain any provision for appeal nor does it require a police officer to assign any reason for his or her decision. Further, any person who fails to comply with such an order shall be liable for prosecution.

However, not all legislations seek to restrict access to information. Both pre and post August 2010 legislation contain provisions that encourage access to information. The Public Archives and Documentation Service Act[26] provides for the preservation of public archives and public records. Record keeping is an essential component of ensuring access to information, hence the importance of this law. The law provide for access to public archives after thirty years but subject to the laws of prohibiting or restricting disclosure.

Secondly, there are several pieces of legislation that relates to the media and consequently have implications of access to information. The *Kenya Broadcasting Corporation Act*[27] established the Kenya Broadcasting Corporation as a Government corporation with the task of, amongst other things, *"provid(ing) independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and in such other languages as the Corporation may decide."*[28] The corporation also has the added responsibility of ensuring fair and equitable coverage during the campaign period as part of balancing different shades of political opinion.

For Media operations and regulations, the Media Act[29] and the Media Council Act[30] are also relevant. In addition the Kenya Information and Communication Act[31] as amended in 2013 establishes the Communications Authority of Kenya with responsibility to license and regulate the information and communication sector.

Access to information is also captured in several sectoral legislations and policies. Both the National Land Policy and land legislations put a premium on access

26 Chapter 19, Laws of Kenya.
27 Chapter 221, Laws of Kenya
28 Ibid, Section 8(1)(a).
29 Chapter 411B of the Laws of Kenya
30 Act Number 46 of 2013,
31 Chapter 411 A

to land information. The National Land Commission Act[32] provides that one of the functions of the Commission is to develop and maintain an effective land information management system at national and county levels. The Film and Stage Plays Act[33] has provisions governing access to information by the public.

One of the key aspects of the Constitution is the provision on leadership and integrity. Access to information is critical for operationalizing the provisions of Chapter six on leadership and integrity. The Leadership and Integrity Act[34] links information to integrity and also includes a provision that seeks to protect misuse of official information. While the section prevents disclosure and use of some information it explicitly states that it shall not be misuse of information if that information is to be used for furthering the interests of the Act.

In the fight against corruption, Kenya has enacted several pieces of legislation, with the main one being the Ethics and Anti-corruption Commission Act.[35] An effective anti-corruption strategy pays due regard to disclosure and information gathering and access. The Act recognizes the place of information in the fight against information. It mandates the Commission to regularly publish and publicize information within its mandate affecting the country.[36] The Act seeks to operationalize Article 35 on access to information as relates anti-corruption initiatives, designating the Secretary or such other officer as the Commission shall designate as the person to who requites by citizens for information are to be directed. It includes express circumstances when request for information can be denied, including that:

> *"(a) the request is unreasonable in the circumstances;*
> *(b) the information requested is at a deliberative stage by the Commission;*
> *(c) failure of payment of a prescribed fee; or*
> *(d) failure of the applicant to satisfy confidentiality requirements by the Commission."*[37]

The County Government Act also makes provision for access to information in counties. Several sections of the Act places premium on the role of information in effective devolved governance. Public participation, for example, is predicated

32 Act Number 5 of 2012
33 Chapter 222, Laws of Kenya
34 Act Number 19 of 2012.
35 Chapter 65 A of the Laws of Kenya
36 Ibid, Section 29.
37 Section 29(3).

on the availability of timely information, data and documents.[38] As an aspect of public communication in the counties, county media is required to adhere to the requirement of the constitutional provisions on access to information.[39] County Governments are also required to facilitate public communication and access to information by using media with the widest public outreach in the county.[40] Section 96 of the County Government Act deals exclusively with access to information, guaranteeing every Kenya citizen access to information held by county governments[41] and their units and any state organ as long as they request for it. County Governments are required to designate an officer to deal with access to information[42] and may develop county legislation on access to information.[43]

Government has over the last few years been pursuing a policy on e-government as a tool for enhancing public administration. The Jubilee Government in its election manifesto promised a digital government. An essential element of such a government is not just digitization of information but also easy availability of information. E-government also known as also known as digital government, online government, or transformational government, is defined as the delivery of public information and services through the use of ICTs.[44] Since 2004, the government has been pursuing a policy of e-governance, focusing on having functioning websites, conducting government services through electronic means as evidenced by recent adopting of e-procurement. Such a policy would be in tandem with the drive for increased access to information.

In procurement processes, access to information is important for ensuring transparency. The *Public Procurement and Disposal Act* provisions dealing with access to informtaion. Section 44 of the Act titled disclosure lists instances where disclosure of information is prohibited including those which would prejudice commercial interests and whose disclosure would inhibit fair completion. However, it is stated that such disclosure would be allowed if it is either pursuant to a court order, allowed by regulations under the Act, is for purposes of law enforcement, for review purposes or to a party that participated in the procurement. It is clear

38 Section 87(a), Chapter 265, Laws of Kenya
39 Section 93, Chapter 265, Laws of Kenya
40 Section 95, Chapter 265, Laws of Kenya.
41 Chapter 265, Laws of Kenya at Section 96
42 Ibid
43 Ibid.
44 Heeks, R. (2002). E-government in Africa: Promise and practice. Institute for Development Policy and Management, 13(1), 1-28; Njuru, J.W., *"Implications of E-Government on Public Policy and Challenges of Adopting Technology: The Case of Kenya"* Volume 1(1) Journal of Global Affairs and Public Policy (2011), available at *http://jghcs.info/index.php/ppp/article/view/83.*

therefore that while the law recognizes the necessity for access to information it limits the extent to which it can be available as regards procurement information. This is a further rationale why a more comprehensive legislation on access to information is necessary.

The Public Finance and Management Act also incorporates access to information in public financial matters. The Parliamentary Budget Office has as amongst its duties the responsibilities to comply with Article 35 of the Constitution by ensuring that documents, reports and other documents it produces are published and publicized within fourteen days of publication. The National Treasury, the Intergovernmental Budget and Economic policy Committee, the county treasury, the county executive committee member for finance, and that for planning are all required to publicize information, all aspects of proactive disclosure of information. Section 198 makes it an offence to conceal financial information, which may also be read to mean duty to provide accurate financial information.

Despite the existence of several pieces of legislation on access and the Constitutional provision, there is still a culture of secrecy that permeates public service. Secondly the legislations highlighted above are not only scattered but also contradict each other in several aspects. This supports the rationale for an access to information legislation.

The jurisprudence from case law since the promulgation of the Constitution further buttresses the need for a comprehensive legislation on access to information. The principle case that raises issues on the right of access to information in Kenya is **Famy Care Limited vs. Public Procurement Administrative Review Board & Another *(Petition No 43 of 2012)***, which concerned an open international tender that had been floated by the Government of Kenya through the Kenya Medical Supply Agency(KEMSA) for supply of family planning drug known as *Depo Provera*. The Petitioner, Famy Care Limited, participated in the said tender but was unsuccessful in its bid. Being aggrieved by the tendering process, the petitioner filed a petition before the High Court challenging the procurement process and alleging that certain fundamental rights and freedoms had been breached. Subsequent to that, the Petitioner filed two applications seeking the enforcement of Article 35 of the Constitution of Kenya. As against Kenya Medical Supply Agency, the petitioner sought the minutes of the evaluation and technical reports of the tender, while from Pharmacy and Poisons Board, it sought disclosure of any correspondence between it and any other party concerning a certain drug in the context of the tender in order to enable it prosecute the petition. At the

hearing, the respondents, in particular KEMSA, raised a preliminary objection that the Petitioner was not entitled to seek enforcement of Article 35 on the ground that it was a *foreign company incorporated in India*. The court agreed, and dismissed the two applications.

In its decisions as regards Article 35, the Court found, inter alia, that the right to information is only enjoyable by Kenyan citizens, and not foreign citizens. Further, this right is enjoyable by natural citizens of Kenya and not Kenyan juridical persons such as corporations or associations.

The above decision was closely followed in **Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others**[45] in which the Court restated that the right protected under Article 35 is only available to Kenyan citizens and not non-citizens and the fact that a corporation such as the Petitioner in this case, can gain nationality, does not extend to citizenship. The same case was used as precedent in **Nelson O Kadison v Advocates Complaints Commission & another**,[46] albeit with a partial consideration that the phrase "another person" under Article 35 does not refer to an agency.

