

KENYA 'S FOI BILL 1999: THE FIRST STEP TOWARDS AN EFFECTIVE ACCESS REGIME

***Analysis of the International Commission of Jurists draft Access to Information Bill 1999
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Article 47 of the draft Constitution of Kenya provides a specific guarantee for the right to access to information held by the state or by a private body where it is required for the exercise or protection of any right or freedom. However, while constitutional protection is an important step towards entrenching the right to information domestically, it is still essential that the right to information legislation is enacted which details the specific content and extent of the right. Legislation sets a clear framework – which can be understood by the bureaucracy and the public – for gaining and given access and places specific obligations on bodies to put in place systems and develop cultures of openness that are uniform.

In recognition of the importance of entrenching the right to information via legislation – and responding to the failure of the Kenyan Government to take action itself – in 1999 the International Commission of Jurists (ICJ) in Kenya took the initiative to draft an *Access to Information Bill*¹. In recent months, attention has again reverted to the ICJ draft Bill. The Government of Kenya has explicitly mentioned the need for right to information legislation in its Short Term Action Plan for the Governance, Justice, Law and Order Sector (GJLOS). It is understood that the Thematic Group on Ethics, Integrity and Anti-Corruption set up under the GJLOS Programme has reopened discussions on freedom of information in Kenya and have adopted the ICJ-Kenya draft Bill as a starting point.

The Bill drafted by the ICJ provides a very good basis from which to develop a right to information law for Kenya. Notably, however, the Bill in its current form still requires work to bring its provisions in line with international best practice. There are a number of general principles that underpin good access laws. CHRI has analysed the Bill against these principles and suggested some improvements. The following is a summary of the key issues raised in CHRI's analysis.

Maximum Disclosure

An effective access law needs to be clearly premised on a strong commitment to the rule of maximum disclosure. This principle is supported by the conceptualisation of access to information as a RIGHT and a concomitant *presumption* in favour of access. The ICJ Bill rightly recognises the right to access information in its Preamble, but care needs to be taken to ensure that this is reflected throughout the entire Bill.

It is a concern that the content of the right may be narrowed in practice because the Bill focuses on access to “official records” and “official information”, rather than “information” generally. This latter term is broader and covers written, audio and visual materials and even samples and materials on its widest interpretation. Likewise, the Bill has unnecessarily restricted access under the law to “Kenyan subjects” or “a Kenyan person”. Conversely, jurisdictions like the United States and Sweden allow *any person* to request information under their access law. This can be important in countries that accommodate large numbers of

¹ Vitalis Omondi, *New Law Against Secrecy Proposed In Kenya*, The East African, 13-19 October 1999.
<http://www.nationaudio.com/News/EastAfrican/111099/Regional/Regional6.html>

asylum-seekers, long-term residents and foreign workers who need to access information related to their welfare or rights.

The Bill should clarify that all arms of government will be covered by the provisions of the law. In some jurisdictions, the executive and the courts have been excluded from the scope of the law. The wholesale exclusion of these bodies cannot be justified. Although there is some information collected and/or used by the executive and judiciary which can legitimately be exempted from disclosure, any such sensitive information will be protected via the exemptions provisions.

The Bill currently allows for private bodies to be made subject to the law if they are specifically prescribed in regulations. In accordance with international best practice, the Bill should extend coverage generally to private bodies that “carry out public functions” and where they “hold information which is required for the exercise or protection of people’s rights”. This recognises that in this age where privatisation and outsourcing is increasingly being undertaken by governments, the private sector has increasing influence and impact on the public and should not be beyond their scrutiny. The South African *Promotion of Access to Information Act* provides a very good model to draw on.

Section 3 states that the rights conveyed by the Bill will be implemented “progressively”. While the Government may legitimately wish to allow time for bodies to prepare for implementation, a maximum time limit should be included in the law to ensure that implementation cannot be delayed indefinitely. This has been the case in India for example, where the Central Freedom of Information Act was passed in December 2002 but eighteen months later is still not in force. Experience suggests a maximum limit of 1 year between passage of the law and implementation should be sufficient.

Effective access laws not only impose a duty on bodies to disclose information upon request, but also require information of general relevance to the public to be proactively published and disseminated, for example, regarding an body’s structure and activities, the documents they hold, their finances, opportunities for consultation and decisions/policies affecting the public. The Bill contains some basic proactive disclosure requirements, but these should be made much more comprehensive. The Bill should also explicitly require that said information be as widely accessible as possible, for example, by requiring that it be made available in multiple languages on the internet and for inspection at all local offices. The information should also be updated regularly.

Encouraging maximum information disclosure by public officials also requires the law to provide protection for “whistleblowers” (i.e. individuals who disclose information in contravention of the law and/or their employment contracts because they believe such disclosure is in the public interest). It is very positive that the Bill contains an entire part devoted to public interest disclosures. However, the provisions are unnecessarily restrictive, imposing a number of duties on whistleblowers to qualify for protection that in practice may be difficult for whistleblowers to discharge. These provisions should be reconsidered to ensure they will effectively protect all whistleblowers as long as they are bona fide in their intention.

