

REPUBLIC OF KENYA

THE ACCESS TO INFORMATION BILL 2000

“A bill for an Act of Parliament to enable the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of government, public bodies and specified private bodies; and to enable persons to have personal information relating to them in the possession of such bodies corrected; and accordingly, to provide for a right of access to records held by such bodies; to provide for necessary exceptions to that right and for assistance to persons to enable them exercise it; to provide for the independent review both of decisions of such bodies relating to that right and of the operation of this Act generally (including the proceedings of such bodies pursuant to this Act); and for those purposes, to provide for the establishment of the office of Information Commissioner and to define its functions; to provide for the publication by such bodies of certain information about them relevant to the purposes of this Act; to amend, the Official Secrets Act (Chapter 187 of the Laws of Kenya) and other laws; and to provide for related matters.

1. This Act may be cited as the Access to Information Act 2000 and shall come into force on the date published in the Kenya Gazette.
2. In this Act unless the context otherwise requires;

“Record” refers to any documentary material regardless of its physical form or characteristics, and any copy thereof, and includes any correspondence, memorandum, book, plan, map, drawing, film, microfiche, diagram, pictorial or graphic work, data, photograph, recording, audio or video-tape, machine readable material and any other information held in electronic form whether on computer disk or tape or in the memory of a computer.

“Document” includes anything that contains information, letters, reports, studies, records, minutes, statistics, directives, instructions, circulars, memoranda, practice notes, opinions, decisions in writing whether in form of sound, visual recordings and non-personal computerised data.

“Information” means any material recorded or stored by any means including tape, computer, or other device and any material subsequently derived from information so recorded or stored whether manually, mechanically or electronically and anything that is part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing.

“Official record” “Official document” and “Official information ” means a record, held by a public authority in connection with its functions as such; and a record is so held if it is in the possession, custody or power of a public authority whether or not it was created by that authority or created before the commencement of this Act.

“Public Authority” means

- a) A government ministry, department or agency
- b) A Parastatal
- c) A Statutory corporation
- d) A Local authority
- f) A specified private body
- g) Any other body providing services, facilities or goods to the public authority (other than under a contract of employment) in relation to those services, facilities or goods;
- h) any other body or authority subject to examination by the Comptroller and Auditor General;
- i) any other body in relation to any function which it exercises on behalf of the government;
- j) any body which is wholly or partly constituted by appointment made by the President or a Minister of the Government or by a public authority;
- k) any body which is -
 - (i) established by virtue of the Presidents prerogative or by an Act of Parliament or an Order made under an Act of Parliament or which is established in any other way by a Minister of the government or by a government department or public authority; and which
 - (ii) receives at least half of its revenues directly from money provided by Parliament or from a levy authorised by an enactment or fee or charge of any other description so authorised or from more than one of those sources

"Access" includes the right to examine, to look at, peruse, inspect, obtain, copy or procure any record, document or information.

PART 1

RIGHT TO KNOW

3. The purposes of this Part of this Act are-

- (a) to extend progressively the right of the Kenyan Subjects have access to information held by public authorities in order to further the public interest by promoting-
 - (i) better informed discussions;

- (ii) free interchange of opinions and an enlightenment of the public;
- (iii) greater accountability of public authorities
- (b) to enable individuals to see information held by public authorities about their affairs and to ensure that it is accurate;
- (c) to ensure that persons are given reasons for decisions taken by public authorities which affect them;
- (d) to ensure that guidelines used by public authorities in making decisions affecting persons are publicly available; and
- (e) to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost.

4. Every Kenyan person shall have the right of access to official records held by a public authority.

5. (1) (a) The right to access under subsection (1) shall apply notwithstanding any statutory restriction or prohibition on the disclosure of information other than information falling within Sub sections 5 (1) and (2); and notwithstanding any common law restriction other than one contained in an order of the court, but only where such a restriction or prohibition applies to information falling within section 5 (2) (d) of this Act.