The other case is **Friends of Lake Turkana Trust v Attorney General & 2 others**[47] which concerned an alleged memorandum of understanding between the Government of Kenya and the Government of Ethiopia, entered into in the year 2006, for the purchase of 500MW of electricity from Gibe III as well as an $800 million grid connection between Kenya and Ethiopia. For purposes of generating the electricity, the Government of Ethiopia constructed dams in River Omo, which entailed a dominant source of water for Lake Turkana. The Petitioner's contention was that the construction of Gibe III Dam would cause environmental concerns and have an adverse impact on Lake Turkana. It was also the Petitioner's claim that the government had failed to provide information on the nature of agreements it had with Ethiopia for the supply of electricity to Kenya. The Petitioner thus claimed that there had been a breach of the right to access information as provided for in article 35 of the Constitution of Kenya 2010.

In its decision pertaining to the right to access environmental information, the Court made reference to Article 69(1)(d) of the Constitution of Kenya

45 Petition No 278 of 2012 [2013] eKLR
46 [2013] eKLR
47 ELC Suit No 825 of 2012 Environment & Land Court at Nairobi (P Nyamweya, J, May 19, 2014), Reported by Beryl A Ikamari & Karen Mwende.

2010 which places an obligation on the state to encourage public participation in the management, protection and conservation of the environment. It also added that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment. The risk of environmental harm posed by the importation of electric power from Ethiopia placed a duty on the Kenyan Government to provide information on the importation and transmission of electric power from Ethiopia. In view of that, the petition was partly allowed, and an order of mandamus issued to compel the Respondents to make full and complete disclosure of the agreements or arrangements entered into with the Government of Ethiopia for purposes of the supply of electric power. The Court based its position on, inter alia, Justice Mumbi Ngugi's dictum in **Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others,**[48] thus;

> *"[T]he right to information implies entitlements to the citizen to information, it also imposes a duty on the State with regard to provisions of information. Thus the State has a duty not only to proactively publish information in the public interest – this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicize any important information affecting the nation', but also to provide open access to such specific information as people may require from the State.*

48 [2013] eKLR

CHAPTER

4

Comparative Best Practices

(a) India

The history of the Right to information in India is interesting since India's Constitution does not have an explicit right or freedom of information. Instead, Article 19, which deals with Freedom of Speech and Expression has been interpreted and used in India to guarantee access to information. In the Indian Case of *S.P. Gupta v. President of India*[49], the Supreme Court reaffirmed this position when it held as follows:

> *"The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest."*[50]

The above and other decisions of the Supreme Court gave impetus for the enactment of a law on access to information. Interestingly, it is the states that first enacted their respective access to information legislation before the nation-wide legislation. India consequently provides examples for Kenya as to the interplay between national level legislation and local level on access to information.

49 1982 (AIR) Sc, 149.
50 Ibid, page 243.

The enactment of the Right to Information Act in India followed agitation led by grassroots organizations. Just like in several countries, while in theory information held by the Government was publicly available to citizens, in Practices the culture of secrecy continued to permeate the bureaucracy supported by the Official Secrets Act of 1923. Although Courts had held that the right to access information was implicit in the Constitutional provisions on Freedom of expression, there still lacked a substantive legal basis and articulation of the right to access information and the procedure for its access in India. It took the concerted efforts of a grassroots movement led by a group of group of villagers in central Rajasthan, mostly poor wage workers, asserted their right to information by responding against ghost entries in muster rolls, which was the sign of rampant corruption in the system, and demanding official information recorded in government rolls related to drought relief work. The movement spread to various parts of Rajasthan, leading to a nationwide movement for the Right to Information and related state legislations.[51]

The involvement of the local citizens and impetus from states are two features that distinguish India's push for a Right to Information legislation. Writing on the involvement of ordinary citizens in the Push for the Indian law, Harsh Mander and Abha Joshi have argued that:

> *"The most important feature that distinguishes the movement for the people's right to information in India from that in most other countries, whether of the North or the South, is that it is deeply rooted in the struggles and concerns for survival and justice of most disadvantaged rural people. The reason for this special character to the entire movement is that it was inspired by a highly courageous, resolute, and ethically consistent grassroots struggle related to the most fundamental livelihood and justice concerns of the rural poor. This inspiring struggle in the large desert state of Rajasthan was led by the Mazdoor Kisan Shakti Sangathan (MKSS), as part of a people's movement for justice in wages, livelihoods and land."*[52]

MKSS started by organizing public hearings in villages where they would demand for the muster rolls of workers in a Public works to be tabled to the public

51 Cuts Briefing Paper, *"Analyzing the Right to Information Act in India, 2010"*. Available at *http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf.*

52 Manda, H and J, Abha, *"The Movement for Right to Information in India: People's Power for the Control of Corruption,"* available at *http://www.rtigateway.org.in/Documents/References/English/Reports/12.%20An%20article%20on%20RTI%20by%20Harsh%20Mander.pdf.*

meeting. At such meetings the residents would have the names read to them for them to confirm whether there were ghost workers being paid. This action received widespread support including from elements within Government. In October, 1995, the Lal Bahadur Shastri National Academy of Administration, Mussoorie, which is responsible for training all senior civil service recruits, took the unusual step of organizing a national workshop of officials and activists to focus attention on the right to information.[53] This meeting developed the first draft of a Freedom of Information Law. Based on this draft the Press Council prepared the first draft which was widely discussed in Public. This was followed in 1997 by the formation of a Working Group by the Government, to develop a legislation, which it did, based on Press Council draft. Its provisions were however not very progressive. This led to the formation of a National Campaign Committee for the People's Right to Information. While the impetus for this came from local activists like MKSS they felt the need for support at the national level. This led to the enactment of a Freedom of Information Bill in 2002, buy which never came to effect.

The national campaign for RTI received a major boost when the UPA Governments Common Minimum Programme promised that the RTI Act would be made more progressive, participatory and meaningful. The National Advisory Council, which was set up to oversee implementation of the CMP since its inception, took a close interest in RTI. All this and many other factors, including pressure from the civil society groups led to the enactment of the RTI Act in India, which came into effect on October 12, 2005.[54] The aim of the law is to empower the citizens, to promote transparency and accountability in the working of the Government, to contain corruption, and to enhance people's participation in democratic process. The preamble to the law captures an important rationale for enacting the legislation, which is so as to provide an objective basis for reconciling the requirements for information provision so as to support the functioning of a democracy with the view that *"revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information."*[55] The Act thus sets out the framework for citizens accessing information held by the public throughout India, except for the state of Jammu and Kashmir, which are excluded for constitutional reasons. Article 370 of the Indian Constitution grants these two

53 Ibid.
54 Supra, note 47.
55 Right to Information Act, Act Number 22 of 2005. Preamble. *Available at http://www.iitbbs.ac.in/pdf/rti-act%20(English).pdf.*

special status and requires that the Parliament may make laws for it only with the occurrence of the state. The disclosure provisions of the Act, in accordance with best practice, are stated to prevail over those of Secrecy, with specific mention in this regard of the Official Secrets Act. Since its enactment, the Act has proved to be strong weapon in the hands of people, for ensuring transparency in government departments and containing corruption. [56]

The Act guarantees every to every information held by the public to every citizen of India. Information is defined to include *"any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force."*[57] The right to information encompasses the right to access information that is held by a public authority or that is under its control. The right extends to inspection of work, documents and records; taking notes, extracts or certified copies of documents or records; and taking certified samples of material held by the public authority or held under the control of the public authority. The debate as to who is a Public authority, although defined in the Indian Right to Information Act has also been subject to litigation. In the case of *Thalappalam Ser Coop Bank vs. State of Kerala and Others*[58], the dispute before the Supreme Court was whether a Cooperative Society was a Public authority within the meaning of the Right to Information Act of India. The Court relied on the definition of a Public body under Section 2 of the Act which provided that a Public authority includes any *"body owned, controlled or substantially financed"*; or *"non-Government organisation substantially financed"* by funds provided by the Government. The court held that mere supervision or regulation by the government does not turn a cooperative society into a public authority. What was required was substantial control of funding, whether direct or indirect. It is important though to underscore that a public authority extends beyond the state and its agencies to those that are substantially controlled or funded by the state or from public coffers, including non-governmental organizations.