Minimum Exceptions

While keeping in mind the overarching principle of maximum disclosure, it is nevertheless well-accepted that there can be a small number of legitimate exemptions in any access regime to protect against disclosures which would result in serious harm to important interests. However,

there is often disagreement about where to draw the line. As a general principle, exemptions should be kept to an absolute minimum and narrowly drawn.

The exemptions in the Bill are somewhat confusing. They are contained in two separate provisions – Sections 5(1) merged and then reviewed to ensure they are the minimum to protect legitimate interests. The exemptions should also be reviewed to ensure that they require a sufficiently high threshold of harm to justify non-disclosure. For example, it is not enough that information simply *relate* to national security to warrant non-disclosure; disclosure should actually be likely to cause serious prejudice or substantial harm to national security.

Additionally, best practice requires that ALL exemptions are still made subject to a “public interest override”, whereby a document which is presumed exempt should nevertheless be disclosed if the public interest in the specific case requires it. While Section 6(1) refers to the public interest, for clarity, all of the exemptions in the Bill should be made explicitly subject to a clearly drafted public interest test. The logic of the exemptions provisions should be: Is the information covered by a legitimate exemption? Will disclosure cause substantial harm? Is the likely harm greater than the public interest in disclosure?

Simple Access Procedures

A key test of an access law’s effectiveness is the ease, inexpensiveness and promptness with which people seeking information obtain it. The law should include clear and uncomplicated procedures ensuring quick responses at affordable fees. Applications should be simple and ensure that the illiterate and/or impecunious are not in practice barred from utilising the law.

A number of standard provisions generally included in access laws to promote effective implementation are missing from the Bill. For example, there is no mention of who will be responsible for managing applications; many laws commonly require a “Public Information Officer” be appointed for this purpose. The absence of a designated information officer could be confusing for the public because requesters will not know who they should contact to follow up their applications. There is also no provision requiring misdirected applications be transferred, which could result in applicants themselves being burdened with the expense and difficulty of resubmitting their applications. The Bill also does not mention which language(s) applications can be made in, nor whether information will be translated, if requested by the applicant. The time limits for processing applications need to be clarified. Time limits should be clearly stated so that there is no room for officials to exploit ambiguities to delay processing of applications. Drawing on international best practice, consideration should also be given to include an additional provision shortening the time limit for responding to applications to 48 hours where the requested information relates to the life and liberty of a person.

The Bill currently allows for the imposition of fees, including the imposition of higher fees for commercial requests. Ideally, no fees should be imposed under the law – a situation that occurred in Australia when their *Freedom of Information Act* was first introduced in 1982. At a minimum, any fees should not be set so high as to deter potential applicants. Best practice requires that fees be limited only to cost recovery, and that no charges should be imposed for applications (as is the case in Trinidad & Tobago and Mexico) nor for search time; the latter, in particular, could easily result in prohibitive costs if bureaucrats drag their heels when collating information.

Independent Appeals & Enforcement Mechanisms

Effective appeals and enforcement provisions ensure the success of access legislation. The Bill's appeals regime – namely, one internal appeal followed by an appeal to the newly established independent Information Commissioner and then to the courts – is well-designed, although some practical issues require clarification.

It is positive that Section 5(3) requires that refusals are accompanied by substantive written reasons and information regarding the appeals process. It should be clarified though, that applicants can appeal not only a decision to refuse access, but also the fees imposed and the form of access provided. While the Bill allows for an internal review as a first step in the appeals process, it leaves the details to be determined in regulations. This is not appropriate. An effective and internally consistent appeals framework is essential to the proper functioning of the entire access regime. The primary legislation should set out such important details to ensure that the overall regime is holistically sound. This deficiency should be rectified as a priority.

Nonetheless, it is very positive that the Bill seeks to establish a new position of Information Commissioner to serve as an independent body with the mandate to hear appeals under the law and make binding decisions and that final recourse still remains with the courts.

The law should include penalties to act as a practical deterrent to non-compliance. The Bill currently contains sanctions for non-compliance with the Information Commissioner's orders and wilful destruction of records subject to requests. However, penalties should also be available where there has been unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records and/ or obstruction of the work of any public body under the Act. Consideration should also be given to permitting penalties to be imposed on individuals because without personalised penalty provisions, many public officials may shirk their duties, safe in the knowledge that their employer will suffer the consequences. Notably though, defaulting officers at whatever level of seniority must be penalized and not just the official responsible for managing the body's requests.

Monitoring and Promotion of Open Governance

Many laws now include specific provisions empowering a specific body, such as the National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. It is positive that the Bill places an obligation on the new Information Commissioner to report annually to Parliament on the operation of the law. However, consideration should be given to elaborating upon exactly what the Information Commissioner's reports should contain at a minimum as the new Commissioner may benefit from more explicit guidance.

It is also increasingly common to include provisions mandating a body to promote the Act and the concept of open governance. Consideration should be given to include provisions which impose a legal obligation to train implementing officials on the new law. The Information Commissioner and/or the Ministry with responsibility for overseeing the law should also be required to raise public awareness of the rights provided under the law.

The full text of the analysis of Kenya's FOI bill can be found on CHRI's website at <http://www.humanrightsinitiative.org>.