- (b) The restriction to the right to access referred to in paragraph (a) above may apply only if it is necessary having regard to;
 - i) the security of the republic or its relations with a foreign state or an international organisation;
 - ii) the central finance policy, monetary policy, or foreign exchange policy of the republic;
 - iii) the inspection, control or other supervisory activities of a public authority;
 - iv) the interest of preventing or prosecuting crime;
 - v) the public economic interest;

(2) (a) An application for access to an official record shall be made to the public authority which keeps the document.

(b) The application shall be examined and approval granted by the aforementioned authority. However, where special reasons so warrant, it may be laid down in a provision of the nature referred to in sub-section 2 (b), subsection (ii), that in applying that provision, examination and approval shall rest with another authority.

(c) In the case of a record of key significance for the security of the republic, it may be prescribed by statutory order, that only a particular authority shall be entitled to examine and approve questions relating to access to the document. In such cases the application must be submitted at once to the competent authority.

(d) No public authority may inquire into a persons identity on account of his request for access to an official record, or inquire as to the purpose of his request, except in so far as such inquiry is necessary in order to enable the

authority to ascertain whether or not any obstacle exists to prevent the release of the document.

- (3)
 - (a) Any official record which may be made accessible to the public shall be produced forthwith, or as quickly as possible, at the place where it is kept, and free of charge, for inspection, to any person who desires to have access to it in such a manner that it can be read, listened to, or otherwise comprehended, or in the form in which it is held unless the applicant requests that it be made available in another form and it is practicable to do so. A document may also be copied, reproduced, or used for conversion to a sound transmission.
 - (b) If a record cannot be made available without the disclosure of such part of it as is exempt, the rest of the document shall be made available to the applicant in the form of a transcript or copy.
 - (c) In any case where it withholds exempt information, a public authority shall notify the applicant that it has done so specifying under which of the paragraphs in section 2 (b), and section 3 of this Act, and for what reasons the information is considered so to be and the procedure by which an appeal against its decision may be made.
- (4) A public authority to whom a request for an official record has been made under this Act shall -
 - (a) provide a copy of the requested record to the applicant as soon as practicable in any case within a period of 15 working days from the date of the application, except where the record sought is of the nature provided for under sections 3 (b) and (c) above, in which case, the record shall be provided within a period of 30 working days, from that date; and where, in either case, the requested record has not been provided within the specified period, the request shall be deemed to have been refused.
 - (b) at the request of the applicant correct any information held by it relating to the applicant which is inaccurate and make any other amendment necessary to ensure that it is kept in accordance to the data protection principles.
- (5) A public authority from which an application for a record has been made, shall make no charge to the applicant for the provision of information other than:-
 - (i) a reasonable charge which shall not exceed the costs of making any copies of records and (if applicable), supplying them to the applicant;
 - (ii) a reasonable hourly charge which shall not exceed the sum of ten Kenya shillings per hour to cover the time spent in compiling the information in response to the request, but no such charge may be made for the first five hours of time so spent unless the request made for a commercial purpose, in which case an additional charge prescribed by regulations may be made and shall reduce or waive any such charges referred to in subparagraph (i);
 - (iii) where the disclosure of the information is in the public interest.

- 6.** (1) Exempt information under this Act is information which falls within the categories listed in section 4 subsection 2(b) above whose disclosure would -
- (a) be likely to have any of the effects specified in the following provisions of this section; and
 - (b) be contrary to the public interest.
- (2) The effects referred to in subsection (1) (a) are :
- (a) to damage the defence or international relations of the republic of Kenya;
 - (b) to damage the lawful activities of the security or intelligence services;
 - (c) to impede the prevention, investigation or detection of crime of the apprehension or prosecution of offenders; to facilitate an escape from legal custody; to prejudice the fairness of legal proceedings; or to endanger the safety or life of any person or the safety of a rare or endangered species;
 - (d) to involve the unwarranted invasion of the privacy of an individual other than the applicant or the person on whose behalf an application has with proper authority been made;
 - (e) by disclosing commercially confidential information relating to the authority; or supplied to or obtained by the authority from a third party causing unreasonable damage to the competitive or negotiating position of that authority or party.
 - (i) In considering the public interest in relation to information referred to under this subsection, particular regard shall be had to the need to;
 - (a) ensure that the expenditure of public funds is subject to effective oversight”
 - (b) keep the public adequately informed about the existence of any danger to public health or safety or to the environment;
 - (c) ensure that any statutory authority with regulatory responsibilities for the third party is adequately discharging its functions;
 - (f) to damage the economy by the premature release of the proposed introduction, abolition or variation of any tax, duty, interest rate or instrument of economic management; or to impede the assessment or collection of any tax or duty;
 - (g) to damage the position of the authority in negotiations relating to the pay or conditions or employment of its employees by revealing information compiled for the purpose of those negotiations;