The Act contains detailed provisions dealing with procedural guarantees to ensure implementation of the Act commencing with the requirement for citizens to

56 Cuts Briefing Paper, *"Analyzing the Right to Information Act in India, 2010"*. Available at *http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf.*

57 Supra, Note 47.

58 Civil Appeal Number 9017 of 2013

submit their requests to a Public Information Officer together with stipulated fees. The officer has specified time limits within which to respond. If a public authority fails to comply with the specified time limit, the information to the concerned applicant would have to be provided free of charge.[59] The other important provisions in the Indian law is the duty imposed on all public authorities to publish specified categories of information including the particulars of its organisation, functions and duties; powers and duties of its officers and employees; procedure followed in the decision making process; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions.

Section 8 of the Act details exceptions to the right to information by providing for circumstances when information will be disclosed and the categories of information that are not subject to disclosure. These include cabinet papers, information received in confidence from a foreign government, information that would impede the process of investigation, information whose disclosure would breach parliamentary privilege, information relating to commercial confidence and trade secrets, information that would prejudicially affect sovereignty and integrity of the country and security and economic interests, and those whose disclosure have been barred by a court of law. Personal information that has no relation to any public activity or whose disclosure would be an intrusion of privacy should also not be disclosed. The Act further provides that any information that can be disclosed to the legislature should be availed to the public. The application of the exception clause is subject to two riders, first that it will be disclosed if the public interest in disclosure outweighs the harm the disclosure of protected interest would bringand once twenty years have elapsed since the event to which the information relates occurred.

Other provisions relate to those of appeals, creation of a Commission to oversee implementation, and stringent penalties for non-disclosure.

India's RTI Act is generally claimed as one of the world's best law with an excellent implementation track record. It is one of the most empowering and most progressive legislations passed in the post Independent India.[60] The right to information law has enabled people to ask important questions about government

59 Cuts, Supra Note 52.
60 Ibid.

and has unearthed fraud, corruption and poor governance.[61] It is for example more powerful than its counterpart in the UK, particularly in its use of penalties for delay and non-compliance.[62]

(b) South Africa

Adoption and implementation of access to information in South Africa has to be seen within the context of post-Apartheid governance and the determination of South Africa to establish a democratic country distinct from the Apartheid era. The political, social and economic edifice of the apartheid system in South Africa was built on the foundation of an institutionalized violation of basic human rights.[63] Consequently both the struggle against apartheid and the Constitution for post-apartheid South Africa revolved around protection of human rights and fundamental freedoms. The 1994 Constitution as a result had a robust Bill of Rights. The Right of Access to Information was included as part of the Bill of Rights in the Constitution.

The inclusion of a constitutional right of access to information was motivated by a desire not to repeat the mistakes of the past.[64] This is because the control of information and enforced secrecy was at the heart of the antidemocratic character of the apartheid system.[65] Article 32 of the South African Constitution provides that:

> *"(1) everyone has the right of access to:*
> *(a) any information held by the state*
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights*
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burdens on the state."*

The South African Constitutional provisions as captured above required the development of implementing legislation. Pursuant to this requirement the Promotion of Access to Information Act was enacted in 2000. Both the Act

61 See , "*How the UK Can Learn from India's Right to Information Act.*" Gurdian April, 10th, 2012. Available at *http://www.theguardian.com/society/2012/apr/10/india-freedom-of-information.*

62 *Ibid.*

63 McKinley, D.T., *"The State of Access to Information in South Africa"*, Centre for the Study of Violence and Reconciliation in South Africa, 2003. Available at *http://csvr.org.za/docs/trc/stateofaccess.pdf*

64 Curry, I., *"South Africa's Promotion of Access to Information Act,"* 9(1) European Public Law 59-72(2003) at 60.

65 Truth and Reconciliation Committee of South Africa, *Report* Volume 2 Para 10-19 (1998).

and the constitutional provision on access to information were trailblazing for their granting of access to information held by private entities over and above information in the hand of public bodies. In addition, the South African context provides that information is to be accessed by all persons and not just citizens of South Africa. Secondly the Act defines the word *"person"* to include both natural and juristic persons, hence information would be available not just to individuals but also legal entities. The Act also provides that its provisions are to govern access to information and if any other legislation attempts to limit its contents, then that legislation is to be disregarded and the Promotion of Access to Information law adhered to. This is an important provision, for it will ensure that the right is not circumscribed by sectoral legislations.

The Act provides the procedures for granting access to information. It is, however, instructive to note that the Act, unlike the Constitution talks about access to records and not information. Records are defined as any recorded information irrespective of the form or medium, in possession or under the control of a public or private body irrespective of whether it was created by that body. As relates information with public bodies, the law provides that once a requester complies with the procedures of the Act and the information is not subject to exceptions under law, then the person is entitled to access to that information. Importantly this is so irrespective of *"the reasons the requester gives for requesting access"* and irrespective of the *"information officer's belief as to what the requester's reasons are for requesting information."* This removes subjectivity in the provision of information. An important provision is the category of public bodies and persons to which the Act does not apply. These are included in Section 12 and include the Cabinet and its committees, judicial functions, an individual member of parliament or a member of the provincial legislature.

One of the innovations of the law is the requirement for publications of manuals by public and private bodies with comprehensive details on how to access information held by them. A similar obligation is placed on the Human Rights Commission to publish simple and detailed guide on how to use the Act and access information held by both public and private bodies. These seemingly innocuous provisions are very powerful in operationalizing access to information. They enable the law to be simplified and for communication to go out to the public in an easy to understand and detailed manner on how to access information.

One of the positive aspects of a freedom of information legislation is the requirement for proactive disclosure of information, without a person having to

apply for such disclosure. Section 15 of the Act provides for voluntary disclosure and automatic availability of certain records held by public bodies. A Similar provision exists in the context of information by private bodies. Public bodies are required to, at least once a year, submit to the Minister a list of information which is available automatically without application for request and the Minister is required to publish this information in the gazette. The cost of the publication is to be borne by the public body. Such information are required to be accessible to the public for free, save the cost of reproduction.

The Act provides that the information officer will be the head of the public body. In addition public bodies are required to designate deputy information officers to aid in the process of ensuring that the public are able to access information that they desire from the public body. The Human Rights Commission is given roles under the Act to assess, monitor and implement various aspects of the Act.

The Act has detailed provisions on circumstances under which information access can be refused. It does this in clear and limited instances out of the conviction that disclosure is the rule and withholding the exemption. There are certain categories of information whose request for access must be denied, while others the refusal is optional. For example request for information about a third party must be refused if the disclosure would result in unreasonable disclosure of personal information about a third party. Other protected information relates to commercial information of third parties, privileged records in legal proceedings, information whose disclosure whose endanger a person's life. Where information to be disclosed relates to certain named aspect of a third party, the law requires the public officer or private person required to disclose that information to give notice to the third party. There is a provision which seeks to guarantee public interest in all aspects of disclosure, requiring that public officers are under a duty to disclose records where such disclosure would reveal disregard or contravention of the law or an imminent and serious public safety or environmental risk. The Courts in South Africa have, however, held that it is incumbent on the public body to justify, in circumstances that it refuses to disclose and provide requested information, that the refusal is justified in accordance with the Promotion of Access to Information Act. In the case of *Transnet Limited and Anor Vs. SA Metal Machinery Co Ltd*[66], the court held that the overriding objective in relation to disclosure clauses is that a public body is obliged to conduct its operations transparently by holding that:

66 2006 (6) SA (285) SCA at 55.

> *"once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to state security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of the state operates, to know what expenditure such an agreement entails…… Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause."*[67]

The Act also has provisions on appeal internally within the public body and access to courts for redress. As with most legislation the debate revolves around the difference between law and practice. In an assessment by the African Platform on Access to information in 2013, a working group of several non-governmental organisations working to promote access to information in Africa, South Africa's framework on access to information was given a score of seven out of ten.[68] The score was reached due to the fact that the country has a specific dedicated law supported by Constitutional guarantees as well as sectoral laws which provide additional mechanisms for accessing the information, like the Housing Act and the Mineral and Petroleum Resources Act. [69]

The importance of the Right of Access to information has been subject of litigation and pronouncement by the Constitutional court in South Africa. In the case of *Conrad Steefans Brummer Versus The Minister for Social Development and Others*[70], the court stated as follows regarding right to information:

> "*The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.*
>
> *Apart from this, access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights.*"[71]

67 Ibid.
68 APAI Secretariat, *Access to Information in Africa: Examining Progress Since the APAI Declaration,(2013)* available at
69 Ibid.
70 2009 (II) BCLR 1075(CC).
71 Ibid.

Despite its progressive nature, there still exist some criticisms regarding the extent of the application of the Right to information in South Africa. The Act is seen as restricting the constitutional right in some instances including its focus on recorded information and not all information. Secondly is the issue of exemptions, some being seen as too broad like commercial information and others like cabinet records as excluding a key part of government from being accesses. The other criticism of the access regime is the recent trend in South Africa to give prominence to security over disclosure.

(c) Sweden

Sweden was the first country to adopt a Freedom of information Act, when in 1776 its parliament enacted the Freedom of the Press Act. While *"in its original formulation the Swedish Freedom of the Press Act was short-lived, a mere six years, but its effect on the general consciousness about rights was indelible. It was recurrently returned to in new forms. After various developments the way of thinking expressed by the Freedom of Press Act of the Swedish Realm has today become a cornerstone of the worldwide struggle for freedom of information."*[72]

In 1766, Sweden became the first country in the world to permit freedom of the press. Freedom of the press is based on freedom of expression and speech, a central tenet of most democracies. Those in authority must be held accountable and all information must be freely available. The identities of sources that provide publishers, editors or news agencies with information are protected, and journalists can never be forced to reveal their sources. The law on freedom of expression was passed in 1991 to expand this protection to non-print media, such as television, film and radio. The law seeks to ensure a free exchange of views, information and artistic creativity.

The principle of freedom of information means that the general public and the mass media have access to official records. This affords Swedish citizens clear insight into the activities of government and local authorities. Scrutiny is seen as valuable for a democracy, and transparency reduces the risk of power being abused. Access to official records also means that civil servants and others who work for the government are free to inform the media or outsiders.

72 Mustonen, J. (Ed), *The World's First Freedom of Information Act, Anders Chydenius Foundation*, Page 20. Available at *http://www.access-info.org/documents/Access_Docs/Thinking/Get_Connected/worlds_first_foia.pdf.*

However, documents can be kept secret if they involve matters of national security; Sweden's relationship with another country or international organisation; national fiscal, monetary or currency policy; inspection, control and other supervisory operations by public authorities; the prevention or prosecution of crimes; the economic interests of the general public; protection of the personal and financial position of private individuals; and the protection of animal or plant species.

The Act which was passed in 1776 and forms part of the Swedish Constitution. The Constitution is governed by four fundamental laws: the Instrument of Government, the Freedom of the Press Act, the Fundamental Law on Freedom of Expression, and the Act of Succession. These take precedence over all other laws. Chapter 2, Article 1 of the Instrument of Government guarantees that all citizens have the right of *"freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others."*[73]

The Freedom of the Press Act, despite its title, guarantees right of access to public documents to everyone and not just the press.[74] The current version of the Act was adopted in 1949 and amended in 1976. Chapter 2 on the Public Nature of Official documents provides that every Swedish subject) shall have free access to official documents." Public officials are required to respond immediately to public requests for documents which can be from anybody including anonymous sources.[75] While the Act talks about Swedish subjects, in Practice everyone can claim this right.[76] In fact, Sweden has gained a reputation for being a good country to access European Union documents.[77]

The Acts defines what falls within the scope of the law. It does this by guaranteeing access to official documents. Article 2 define these broadly to mean *"record which can be read, listened to, or otherwise comprehended only by means of technical aids"* and in Article 3 official documents include documents which are *"in the keeping of a public authority, and if it can be deemed under the terms of Article 6 or 7 to have been received, prepared, or drawn up by an authority"*. Specifically letters and other communication addressed to civil servants and relate to official matters are

73 The Instrument of Government. See *http://www.scandinavianlaw.se/pdf/52-26.pdf.*
74 Mendel. T. Freedom of Information: A Comparative Legal Survey (UNESCO, 2003) page 79. Available at *http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf.*
75 Banisar, D., Freedom of Information Around the World: A Global Survey of Access to Information Laws, 2006. Available at *http://www.freedominfo.org/wp-content/uploads/documents/global_survey2006.pdf.*
76 Mendel, Supra, Note 74
77 Ibid.

considered official documents. Article 6 and deal with when documents can be considered to be official documents, with Article 6 addressing the issue of tenders, stating that these become official documents only after the tenders have been fixed. Thus the documents must first be received before they can be subject to access. Article 7 provides that a document has been drawn up by a public authority only if the matter to which it relates has been "finally settled by the authority", *"finally checked and approved"* or *"finalized in some other manner."*[78] A range of working documents are consequently excluded from disclosure until the matter to which they relate has been concluded. Still, preparatory documents not used in the final version may never be disclosed under this rule.[79]

Another issue defined in the law is public authorities. These have been defined to include *"the Parliament, the General Assembly of the Church, and any local government assembly vested with powers of decision-making shall be equated with a public authority."*[80] However companies, associations and foundations are excluded from the definition even if they are wholly owned or controlled by the State.

The Act also has provisions relating to procedure for requests and access, with all public authorities required to respond to requests immediately, including from anonymous sources. Each authority is required to keep a register of all official documents and most indices are publicly available. This makes it possible for ordinary citizens to go to the Prime Minister's office and view copies of all of his correspondence.[81] There are four exceptions to the requirement for registration: documents that are of little importance to the authorities' activities; documents that are not secret and are kept in a manner that can be ascertained whether they have been received or drawn up by the authority; documents that are kept in large numbers which the government has exempted under the secrecy ordinance; and electronic records already registered and available from another ministry.[82]

The Act also contains an exception clause and requires that all documents that are secret must be specified by law. The Act does not have a public interest override. Decisions by public authorities to deny access to official documents may be appealed internally. They can then be appealed to general administrative courts and ultimately to the Supreme Administrative Court. Complaints can also be

78 Supra, note 74 at page 80.
79 Ibid.
80 Section 5.
81 Supra, note 75.
82 Public Access to Information and Secrecy with Swedish Authorities. *http://www.regeringen.se/sb/d/574/a/3682.*

made to the Parliamentary Ombudsman.[83]

It is important to note that the provisions of the Freedom of the Press Act are supplemented by those of *Public Information to Access and Secrecy Act* which entered into force on 30th June 2009.[84] The Act underscores the additional freedom of expression and right of public officials to communicate about the government.[85] Sweden has also enacted the Personal Data Act giving individuals the right to access and correct personal information held by public and private bodies.

(d) Mexico

Mexico is hailed as one of the countries with the most progressive freedom of information legislation in the world. Some writers have written that "Mexico has taken the lead with one of the strongest laws in the world, overseen by an information commission and an advanced information system which keeps track of all requests and ensures that they are answered on time."[86]

In the case of Mexico, the first approach to the right of access to information dates from 1977 and is since registered in the Constitution of the United Mexican State.[87] In an amendment to the Constitution in 1977, Article 6 was included that provides for a right to information by stating that *"the right of information shall be guaranteed by the state."* In addition the Supreme Court in Mexico made a number of decisions further enhancing that right.[88]

Mexico signed into law, its Freedom of Information Act, titles *The Federal Law of Transparency and Access to Government Information* Act on 10th June 2002. It *"sets forth the organs, criteria and procedures, principles and specific deadlines by which the right of access to information before federal authorities can be enforced."* [89]The law has been hailed, with some seeing it as *"outshining the US as the Global*

83 Supra, note 75.
84 For a Highlight of the Act, See Ministry of Justice, Public Access to Information and Secrecy Act: information concerning public access to information and secrecy legislation, etc. Available at *http://www.government.se/content/1/c6/13/13/97/aa5c1d4c.pdf.*
85 Ibid.
86 Supra, note 75 at page 19.
87 See *"Introduction to Federal Institute for Access to Information and Data Protection"* available at *http://privacyconference2011.org/includes/IntroductionIFAIIngles.pdf.*
88 Supra, note 75 at Page 106.
89 Supra, note 87.

Gold standard" of championing the right to know."[90] The law allows all persons to demand information in writing from federal government departments, autonomous constitutional bodies and other government bodies, which must respond to such requests within twenty working days.[91]

The law creates five categories of privileged information, whose release can be withheld if the release will harm the public interest. These include information on national security, public security or national defense; international relations; financial, economic or monetary stability; life, security or health of any person at risk; and verification of the observance of law, prosecution of crimes, collection of taxes, immigration or strategies in pending processes. There are an additional six categories of exempted information. These are information protected by another law that can be considered confidential or privileged, commercial secrets, preliminary findings, judicial or administrative files prior to a ruling, public servants responsibility proceedings before a ruling, and opinions in a judicial process prior to a final decision.[92] Information may only be classified for up to 12 years. Information relating to "the investigation of severe violations of fundamental rights or crimes against humanity" may not be classified. Personal data is considered confidential and is not subject to the 12 year rule.