(h) to damage the work of the authority by impairing its ability to obtain similar information in future, where the information in question was supplied to it in confidence by a third party who -

1. was not and could not have been required by statute, contract or otherwise to do so; and
2. did not supply it in the expectation of receiving in return so advantage or of affecting any change in the policy or practice of an authority or in the framing of legislation that would be of benefit to it;

(i) by revealing the advice, opinion or recommendation tendered by any identifiable individual in the course of that individual's official duties for the purpose of the formulation of the policy of the authority

- a) to damage the authority's ability to give adequate consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; or
- b) to prejudice the candour of any similar advice, opinion or recommendation to a degree likely to damage the quality of any resulting decision.

But information is not exempt under this paragraph insofar as it consists of factual information; or of the analysis, interpretation or evaluation of or any projection based on factual information; or of expert advice on a scientific, technical, medical, financial, statistical, legal or other matter other than advice to which paragraph (j) below applies; or of guidance such as is described in section 7 (2) (c) below; or of information relating to the personal affairs of the applicant; or of the reasons for any decision taken in relation to the applicant;

- (j) damage the authority's position in any actual or contemplated legal proceedings by revealing the legal advice which it received in anticipation of or connection with such proceedings;
- (k) interfere substantially and unreasonably with the work of the authority by requiring it to identify and retrieve a substantial volume of records, provided that before refusing to provide information on these grounds the authority has taken reasonable steps to assist the applicant to reformulate the request so as to avoid causing such interference.

7. A public authority shall-

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

(c) disclose records in its custody

8. (1) A public authority shall take reasonable steps to assist any person seeking to exercise any right under this Act.

(2) A public authority shall, taking any necessary steps to avoid the disclosure of exempt information, make available -

(a) a guide sufficient to enable any person wishing to apply for records under this Act to identify the classes of records held by it, the subjects to which they relate, the location of any indexes to be consulted by any person;

(b) an indexed register containing copies of records released in response to requests under this Act other than records relating to the personal affairs of the applicant;

(c) any guidance used by the authority in relation to its dealings with the public or with corporate bodies;

(d) to any person the reasons for any decision taken by it in relation to that person.

(3) The materials referred to in paragraphs (a) and (c) above shall be made available

(a) for inspection by any person without charge

(b) by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made, and

(c) on the Internet, provided that the materials are held by the authority in electronic form and it is practicable for it to so make them available.

9. (1) For the purposes of this Act there shall be an officer known as the Information Commissioner (the "Commissioner").

(2) The Information Commissioner may serve a maximum of two three-year terms.

10. (1) The President shall nominate a candidate or candidates for the post of Information Commissioner from persons qualified under the provisions of this Act and parliament by a special majority vote, shall confirm the said nomination.

(2) The person appointed to the office of Information Commissioner shall -

(a) be a person qualified to be appointed as a judge of the High Court of Kenya;

(b) be publicly regarded as a person who can make impartial judgements;

(c) have sufficient knowledge of the workings of Government;

- (d) not have had any criminal conviction and not have been a bankrupt;
- (e) be otherwise competent and capable of performing the duties of his or her office;
- (f) not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and
- (g) not hold any other public office unless otherwise provided for in this Act.