Every public body is required to create a liaison unit to answer requests and fulfill the other requirements of the law.[93]They must produce a regular index of all files, including privileged or confidential files. They are required to publish an extensive amount of information on their web sites, including structure, directories, salaries of public employees, aims and objectives, audits, subsidies and contracts. They are required to set up information committees to review classification and non-disclosure of information and monitor compliance of the body.[94]

One of the novelties of Mexico is how it deals with the scope of coverage of the law. It *"has adopted a novel approach to the question of coverage, providing for a detailed very set of obligations for administrative bodies, and then placing the legislative and judicial branches of government under a generic obligation effectively to do their best*

90 See Julia Collins, "Is Mexico Doing a Better Job with Access to Information and Transparency than the US- At Least at the National Level." 23/10/2013 Available at *http://nsarchive.wordpress.com/2012/10/23/is-mexico-doing-a-better-job-with-access-to-information-and-transparency-than-the-us-at-least-on-the-national-level/.*

91 Supra, note 75 at Page106.

92 Ibid.

93 Ibid

94 Ibid.

to meet the same set of obligations, without setting these out in the same detail."[95] This innovation may provide a useful model for Kenya to consider.

In February 2014, Mexico pushed through several transparency reform initiatives which have improved the framework for access to public information. Transparency International, in hailing this reform measures, have summarized them and stated as follows:

"Some of the main points of the reform:

- *The Federal Institute on Access to Information (IFAI) now has constitutional autonomy, being the only one of this kind worldwide. The institute has more freedom to act and to represent citizens' rights.*
- *More bodies are subject to transparency laws: political parties and unions, civil society organisations, corporations, and individuals who receive tax-payers' money or public funds are obliged to deliver information – this is in addition to the government, congress and the judiciary.*
- *The decisions made by the new access-to-information institute cannot be appealed. The only exception is that the Presidency can make an appeal to the Supreme Court on the grounds of protecting national security.*
- *Decisions made by local access-to-information institutes to not provide certain information can be revised by the IFAI, if a citizen asks it to do so or if the IFAI believes the case needs to be revised."* [96]

The law gives Public bodies in Mexico the right to reject *"offensive requests."* As regards fees, access to personal data is free.[97] The other issue relates to appeals to courts, where only requesters and not public bodies may prefer an appeal to courts.[98] One of the other greatest innovations of Mexico is its establishment of the Federal Institute of Access to Information with specific mandate of information appeals. The Institute *"hears appeals from any refusal to disclose information, from a failure to comply with established time limits, against the level of fees charged or from a refusal to disclose the information in the form requested."*[99] The Institute also has the wider mandate of setting standards regarding record maintenance and ensuring that public bodies adhere to these standards.

95 Mendel. Supra, note 74, at Page 125.
96 Transparency International: *"Mexico Pushes Through Transparency Reform"* 13th February, 2014. Available at *http://www.transparency.org/news/feature/mexico_pushes_through_transparency_reform.*
97 Supra, note 74 at page 127.
98 Supra, note 74 at Page 131.
99 Ibid.

While Mexico's federal law is progressive, those of the states are not and have had varied standards from that of the federal law. It is a demonstration of the need for Kenya to ensure that there exists some standards in the national legislation for counties as they develop they own legislations.

CHAPTER

5

Rationale for Access to Information Law in Kenya

There are several reasons why Kenya would need to develop an Access to information law. Some of these reasons are specific to the country's context, while others are universal. As part of the community of nations Kenya would do well to place itself in the same league as progressive democracies that have enacted such legislation. Unlike in 1990, when only 13 countries had laws granting right to information, today 99 countries have such laws. In addition international conventions increasingly reassert the importance of the right not just as a distinct right but for the realization of the rights, be it anti-corruption, environment, human rights, Children rights and several other rights. In addition international bodies like the World Bank also recognize that access to information is at the centre of their operations. As part of its international commitments starting with being party to the African Charter on Human and People's Rights and international conventions that recognize access to information and call for parties who are members to them to the act domestic legislation, Kenya should adopt an access to information legislation.

Secondly, information is a prerequisite for democratic development of the country. The adoption of the Constitution followed several years of agitation. At the basis of the current Constitution is the need to deepen democratic development of the country. Information, especially information in the hands of public bodies, is a key economic resource and the raw material for the transition from a commodity-based economy to a knowledge-based economy. Moreover, good governance principles cannot be advanced unless the existing legislation empowers citizens and enables them to participate in public affairs. In the country's quest to attain sustainable economic and social development, access to information that is relevant and accurate is a central prerequisite. The state should obligate not only its agencies but other stakeholders and partners to ensure that information that is at their disposal and is necessary for the public is so availed as soon as possible without any resistance, manipulation or distortion.

The link between democracy and information access can be seen in the context of the need to promote transparency and accountability in governance. A democratic state is one that adheres to the principle of good governance, principles that require that leaders are held to account by the citizenry. This requires the availability of information. Leaders at all levels starting from the ward level, constituency, and county to the national level should be kept accountable. Provision of information will ensure that citizens follow the actions and programmes of the leadership, participate in them, critique them and consequently contribute to more people-centred and sustainable socio-economic development. Two examples suffice. First relates to the Constituency Development Fund (CDF), a fund which has been hailed as having transformed the socio-economic conditions in Kenya despite concerns about its constitutionality. One of the criticisms of CDF relates to the manner in which the funds are used. Access to information ensures that all citizens have relevant and accurate information on CDF operations, projects and thus can more accurately and objectively access the workings of CDF in any particular constituency. The second aspect relates to devolution, which has led to availability of more resources at the local level. the success of devolution require that citizens have all the relevant information on the governance and development processes taking place at the local level to enable them engage meaningfully. Without information, devolution runs the danger of perpetuating and even surpassing some of the ills that were associated with the centralized system of governance. Information is also a core component of free and fair elections. A critical element of free and fair elections is the guarantee that election will be the basis on which the people express their will to be governed. Availability of information ensures that elections actually are based on free will and not manipulation, coercion or ignorance.

In the final analysis democracy cannot thrive in a culture of secrecy. It requires free flow of information. *"In order for democracy to work effectively, safeguards must be put in place to protect against systems and laws that serve to keep the public isolated from official decision-making, and in particular those that keep them in the dark about government policies and activities. Democracy is founded on the principle of representative government and it is therefore essential that politicians and government authorities communicate openly with citizens so that they are fully aware of the public issues they are supposed to be representing."*[100]

100 Commonwealth Human Rights Initiative, Our Rights: Our Information (New Delhi, India) page 15. Available at *http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf.*

Development and progress in the country also requires that corruption in both public and private sphere be eliminated. Corruption is one of the obstacles to development and contributors to poverty in Kenya. Consequently, to accelerate the country's development sealing the loopholes of corruption is mandatory for it will enable resources to be available and put to their intended uses. The fight against corruption can only succeed when there is information availability. When information is publicly available, citizens are able to track spending and decisions. This enhances both accountability and transparency. The United Nations Convention against Corruption adopted in 2003 and the African Union Convention on Preventing and Combating Corruption underscore the importance of access to information in the fight against corruption. Article 13 of the UN Convention requires state parties to ensure access to information and to undertake public information activities that contribute to non-tolerance of corruption, as well as public education programmes. With recognition of the right to access to information, whistleblowers will receive protection for providing information that helps to detect and prosecute corrupt officers. The Goldenberg scandal, for example, was only discovered following supply of information by a whistleblower. For the country's fight against corruption to succeed, there is need for legal guarantees of the right to access information. Two public aspects where there is susceptibility to corruption are in the area of public procurement and public financial management. Access to information on procurement processes and decisions on financial management are important for deterring, detecting and prosecuting corruption.