11. (1) The Information Commissioner shall be completely independent of the interference or direction of any other person or authority.

(2) (a) A person holding the Office of Information Commissioner may be removed from office before expiry of his or her term only for inability to exercise the functions of the office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

(b) The Information Commissioner shall be removed from the office by the President if the question of his removal has been referred to a Tribunal appointed under this section and the Tribunal has so recommended.

(c) The President shall appoint the Tribunal consisting of a chairman and four other members from among persons:-

(i) who hold or have held the office of judge of the High Court or Court of Appeal;

(ii) who are qualified to be appointed as judges of the High Court under section 61 (3) of the Constitution.

(3) The Information Commissioner shall:-

(a) investigate any complaint that an authority has failed to comply with any requirement of this Part and may initiate an investigation in the absence of a complaint;

(b) perform his or her functions under this Part so as to further the purposes specified in sub section 1 (1) above;

(c) conduct an investigation with as little formality and as expeditiously as the requirements of this part and other matters within the scope of the Commissioner's functions and may give advice to any person as to any of those matters;

(d) annually lay before Parliament on or before the first day of October a report on the operation of this Part and may from time to time lay before of Parliament such other reports on its operation as the Commissioner thinks fit.

(4) The Commissioner may decline to investigate a complaint in relation to any decision or action of a public authority unless before making it the complainant has complied with any procedure prescribed by regulations for seeking the internal review by the authority of any such decision or action and, following a

period of 15 working days from the date on which the application for review has not been completed or the complainant remains dissatisfied with the outcome of the review.

- (5) For the purpose of an investigation under this Act the Commissioner -
 - (a) may require any minister, officer or employee of the authority concerned or any other person who in the Commissioner's opinion is able to provide information or produce records relevant to the investigation to do so;
 - (b) shall have the same powers as the Court in respect of attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad) and in respect of the production of documents;
 - (c) may examine any record to which this part applies, including any record containing information which is or may be exempt;
 - (d) shall take all reasonable precautions to avoid the disclosure of information which is or may be exempt but may disclose to the appropriate authority any information, including exempt information, which in the Commissioner's opinion indicates the commission of an offence or significant misconduct on the part of any person;
 - (e) may receive and consider any record or information, whether or not it would be admissible in a court of law; and
 - (f) may enter any premises occupied by a public authority and examine or remove any record or material relevant to the investigation.
- (6) No obligation to maintain secrecy or other restriction upon the disclosure of information, whether imposed by an enactment or by any rule of law or otherwise, shall preclude a person from supplying information to the Commissioner for the purpose of an investigation under this section.
- (7) The government shall not be entitled, in relation to any investigation by the Commissioner, to any privilege in respect of the production of records or the giving of evidence as is allowed by law in legal proceedings produced by a person in the course of such an investigation shall be privileged in the same manner as if it were said or supplied in proceedings in court.

- 12.** (1) On the completion of an investigation the Commissioner may make an order requiring an authority to take such steps as the Commissioner deems necessary to comply with the requirements of this Part within such period of time as the order may specify;
- (2) If any person (including a minister) without lawful excuse -
- a) fails to comply with an order of the Commissioner; or
 - b) obstructs the Commissioner in the performance of his or her functions; or
 - c) is guilty of any act or omission in relation to an investigation by the Commissioner which, if that investigation were a proceeding in court, would constitute contempt of court,

the commissioner may certify the offence to a court which may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with the person in any manner in which court could deal with the person if he or she had committed the same offence in relation to the court.

- (3) All appeals will lie to the High Court and the decision of the High Court shall be final.
- (4) Hearings before the Commissioner shall be conducted in the manner prescribed under the rules hereunder.
- (5) Any person who destroys a record -
- (a) which at the time it was destroyed was the subject of a request, or of a complaint to the Information Commissioner, under this Act; and does so
 - (b) intending to prevent its disclosure in accordance with the requirements of this Act or in circumstances in which it was foreseeable that such disclosure would thereby be prevented; commits an offence and shall be liable on summary conviction to a fine not exceeding the statutory maximum or, on conviction on indictment, to imprisonment for a term not exceeding six months or a fine not exceeding Kshs 100,000 or both unless the person can prove that at the time of the alleged offence he or she did not know and had no reasonable cause to believe that the record was a record to which this subsection applies.

PART II
PROTECTION FOR PERSONS MAKING
PUBLIC INTEREST DISCLOSURES

13. (1) Subject to the following provisions of this section no person shall be penalised in relation to any employment, profession, voluntary work, contract, membership of an organisation or the holding of any office as a result of having made or proposed to make a disclosure of information which he or she obtained in confidence in the course of that activity if the disclosure is one which, because of the public interest, a court would not restrain.
- (2) Subject to subsection (3) the provisions of subsection (1) shall only apply where the person -
- (a) believes on reasonable grounds that the information is accurate; and
 - (b) has not made or proposed to make the disclosure for the purpose of obtaining payment or personal gain; and
 - (c) has -
 - (i) previously drawn the matter which the information concerns to the attention of the individual to whom the obligation of confidence is owed, or to a person designated by that individual for that purpose, and
 - (ii) allowed a reasonable period of time for appropriate action to be taken by that individual, but no such action has been taken;
- unless it was not reasonable to do so because of the urgency of the matter or because another individual had previously done so in relation to the same matter and had been penalised as result.
- (3) For the purposes of subsection (1) a disclosure which is made to the police or to an appropriate regulatory body in accordance with subsection shall be deemed to be made in the public interest.
- (4) For the purpose of this section a person is penalised if he or she is dismissed, discriminated against, made the subject of any reprisal or other form of adverse treatment or is denied any appointment, promotion or advantage that otherwise would have been provided; and the imposition of any such penalty in contravention of this section shall be actionable as a tort .
- (5) Any term of any settlement arising from a claim under this section, insofar as it purports to impose an obligation of confidentiality on any party to the settlement in respect of information which is not inaccurate and which was or was proposed to be disclosed, shall be unenforceable.
- (6) In any proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information it shall be a defence to show that in the circumstances the disclosure was in the public interest, provided that where the offence is alleged to have been committed by a public servant or government contractor and involves the disclosure of information obtained by him in his position as such, the defendant had before making the disclosure complied with the provisions of subsection (2).

PART IV GENERAL

- 14.** (1) The Minister may by regulations make further provision for -
- (a) the manner in which applications under this Act are to be made;
 - (b) the form in which information is requested under this Act is to be supplied;
 - (c) the making of applications for personal information by representatives of the individual to whom the information relates;
 - (d) for the measures which public authorities shall take to ensure in order to assist persons in exercising their rights under this Act;
 - (e) the measures which public authorities shall take to ensure that adequate records are created and maintained by public authorities;
 - (f) for the procedures that should be followed by a complainant in asking authority to review any decision or failure to act before a complaint may be made to the information Commissioner;
 - (g) the charges which may be made for the provision of information for commercial purposes;
 - (h) a public authority to consult with a third party before giving access to information obtained by it from that party;
 - (i) procedures requiring a public authority to ensure that personal information is accurate;
 - (j) compensation to be sought by an individual who has suffered damage as a result of the holding of inaccurate information about his or her personal affairs by a public authority;
 - (k) the procedure to be followed by the Information Commissioner in carrying out an investigation;
 - (l) the records that public authorities shall be required to keep;
 - (m) the salary and expenses of the Information Commissioner;
- 15.** The following laws are to be amended:
- a) The Official Secrets Act (Cap 187)
 - b) The Evidence Act (Cap 80)
 - c) The Penal Code (Cap 63)
 - d) The Preservation of Public Security Act (Cap 57)
 - e) The Kenya Broadcasting Act (Cap 221)
 - f) The Kenya Posts & Telecommunications Act (Cap 411)
 - g) The National Intelligence & Security Service Act 1998