The Country, since the start of the new millennium has been pursuing policies geared towards rapid economic growth and transformation of the society. Starting with the Economic Recovery for Wealth and Employment Creation and now, Vision 2030, economic progress is a major agenda for Kenya. Vision 2030, on its part gears to turn Kenya into a middle income and industrializing country by the year 2030. The Vision recognizes the importance of information access and provision for the realization of the Vision. Access to information is captured under the political pillar as part of the drive to promote transparency and accountability. However, a detailed reading of the Vision reveals that access to information is not just a political aspect of Vision 2030, but transcends to the economic and social pillar too. It is mentioned in the context of public services, access to market, Science and innovation and land information, for example. The realization of Vision 2030 and its targets will be greatly improved through adoption of access to information. Information availability will improve transparency, citizens' decision-making and involvement in all aspects of governance including economic decisions and programmes.

One of the challenges that has faced this country since independence is ignorance. Indeed at independence, the key challenges were summarized as illiteracy, ignorance and disease. Education is the main solution for eradicating ignorance. In addition, though, there is a second form of ignorance that formal education alone will not eradicate. This relates to ignorance of Government processes, programmes and public policy decisions. This aspect of ignorance leads to rumours, disinformation and sometimes apathy. It transcends all policy processes, be they the workings of the legislature, the operations of the Judiciary or the executive at the national and devolved systems. many citizens due to lack of sufficient information will not engage in public policy processes, like contributing to shaping a new policy option for the country, youth taking up Uwezo fund, parents applying for bursary funds and many other examples. It may also account to farmer's not selling their produce at the right prices due to lack of access to market information. A legal and policy framework on access to information, will put public officials under a duty to provide regular information that help to address ignorance and reduce aspects of disinformation. When positive information access is curtailed, it stars being passed through information means with the attendant dangers of information distortion. Vision 2030, although in a different context captures the need for provision of positive information in the following manner:

> *"Extending credit referencing system from simply negative information (e.g. information on defaulters) system to a positive information system (e.g. information on credit worthiness), to increase competition and efficiency (reducing non-performing loans) whilst effectively protecting consumer information and rights."*[101]

The point that the above quotation underscores is that an access to information regime should not just be seen in the negative light of exposing ills in society, While that is also an important aspect of an access regime, also provides information that enhances development.

Worldwide access to information is necessary as a human rights issue. The right to access public information will help citizens to realize their human rights in addition to being a human rights issue. The Constitution, by including access to information under the Bill of Rights acknowledges the country's recognition of the human rights aspects of access. Secondly, private entities are required to provide access only to the extent that the information is required by another person for the protection of the right or fundamental freedom. The importance

101 Republic of Kenya, *Vision 2030(Nairobi*, 2008) page 9.

of access to information for the realization of other human rights was recognized as early as 1946, when the United Nations General Assembly concluded that *"Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated."*[102]

Kenya has a very vibrant and free media. Media freedom and operations is fed on information. The availability of information enables the media in any democratic society to perform its traditional functions in a robust and objective manner. On the contrary societies that are closed and repressive make media operations extremely difficult. Media have had to go to court in many countries seeking access to information so as to undertake their role. The most cited case on access to information in Kenya is that of *Nairobi Law Monthly and Kenya Electricity Generating Company*[103] related to access to information to enable a media house undertake its duty as a media house. The media helps to inform society and to do so they require to access information. In many societies, *"the media is often the main source of public information, informing and shaping public opinion and contributing to public debates about important issues. This is a two-way process: the coverage of current events by the media also serves to inform government's understanding of public opinion, which in turn feeds into policy-making."*[104] Consequently a society that promotes access to information supports media freedom and media responsibility since the media will have available objective and public information to carry out their duties. Such a regime will also make it easier for the media to keep the leadership at all levels in check and enable exposure of corrupt practices within the country.

102 UN General Assembly (1946) Resolution 59(1), 65th Plenary Meeting, 14 December *http://daccess - ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(I)&Lang=E&Area=.*

103 High Court Petition Number 278 of 2011

104 Commonwealth Human Rights Initiative, Our Rights: Our Information, New Delhi, India, 2007 page 10. Available at *http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf. See page 25.*

CHAPTER

6

Key Issues for Kenyan Legislation on Access to Information

The inclusion of the Right of Access to Information in Article 35 of the Constitution marks a milestone in the campaign and efforts over the years to guarantee availability of information held by public bodies. It also adheres to Kenya's international commitments, more specifically the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights. The inclusion of Access to Information as part of the Bill of Rights, while a useful step, requires accompanying legislation to ensure effective realization of the right. Best practice calls for a domestic legislation on Access to Information in addition to the Constitutional guarantees.

Within the African continent, the African Union has adopted a model Freedom of Information law prepared by the African Commission on Human and People's Rights. In addition, Article 19 also developed a model Freedom of Information Law. Both of these provide guides on the content of a freedom of information law. They would, therefore, act as a template against which to review the current draft of the Freedom of Information Bill with a view to improvement. In doing so, one has to be alive to the fact that a model is not legally binding document. Countries have the option of choosing which aspects they would like to incorporate into their domestic legislation.

Secondly, the key guide must be compliance with the letter of Article 35 of the Constitution and the spirit of the Constitution generally. From the Constitution, key issues to be included in the Bill include:

- Recognition of the Right of Access to information
- Elaboration of those entitled to access information

- Access to Information Held by State: Nature, form and procedure of access
- Access to Information by Private Bodies: Condition for access, nature, form and procedure
- Exceptions
- Public awareness and education

Article 19, in their guide; have identified key principles which should guide a freedom of information law. These include:

- Freedom of information should be guided by the principle of maximum disclosure
- public bodies should be under an obligation to publish key information
- public bodies must actively promote open government
- exceptions should clearly and narrowly drawn
- requests for information should be processed rapidly and fairly and an independent review of any refusals should be available
- individuals should not be deterred from making requests by excessive costs
- Meetings of public bodies should be open to the public
- laws which are inconsistent with the principle of maximum disclosure should be amended or repealed
- Individuals who release information on wrongdoing-whistleblowers-must be protected.

In addition, borrowing from assessment of access to information laws, there are certain minimum issues that an adequate law needs to address. In a global survey of freedom of information laws worldwide in 2006, *David Banisar*[105] discusses key aspects that progressive access to information legislation should contain.

They include:

First, is the debate about which bodies are covered by the access regime? Most laws focus on the executive and administrative bodies that make up the modern bureaucratic state.[106] In few instances there is inclusion of the legislature and the judiciary. Best practice would require that the provision on bodies covered and that defines public bodies be as expansive as possible

105 Banisar, D., Freedom of Information Around the World: A Global Survey of Access to Information Laws, 2006. Available at http://www.freedominfo.org/wp-content/uploads/documents/global_survey2006.pdf.

106 Ibid.

and in any case cover all bodies that exercise government functions. While a few Countries, for example the UK and India exclude some institutions, like security agencies, that handle sensitive information, the limitation with this approach is the exclusion extends to mundane issues that do not even have linkages with security. It is better practice to exclude categories of information instead of blanket exclusion of institutions, as the latter is more prone to promoting secrecy and corruption. More recent legislation, have even extended the provision of information to those held by Private bodies. South Africa is the leading example in this category and is the model that Kenya's Constitutional provision requires the country to emulate. Denmark's Access to Public Administration Files Act applies to natural gas companies and electric plants.[107]

Secondly, in countries with federal or local states, there is necessity for the sub-national governments to enact separate access legislations, to cover information that is within they exclusive domain and also to promote the culture of transparency at the local level. This is the experience of countries like USA, India and Japan. The national legislations and the local legislations in these instances need to have similar import and philosophical underpinnings.

Thirdly, the sensitive issue of personal data and information, intrusion of privacy and linkages with access to information is a critical concern that national legislation, including Kenya's access to information has to grapple with. In several countries, they have enacted a Privacy and Data Protection law, which will deal with this issue and also give citizens the right to access and correct their own personal information held by public and private entities.

Fourthly, is the clear delineation of what is accessible and subject to access legislation. Generally there seems to be a preference to recorded information. Towards this end, older access legislations typically refer to the right to access records, official documents or files. Newer laws on the other hand, refer to a right to information and define information to include all information, whatever the medium in which it is stored. The difference between these two approaches impacts on the extent of access and require to be considered and a clear decision adopted by the Kenyan law. In South Africa the reference is to records and not information. In Sweden, too, the term used is "official

107 Ibid.

documents" which excludes documents under preparation and drafts not used in the final decision, hence excluding a large body of information. This would also apply to reference to records since some information are oral. India's legislation does not just limit itself to records but even extends to food samples distributed or materials used for road construction. Denmark and New Zealand have had their right of information interpreted to include relevant oral information, with a requirement that public officials reduce such information to records and supply them.

Fifth, on who can access, while the original focus was on citizens, *"(a) majority of countries now allow anyone to ask for information regardless of legal interest, citizenship or residency."*[108] Other countries, like Finland even go to the extent of allowing anonymous requests in a view to avoid requesters being discriminated against.

Sixth, relates to exemptions. There is recognition worldwide, that while access is the norm, democracy will require that certain information be excluded from public access. What legislations require to do is to detail the categories of information that should not be excluded and limit the list to the extent possible. There are certain generally acceptable grounds for exclusion, for example, national security, personal privacy and protection of commercial confidentiality. Certain modern laws prohibit certain categories of information from being withheld. This is a creative additional provision to the exemption clause so that even if the clause exists such information must be released. A key issue is the inclusion in most modern and progressive legislation of a *"public interest"* test, which requires balancing the right to withhold information with the public interest to disclose. This allows for information to be released even if harm is shown if the public benefit in knowing the information outweighs the harm that may be caused from disclosure.[109] For some countries, like Mexico there is a twelve year limit for application of an exemption clause to a certain category of information.

Seventh, is the need to include an appeal and oversight mechanism within the body of the legislation. The appeals and enforcement mechanism vary from administrative reviews, court reviews and enforcement or oversight by independent bodies. Independent Commissions are preferred worldwide as

108 Ibid.
109 Ibid.

the most effective for oversight purposes. The first level of appeal is usually internal within the body. This is normally followed up with an external Body, an Ombudsman in several countries, or as is common in several countries in the recent past, to create an information Commission. The issue to be dealt with is whether to give the Commission only advisory and reporting functions or also binding decisions. Few countries in addition have a tribunal. The last level of appeal is usually to courts of law. In some countries with Information Commissions, the courts' jurisdiction is limited to issues of law.[110]

Eighth, Is the inclusion of sanctions to be imposed on public bodies and their employees for unlawfully withholding information. While many government employees are against this provision, it is a powerful tool for promoting disclosure and ensuring that the law is adhered to. It helps to deal with bodies or employees who either unreasonably refuse to release information, alter or even destroy information that is required to be released. In India, these provisions are being used by Information Commissioners to fine information officers who refused or unduly delayed releasing information under the Right of Information Act.[111]

Ninth, is proactive disclosure and affirmative publication. Modern access legislation include provisions placing a positive duty on public authorities to periodically disclose certain and listed categories of information to the public without waiting to be asked by members of the public or individuals. This is beneficial not just to members of the public but to the public bodies too as it reduces the administrative burden of responding to routine requests.

Tenth, is the inclusion of provisions of protection of whistleblowers. These have been two major themes in the whistleblowing provisions, *"a proactive part which attempts to change the culture of organizations by making it acceptable and facilitating the disclosure of information on negative activities in the organisation such as corrupt practices and mismanagement and a second aspect made up of a series of protections and incentives for people to come forward without fear of being sanctioned for their disclosures."*[112]

110 Ibid.
111 Ibid.
112 Ibid.

Lastly, is the provision on e-information putting a duty on public authorities to disclose and make available certain types of information through electronic means and to encourage use of e-communication to request for and respond to request for information.

The above provide a useful basis for assessing and improving the current draft Access to Information Legislation in Kenya. In redrafting the current Access to Information Bill, the above issues should be considered. In addition the Bill should also deal with the following:

- *Defining Citizen*- One of the greatest controversies relate to who should have the right to access information. This controversy is not unique to Kenya. There exist two schools of thought, with one side arguing for all persons and another restricting the right to citizens only. Kenya's Article 35 provides that every citizen is entitled to access to information. Question still remains as to whether this is natural or legal persons. Kenyan courts have interpreted the clause to mean natural persons. However, the Bill should adopt a more expansive definition of categories of persons who can access information by including natural persons whose ownership is fully Kenyan. This would be in consonance with Constitutional provisions relating to citizenship acquisition of land (See Article 65(3) of the Constitution.

- *Section 3 should be expanded*: The objects should be expanded to include: public awareness and education, institutional framework for oversight, dispute resolution; separate section. In addition subsection b and c should be redrafted so that (b) addresses public bodies and (c) private bodies.

- Add new Part on Disclosure by Public Bodies and a Separate Part on disclosure by Private bodies: The current Part 2 titled Right to Information. Consideration should be given to making Section 5 a stand-alone Part. Further, there should be a section just like section 5, which deals exclusively with disclosure by Private entities so as to operationalize Article 35(1) (b) of the Constitution. Currently Part 4 mixes up access to information held by private bodies with those by public bodies in an unhelpful manner. Currently even Part III on access to information deals with procedures relating to information held by public entities yet there is need for procedures in accessing private information too. This augments the necessity for detailed and separate treatment of private information in the Bill.

- *Exempt Information*: The provisions of Section 6 on exempt information are important especially in light of the requirements of Article 24 of the Constitution on limitation of the enjoyment of the rights. It is information to improve the drafting of this section by having specific language dealing with private information and those dealing with public information as the exemptions may be slightly different. Secondly, the exemptions relating to public security are likely to be the most controversial. I would suggest we put them in a separate section to enable them stand alone and borrow heavily from the language of the Global Principles on National Security and the Right to Information (Tshwane Principles).

- *Whistleblower Protection*: There should be a separate section protection whistleblowers who disclose information in the public interests. This Part should be cross-referenced with relevant legislation touching on whistleblowers including anti-corruption legislation.

- *Separate Provision on Publicity, education and Promotion of Openness*: This is a key aspect of right to information legislation and requires to be dealt with in details in a separate legislation.

- *Information Officer-* There are two competing needs on the provisions of section 7 of the Bill on designation of information officers. On the one hand arises out of the Government desire to keep the wage Bill down hence the need to ensure that new legislation avoids as much as possible creation of new institutions and positions. Secondly is the requirement of clarity on responsibility within the Institution for providing citizens with access to information that they require. Section seven of the current draft tries to balance this task. IN our view, though this could be improved by redrafting the section so that the officer with responsibility under the law is the Chief Executive officer. But he will not be the information access officer. He will have overalls responsibility and requests will be addressed to him. The same provision will apply to private companies. In addition, every public entity will be required to designate, from its staff an access to information officer, whose duties should be briefly stated in the Bill, including responsibility for proactive disclosure, public education and liaison with the public.

- *Commission Responsibility for oversight*: Article 59 of the Constitution provides that the Kenya National Commission on Human Rights has

responsibility for promoting the protection and observance of human rights and also investigating complaints of violations. This provision would give the Commission oversight responsibilities over Access to information. In implementing Article 59, however, three Commissions were established by statute, including the Commission on Administrative Justice, the Gender and Equality Commission and the Commission on Human Rights. The Draft Bill proposes to give the powers of oversight to the Commission on Administrative Justice. There is bound to be debate about the more appropriate Commission between the Commission on Human Rights and that on Administrative Justice. Strictly speaking access to information is a human rights issue. It goes beyond administrative justice. However, one can argue that due to the current mandate of the two bodies, the Human Rights Commission has huge responsibility which may overburden it. The other issue will relate to the oversight over private bodies in providing information which is only information required for enjoying human rights, another justification for resort to the Human Rights Commission as opposed to the Commission on Administrative Justice. The upshot is that there is need for greater debate on the correct Commission. Should exigency demand that the Commission on Administrative Justice be the responsible Commission, then there is need for the Bill to have a clause on linkages with the Human Rights Commission. One way would be to have education and awareness undertaken by Human Rights and Enforcement and oversight by Commission on Administrative Justice.

- *Access to Information held by Devolved Governments*- Section 96(1) of the County Government Act deals with Access to information within devolved units. It contemplates counties passing their own access to information law, but that such law will be subject to national legislation on access to information. It is necessary that a part of the Act deals with standards for access to information held by County Governments. This will enable County Governments to develop their own county specific legislation but that such legislation require to meet the standards to be provided in the Bill.

- *Arrangements of Sections*- The thematic arrangements of the Bill are largely misleading. Many parts are given headings that do not communicate what the parts cover. In addition the parts cover much more than what the headings refer to. Part IV, for example as currently drafted does not relate to the heading. It includes protection of those making disclosure

and management of records, issues which should be dealt with in separate sections. There is need to improve the overall flow of the Bill to make it sequential and easy to follow.

On strategies, it is important to address the question of ownership of the Bill. Borrowing from comparative experience the Bill should be owned by a wide spectrum of stakeholders both in Parliament and outside. A key opposition to the Bill will most likely be concerns about national security and those relating to privacy protection. There should be a separate meeting held on the links between national security and access to information and how the two can be balanced. This would include explanation of the Global *Principles on National Security and Right to Information (The* Tshwane Principles) and how these are being dealt with in the legislation. A separate session should then focus on how to protect personal data and privacy of the person including those in public office from intrusion under the guise of access to information.

One of the debates in the legislative process since the last elections relates to which legislation requires to pass through the National Assembly only and which ones must go to both the National Assembly and the Senate. The Constitution at Article 95 outlines the roles of the National Assembly while Article 96 provides for the functions of the Senate. In addition Article 109-111 elaborates on the Bills that should go to the Senate, with the broad guide being Bills that concerning County Governments. The experience to date has however not made it easy to state with certainty which Bills concern County Governments. Should the expression *"concerning county Governments"* be given a liberal or restrictive interpretation? Should recourse be heard to Schedule Four of the Constitution and such Bills be limited to those that affect the fourteen functions of County Governments?? Or should it be left purely to the determination of either of the Speaker's or both Speakers? The matter has been litigated in The Supreme Court following difference of opinion between the Senate and the National Assembly. In its advisory rendered in the case of *The Speaker of the Senate and the Senate Versus The AG and Others*[113] , the court adopted its earlier position in the case of case about the date of the next election and held that *"the expression 'any matters touching on county government' should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government."*[114] The Court, however added the caveat that "*interpretation in this category is to be made*

113 Supreme Court of Kenya at Nairobi, Advisory Opinion Number 2 of 2013
114 Ibid.

cautiously, and on a case-by-case basis….:" The Court arrived at the conclusion that the Division of Revenue of Bill was a Bill concerning counties. In doing so, they however quoted from the Final report of the Task Force on Devolved Government that stated as follows:

> *"Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county government"*

It is clear, therefore, that the debate on which Bills concern counties and which ones do not still continues to be one of interpretation. If one reads the Fourth Schedule, it will be evident that access to information is not listed as one of the fourteen functions of county government. However, in a broader sense access to information is not just a stand-alone right, it is also necessary for the realization of other rights. In our view, the law on access to information needs to go to the Senate since County Governments have specific information that they will be custodians of and which citizens will need to access. Information will also affect the functional areas of counties. In addition the County Government Act already delineates access to information as one of the areas where counties require legislation. This Bill proposes to include standards for such legislation for Counties. Taking it to the Senate would, consequently comply with the constitutional requirement. It would also help to expand the ownership of and guarantee of information availability by a wider stakeholder group.

The next issue that the process should consider is building a constituency for the Bill. The experience of the Sexual Offences Bill and even international comparative experience from India on the Right to Information Act underscores the importance of having a stakeholder group to support the process. Several CSOS have worked on the issue of Access to information including being part of litigation before the case. Their support will be instrumental for the process. However, it is important that the Bill does not become a CSO Bill. Tactically, doing so will only help to galvanize the opposition constituents for the Bill. CSOs must be part of pushing for the Bill but they should not take the driving

seat. Instead, a multi-stakeholder advisory group tentatively called *"Friends of Access to Information."* or "*Advisory Group in Support of Access to Information Law in Kenya"* should be constituted. This group should help the mover to discuss the Bill in public, engage the media and reach out to key constituencies to galvanize support for the Bill. It is proposed that the Advisory group comprise of representatives from:

- Private Sector
- Religious bodies(Christian and Moslem)
- Representative of Media (Media Council)
- Respected CSO representative
- Member of National Assembly
- Member of Senate

The membership must be carefully chosen based on credibility and acceptability to the public and ability to rally their constituencies in support of the Bill. Once the names are agreed upon, a meeting should be held for the group. The group should then be able to initiated discussions with key stakeholders and be sued for media discussions on the importance of the Bill.

CHAPTER

7

Conclusion

The importance of an access to information legislation cannot be gainsaid. The Country has now reaffirmed its commitments to join the majority of nations in the word, that not only recognize access to information as a fundamental component of their democratic development but also that have put in place legislative provisions to promote and guarantee access to information.

Past efforts to enact the legislation has not been successful. It will, therefore require concerted lobbying and consensus building to ensure the legislation is adopted. Secondly, as recent past has demonstrated sometimes the enactment of legislation creates more harm than good. There is concern, for example that the Leadership and Integrity Act, as enacted waters down the constitutional provisions of Chapter Six. In Uganda, there is growing disquiet with the provisions of the Access to Information law, it being argued that as opposed to ensuring access to information, it actually ends up limiting access. It is important that the legislative development process guard against clawing back through the provisions of the law, the Constitutional guarantees in Article 35 to accessing information.

It is also important that the process of enacting access to information be seen in the larger context of operationalizing the Constitution, a process that requires development of new ethos amongst all segments of society, both public and private. As one writer has quipped:

> "*The enactment of a FOI law is only the beginning. For it to be of any use, it must be implemented. Governments must change their internal cultures. Civil society must test it and demand information. Governments resist releasing information, causing long delays, courts undercut legal requirements and users give up hope and stop making requests*."[115]

115 Banisar, D., Freedom of Information Around the World: A Global Survey of Access to Information Laws , 2006. Available at http://www.freedominfo.org/wp-content/uploads/documents/global_survey2006.pdf.

In addition to enacting the law, there must be campaigns to promote a culture of openness and transparency. Public officials will have to be trained and socialized to move away from their previous attitude of secrecy to realizing that information that they hold is held in Public trust and that citizens have a right to seek and access such information. Further that such access is not inimical to the interests of the state but instead helps to create an open and democratic society in accordance with the Country's Constitution and promotes faster socio-economic development.

Citizens will also need public education and awareness so as to reduce apathy and ensure that they make use of the access and transparency guarantees to seek information to enable them to fully participate in governance, hold their leaders to account and take advantage of government services and opportunities.

An effective information access regime is predicated on the existence of an effective record management system. There is need for the country to review and improve its record keeping and retrieval systems. Unless we do so, then information access and its guarantee will continue to be theoretical since most information will not be easily accessible due to poor record management and retrieval. This is becoming a challenge too as related to electronic records. The lack of effective records keeping and its impact on access to information was captured in an annual report of the Information Commission of Canada as follows:

> *"The whole scheme of the Access to Information Act depends on records being created, properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before destruction to ensure that valuable information is not lost. If records about particular subjects are not created, or if they cannot be readily located and produced, the right of access is meaningless. The right of access is not all that is at risk. So, too, is our ability as a nation to preserve, celebrate and learn from our history. So, too, is our governments' ability to deliver good governance to the citizenry."*[116]

There will also be need to review all the other laws and ensure that they are in tune with access to information law. The inclusion of transparency provisions in laws dealing with public finances, procurement, environment and other aspects of public administration will also be necessary. Developing a culture of openness cannot just be restricted to an Access law. Indeed, there are some who argue that instead of one law, what we need is access provisions in all other legislations. This

116 Information Commission of Canada, Annual Report 1999-2000.

report advocates for both a stand-alone access legislation and inclusion of access provisions in other sectoral legislations. Special focus needs to be paid to the Official Secrets Act. While there is continued need to keep certain Government information secret, especially in the error of increased terrorism threat, the reverse is also true. An effective fight against security threats and terror require availability of information and cooperation of citizens, an issue that requires access to information. It is therefore necessary that the Official Secrets Act be amended to bring it in line with the need for accessing information.

The balance between access to information and protection of personal privacy is another critical issue that as a country we have to grapple with and ensure. As we become more open and information becomes more available so does the threat to intrusion of personal privacy and spaces increase. Both protection of personal information and access to information are important pursuits for the country and one should not be sacrificed for the other.

Once enacted, we must also ensure that the law is faithfully implemented. This requires that citizens test the laws and that information once accessed is used. Access is not just an end in itself, it is also a means to ensuring that we create a more prosperous, equitable and developed Kenya one that fights corruption and security threats and that is progressive, inclusive and equitable. This is because access to information alone does not automatically translate to increased accountability or increased awareness of released information.

NOTES

Our Vision

A premier organisation promoting a just, free and equitable society

Our Mission

To protect human rights, and promote the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices