

Analysis of the Republic of Kenya
draft Access to Information Bill 2000
(developed by The International Commission of Jurists Kenya)

**Submitted by the
Commonwealth Human Rights Initiative, April 2004**

The very foundation of a good choice is knowledge...How can the people receive the most perfect knowledge relative to the characters of those who present themselves to their choice, but by information conveyed freely, and without reserve, from one to another

James Mill, 1825

1. The Kenyan draft *Access to Information Bill* was developed in 1999 by the International Commission of Jurists in Kenya¹. The draft was initially prepared with a view to presenting it to Parliament for consideration. However, it was overtaken by the establishment of the Constitution of Kenya Review Commission; recognising the importance of securing domestic legal recognition of the right to information, attention shifted to ensuring the right was included in the new draft Constitution.
2. Notably, Article 79 of the current Constitution of Kenya guarantees the freedom of expression, which includes: “freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)”. The Republic of Kenya has also acceded to the International Covenant on Civil and Political Rights (ICCPR). Section 19(2) of the *ICCPR* protects the right to information in the similar terms to the Kenyan Constitution; it states that the right to freedom of expression includes the right “to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”. By ratifying the *ICCPR* and including a similar provision in its Constitution, the Republic of Kenya has agreed to take on the responsibility for the protection and promotion of the right to information. Notably, Kenya has also acceded to the African Charter on Human and People’s Rights which, by article 9, specifically enshrines the right to receive information by all individuals.
3. It is within this overall context that the Commonwealth Human Rights Initiative (CHRI) understands that the enactment of right to information legislation may again be raised by civil society in the near future. Even if constitutional protection *is* specifically extended to the right under the new Constitution, legislation is still needed to effectively operationalise the right. It is in recognition of the fact that the draft Bill may be reconsidered in the near future that CHRI has prepared the current analysis of the draft Bill.

THE VALUE OF THE RIGHT TO INFORMATION

4. At the outset, it is worth reiterating the benefits of an effective right to information regime:
 - *It strengthens democracy.* The foundation of democracy is an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

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> (Accessed on 21 March 2004).

- *It supports participatory development:* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess why development strategies have gone askew and press for changes to put development back on track.
 - *It is a proven anti-corruption tool:* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
 - *It supports economic development:* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
 - *It helps to reduce conflict:* Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.
5. It is important to recognise in the context of the current law-making exercise that for right to information legislation to be effectively implemented and utilised, it needs to be respected and 'owned' by both the government and the public. Experience shows that this is most likely where legislation is developed participatorily. Participation in the legislative development process requires that government proactively encourage the involvement of civil society groups and the public broadly. This can be done in a variety of ways, for example, by: convening public meetings to discuss the law; strategically and consistently using the media to raise awareness and keep the public up to date on progress; setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the development of legislation; and inviting submissions from the public at all stages of legislative drafting.

ANALYSIS OF DRAFT BILL AND SUGGESTIONS FOR IMPROVEMENT

6. While it is necessary to ensure that the public participates in the drafting process to ensure that the final legislation developed is appropriate for the national context, it is generally well-accepted that there are basic minimum standards which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*², provides more detailed discussion of these standards. The critique below draws on this work.³

² http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm

³ All references to legislation can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm

Introductory Provisions

7. It is positive that the introduction to the draft Bill specifically states that the Bill seeks to enable access to information to the greatest extent possible, consistent with the public interest and the right to privacy. However, while this sums up the underpinnings of any good access law, it does not clearly extend a *right* to information.

CHRI recommends that the draft Bill be reviewed to ensure that its provisions are drafted in language which makes it clear that the public have the (immediate) right to access information and the government a duty to ensure they can obtain such access.

8. The Bill rightly refers in the Preamble to access to *information*. This broad term is preferable to formulations which restrict access only to (public and/or official) documents or records. Notably however, the definitions in s.2 refer to “records”, “documents”, “official records” and “information”. It is not clear why so many different definitions were included. Furthermore, the term “information” is restrictively phrased, in that it only covers “material recorded or stored”. It is not clear whether this would allow access to information such as materials used to construct buildings/roads/etc. In developing country contexts in particular, access to such information has been extremely useful in ensuring that public works have been properly undertaken.

CHRI recommends that all the various definitions of information in s.2 be combined and a single definition of information be included which is reworded to ensure the broadest coverage. Section 2(d) of the Indian Freedom of Information Act 2002 provides a good example:

"information" means any material in any form relating to the administration, operations or decisions of a public authority;

CHRI recommends that the entire draft Bill be reviewed to make reference to access to information, rather than documents, records or official records. A number of provisions throughout the Bill use these latter terms interchangeably. A single standard of “access to information” should be adopted throughout the Bill.

9. Taking account of the fact that the right to access information in the draft Bill is provide in relation to “public authorities”, the definition of said “public authorities” in s.2 should be more broadly defined. It is not clear whether the executive and judicial arms of government are covered by the definition. International best practice requires that all three arms of government be covered by access legislation. Traditionally, the executive (ie. President) was often exempted, but broad class exemptions are not justifiable under a system genuinely committed to democratic oversight. While information about some aspects of both the executive’s and the judiciary’s functions may legitimately be withheld from disclosure, this should be covered specifically by the exemptions provisions.

CHRI recommends that the Bill be reviewed to ensure that its provisions are drafted to cover all three arms of government.

10. Both the Preamble and the definition of “public authority” in s.2 rightly attempt to include private bodies within the scope of the law. However, the terms of these provisions refer to “specified” private bodies. Thus, until such specifications are made, the law would confer no general right against private bodies. In accordance with international best practice however, disclosure of information should be the duty of all private bodies whenever it is necessary to exercise or protect one’s rights. Many private bodies – in the same way as public bodies - are institutions of social and political power, which have a huge influence on people’s rights, security and health. In this context, they should be as accountable and transparent with regard to their actions and decisions as the State.

CHRI recommends that the Bill be amended to include specific provisions to bring private bodies within the scope of the law. Part 3 of the South African Promotion of Access to Information Act 2000 is internationally recognised as providing the template for such provisions:

- (1) A requester must be given access to any record of a private body if—
- (a) that record is required for the exercise or protection of any rights;
 - (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
 - (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- (2) In addition to the requirements referred to in subsection (1), when a public body...requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.
- (3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.

Part 1 – Right to Know

11. It is positive that s.3 states that the purpose of the law is to promote informed discussions, accountability and exchange of information and ideas. To assure a liberal interpretation of the right to information and to promote the presumption in favor of access, it is important that the intent of the Bill establish clearly the principle of maximum disclosure, transparency and accountability. It is problematic however, that the draft Bill states that the right to information will be extended “progressively” to “Kenyan Subjects”.

- *Progressively*. While the Government may wish to implement the law in a phased manner, as was the case in Mexico and the United Kingdom, for example, this can be achieved by including a timetable for implementation in the law itself. The use of an ambiguous term such as “progressively” may otherwise allow the Government to unjustifiably delay implementation. Notably, experience from the field indicates that it should take no more than 1 year to prepare for implementation. The United Kingdom’s 5 year implementation schedule has widely been criticised as unreasonable.
- *Kenyan Subjects*. International best practice requires that any person at all should be able to access information, whether a citizen or not. There is no justification for excluding permanent residents from accessing information, nor in fact, for broadening the coverage further to all people. The right to information is globally extended in the United Kingdom for example, as well as the US and Mexico.

CHRI recommends that s.4 be redrafted to ensure the right to information is implemented within no more than 1 year after its enactment.

12. Section 4 sets out the parameters of the right to information, but the provision is flawed in a number of respects. It restricts the scope of the law to Kenyan persons (see the critique at paragraph 5, bullet point 2) wanting access to official records (see the critique at paragraph 2) from public authorities (see the critique at paragraphs 3 and 4).

CHRI recommends that s.4 be redrafted to take account of all of the problems identified in the paragraphs 2-5 above.

13. It is positive that the provision provides that the right to access overrides statutory or common law prohibitions, but s.(1)(a) is confusingly worded at present. What is meant by the “right of access under subsection (1)”? Should the references to restrictions on disclosure be to s.6(1) and (2) rather than s.5(1) and (2)? What is the intended effect of the reference to s.5(2)(d)? *CHRI recommends that this section be reconsidered and redrafted for clarity.* Section 5(1)(b) contains exemptions to the general right of access provided in s.4. It is unnecessary to include these general categories of exemption, when s.6 sets out a detailed exemptions framework. It is particularly worrying that these exemptions are not stated to be subject to any public interest override. Further, they are very generally worded, such that a broad interpretation could easily result in severe

restrictions on the right to information. *CHRI recommends that s.5(1)(b) be deleted and/or merged with s.6.* **Insert new: Part II – Procedures for making requests**

15. Sections 5(2) to (5) set out the procedures for making and dealing with access to information requests. For clarity, consideration should be given to separating them out from s.5(1) which deals with the parameters of the right itself.

16. Section 5(2)(a), which concerns who an application should be made to, is potentially restrictive in practice. While it is obviously preferable that an application be made to the body which keeps the information, the law should include provisions for transferring applications where they not submitted to the most appropriate body. In practice, it may be difficult for members of the public to ascertain which body, or bodies, hold the information they require and, if they are initially mistaken, to then submit multiple application until they find the right body. It is simpler, cheaper and timelier to require public bodies to simply transfer applications which would be better handled by another body.

CHRI recommends that s.5(2)(a) clearly make bodies responsible for transferring applications which they are not in a position to respond to. Sections 8 and 7(4) of the Jamaican Access to Information Act 2002 provide an example.

8.—(1) *Where an application is made to a public authority for [information] -*
(a) which is held by another public authority; or
(b) the subject matter of which is more closely connected with the functions of another public authority,
the first mentioned public authority shall transfer the application or such part of it as may be appropriate to that other public authority and shall inform the applicant immediately of the transfer.

(2) A transfer of an application pursuant to subsection (1) shall be made as soon as practicable but not later than [X] days after the date of receipt of the application.

7.—(4) *A public authority shall respond to an application as soon as practicable but not later than—*

(a) [X] days after the date of receipt of the application; or

(b) in the case of an application transferred to it by another authority pursuant to section 8, [X] days after the date of the receipt by that authority,

so, however, that an authority may extend the period of [X] days for a further period, not exceeding [X] days, in any case where there is reasonable cause for such extension.

17. Section 5(2)(b) is confusingly worded. It refers to subsection 2(b)(ii) but no such provision is included in the draft Bill. It is understood that the reference may have been to s.(2)(c) instead. Section 2(c) is appropriate, on the basis that its intent is to protect potentially sensitive information from being seen by low level bureaucrats. However, it is assumed that the same timelines for a response will apply in such cases and the same standard of exemptions.

18. Section 5(2)(d) should be redrafted to specifically require that the identity of a requester can only be requested in cases where third party exemptions may apply. In no other cases is the identity of a request of relevance.

CHRI recommends that s.5(2)(d) be amended to ensure the identity of a requester can only be requested in cases where third party exemptions may apply.

19. Sections 5(3) and 5(4) appear to overlap substantially, and may therefore be liable to cause confusion in terms of when and how information will be accessed.

- The time limits in s.5(3)(a) for producing information are ambiguous and therefore open to abuse by the bureaucracy.

- There is little justification for the differential time limits included in s.4(a). Possibly, there is an argument that documents which require considerably partial deletion may take time to prepare. However, best practice does not justify delay in cases where a decision has been made to withhold information.
- It is not clear what criteria will be considered in deciding whether it is “practicable” under s.5(3)(a) to provide information in a certain form. Will cost be considered? What about the public interest, for example, in translations?

CHRI recommends that ss.5(3) and (4)(a) be merged and redrafted to ensure clarity regarding the time limits applicable for determining applications and producing information. Time limits applicable to information which is exempt or will be partially disclosed should be reconsidered.

CHRI recommends that an additional provision be included requiring information to be provided with 48 hours where it relates to the life and liberty of a person. This is consistent with s.7(1) of the Indian Freedom of Information Act 2002.

CHRI recommends that s.3(c) be redrafted as a new provision dealing with the provision of reasons and advice on appeals processes in cases where an application is rejected.

CHRI recommends that the last 2 lines of s.4(a) be redrafted as a new provision dealing with deemed refusals.

20. The draft Bill does not currently address the issue of translation of requested information. A society which promotes democratic participation and aims to facilitate the involvement of all of the public in its endeavours should ensure that people are able to impart and receive information in their own language as well as in their own cultural context.

Considering that Kenya’s official languages are both English and Swahili, CHRI recommends that an additional provision be included which enables citizens to access information in the second official language. Section 12 of the Canadian Access to Information Act 1985 provides a useful example:

(1) A person who is given access to a record or a part thereof under this Act shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared

21. Section 4(b) is confusingly worded. Presumably, the intention was to require the amendment of *inaccurate* (not “accurate” as at line 2) information.

22. Section 5(5) sets out the fees regime. Best practice requires that any fees which are imposed for gaining access should not be so high as to deter potential applicants. Fees should be limited only to cost recovery. Ideally, no charges should be imposed for applications nor for search time. The latter, in particular, could easily result in prohibitive costs and defeat the intent of the law, particularly if bureaucrats deliberately dragged their heels when collating information in order to increase fees.

CHRI recommends that s.5(5) be worded to make it clear that any fees imposed should not be prohibitively high, so as to defeat the intention of the law. Section 5(5)(ii) should be deleted.

23. Section 5(5)(ii) allows for a differential fee structure for commercial requests. However, the draft Bill states at s.5(2)(d) that requesters should not be asked for the reasons for their request, such that in practice bodies imposing fees should not be aware of the purpose of the request. Presumably, bodies cannot simply assume a request is being made for a commercial purpose simply because it is made by a commercial body.

CHRI recommends that s.5(5) be amended to remove any allowances for higher charges to be levied for commercial requests.

24. The purpose of s.5(5)(iii) is unclear. It appears to specifically impose charges where the disclosure of information is in the public interest! In fact, the opposite should be the case. Provision should be included for fees to be waived if disclosure of the information is in the public interest.

CHRI recommends that s.5(5)(iii) be deleted.

CHRI recommends that a new provision be included which allows for fees to be waived if disclosure is in the public interest. Section 30A of the Australian Freedom of Information Act 1982 provides a useful example:

(1) Where:

(a) there is, in respect of an application to [a body] requesting access to a document or under subsection 54(1) requesting a review of a decision relating to a document, an application fee (whether or not the fee has been paid); and

(b) [the body] considers that the fee or a part of the fee should be remitted for any reason, including either of the following reasons:

(i) the payment of the fee or of the part of the fee would cause or caused financial hardship to the applicant or a person on whose behalf the application was made;

(iii) the giving of access is in the general public interest or in the interest of a substantial section of the public;

the agency or Minister may remit the fee or the part of the fee.

25. The draft Bill does not currently contain sanctions for non-compliance, unreasonable delay or the unreasonable withholding of information. (Section 12(1) deals with non-compliance with the Information Commissioner's orders and s.12(5) only with penalties for willful destruction of records subject to requests.) Rights needs remedies however. The availability of penalties is essential to ensuring the proper application of the law is not undermined and that political and/or bureaucratic resistance to open government does not go unchecked.

CHRI recommends the inclusion of additional provisions to supplement the penalties included at s.12(5) which will enable penalties to be imposed on officials obstructing the application of the law. The provisions should specifically state who – the Information Commissioner, the courts or any other body – can impose the penalty. A number of provisions have been included below for consideration:

- s.12 of the Maharashtra (India) Right to Information Act 2002

(1) Where any Public Information Officer has without any reasonable cause, failed to supply the information sought, within the period specified...the appellate authority may, in appeal impose a penalty of rupees two hundred fifty, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.

(2) Where it is found in appeal that any Public Information Officer has knowingly given

(a) incorrect or misleading information, or

(b) wrong or incomplete information ;

the appellate authority may impose a penalty not exceeding rupees two thousand, on such Public Information Officer as it thinks appropriate after giving such officer a reasonable opportunity of being heard...

- (4) *The penalty under sub-sections (1) and (2) as imposed by the appellate authority, shall be recoverable from the salary of the Public Information Officer concerned, or if no salary is drawn, as an arrears of land revenue.*
- s.54 of the UK Freedom of Information Act 2000:
 - (1) *If a public authority has failed to comply with [a notice of the appeals body, the appeals body] may certify in writing to the court that the public authority has failed to comply with that notice.*
 - (2) *Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.*
 - s.49 of the Article 19 Model Law:
 - (3) *It is a criminal offence to wilfully: -*
 - a. *obstruct access to any record contrary to this Act;*
 - b. *obstruct the performance by a public body of a duty under this Act;*
 - c. *interfere with the work of the [appeals and/or monitoring body]; or*
 - d. *destroys records without lawful authority.[.or*
 - e. *conceals or falsifies records.]*
 - (4) *Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.*

Insert new: Part III – Exemptions

26. Section 6 sets out the exemptions regime. (Section 5 currently also contributes to the exemptions regime. However, in accordance with the comments in paragraph 8 above, CHRI recommends that the entire exemptions regime be captured in this Part.) It is very positive that s.6(1) appears to make the entire exemptions regime subject to the dual requirements that disclosure must be likely to have a (negative) effect *and* be contrary to the public interest. International best practice regarding the principle of maximum disclosure requires that any restrictions on access information should always be subject to the tests of whether non-disclosure is in the public interest. ARTICLE 19 has developed a simple 3-part test to be applied every time the right to access is restricted. *CHRI recommends that the public interest test in s.6(1)(b) be elaborated upon. The key questions to be considered are: Is the information covered by a legitimate exemption?*

(2) Will disclosure cause substantial harm? Is the likely harm greater than the public interest in disclosure? CHRI recommends that s.6 be drafted so that the public interest issues detailed in s.6(2)(e)(i) be considered in relation to all of the exemptions, rather than just s.6(2)(e). The exemptions in s.6(2) are extremely detailed. It is positive that they are drafted in terms of requiring actual harm or damage to be shown. Consideration could be given to simplifying some of the provisions, for ease of understanding for the public and the bureaucracy. For example, s.(6)(i)(b) is quite complicated. Notably, it is vital that this provision does not operate to protect bureaucrats from having their advice to government scrutinised. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, where the discussions relate to sensitive information, it must be remembered that such information will be protected under other exemptions clauses.

29. Documents more than ten years old should not be subject to the exemptions regime. After this time, release should be broadly permitted, except for information subject to continuing privacy obligations.

Insert new: Part IV – Proactive Disclosure

30. Section 7 deals with records management. Consideration should be given to moving this provision so that it sits together with the sections on monitoring and training, and other issues related to the practical implementation of the law. The huge volume of information in government's hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. The key is to ensure a comprehensive framework is in place which is capable of supporting the objectives of the access legislation. It is therefore positive that the draft Bill contains provisions dealing with records management. Consideration should be given to specifically requiring that the appropriate record keeping and management systems are in place to ensure the effective implementation of the law. For example: *“Every public body is under an obligation to maintain its records in a manner which facilitates the right to information as provided for in this Act.”* Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management. (See s.46 of the United Kingdom *Freedom of Information Act, 2000* for a good model.)
31. Section 8(1) imposes an obligation on public bodies to assist people to exercise their rights under the law. This is an excellent provision. Consideration should be given to separating this section out and placing it at the start of new Part II above to ensure that all bodies covered by the law are fully aware of their duty to assist requesters at all stages in the process of accessing information.
32. Section 8(2) address, to some extent, the best practice requirement that bodies should proactively disclose certain types of Information that is relevant to the citizens for the realisation and protection of their rights. Such mechanisms work to increasing the confidence in government and private bodies while at the same time reducing the number of request made under access legislation. Information commonly provided under such provisions include: the structure and activities of every department; information about all classes of records under each department's control; a description of all manuals used by employees for administrative purposes; and names and addresses of officers who deal with information request.
33. While s.8(2) provides a basic proactive disclosure framework, consideration should be given to setting up a more comprehensive proactive disclosure regime, to the benefit of the public. Section 8(3)(a) could also usefully specify that the materials proactively provided should be available at all offices of the body, both its headquarters and any regional/local offices. Further, a specific provision should be including requiring the regular updating of the information provided every 6-12 months.

CHRI recommends that s.8(2) be extended to require more comprehensive proactive information disclosure. Section 7(1) of the Trinidad & Tobago Freedom of Information Act 1999 and s.4 of the Indian Freedom of Information Act 2000 provide good examples of proactive disclosure clauses:

Trinidad & Tobago: (a) cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago [and on their website and to keep copies for inspection at all of their offices] as soon as practicable after the commencement of this Act -

- (i) a statement setting out the particulars of the organisation and functions of the public authority, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions and particulars of any arrangement that exists for consultation with, or representation by, members of the public in relation to the formulation of policy in, or the administration of, the public authority;

- (II) a statement of the categories of documents that are maintained in the possession of the public authority;
 - (III) a statement of the material that has been prepared by the public authority under this Part for publication or inspection by members of the public, and the places at which a person may inspect or obtain that material;
 - (IV) a statement listing the literature available by way of subscription services;
 - (V) a statement of the procedure to be followed by a person when a request for access to a document is made to a public authority;
 - (VI) a statement specifying the officer responsible within each public authority for the initial receipt of, and action upon, notices under section 10, requests for access to documents under section 13 and applications under section 36;
 - (VII) a statement listing all boards, councils, committees and other bodies constituted by two or more persons, that are part of, or that have been established for the purpose of advising, the public authority, and whose meetings are open to the public, or the minutes of whose meetings are available for public inspection;
 - (VIII) if the public authority maintains a library or reading room that is available for public use, a statement of that fact including details of the address and hours of opening of the library or reading room; and
- (b) during the year commencing on 1st January next following the publication, in respect of a public authority, of the statements under paragraph (a) that are the statements first published under that paragraph, and during each succeeding year, cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago statements bringing up to date the information contained in the previous statements.

India: (b) publish [widely and in a manner easily accessible to the public]...

- (i) the particulars of its organisation, functions and duties;
 - (ii) the powers and duties of its officers and employees and the procedure followed by them in the decision making process;
 - (iii) the norms set by the public authority for the discharge of its functions;
 - (iv) rules, regulations, instructions, manuals and other categories of records under its control used by its employees for discharging its functions;
 - (v) the details of facilities available to citizens for obtaining information; and
 - (vi) the name, designation and other particulars of the Public Information Officer;
- (c) publish all relevant facts concerning important decisions and policies that affect the public while announcing such decisions and policies;
- (d) give reasons for its decisions, whether administrative or quasi-judicial to those affected by such decisions;
- (e) before initiating any project, publish or communicate to the public generally or to the persons affected or likely to be affected by the project in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.

Insert new: Part V – Information Commissioner

34. CHRI welcomes the appointment of an independent Information Commissioner mandate to conduct investigations and determine appeals in respect of complaints regarding the application of the law. Best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, the availability of another independent body as the first point of appeal is a positive step.
35. It is a good sign that s.10(2) appears to ensure that the Information Commissioner will be a person with strong qualifications and integrity. Likewise, it is encouraging that s.11(1) specifically states that the Information Commission will be completely independent. (Consideration should be given to clarifying that the Information Commissioner *will*

however, be subject to the direction of the courts.) However, it should be recognised that the creation of a new office of the Information Commissioner will require the allocation of financial resources from the Government. It is important that the Government is genuinely committed to ensuring the new Commissioner can discharge his/her mandate effectively and does not indirectly exert influence via the (non)allocation of funding.

36. Consideration should be given to separating out ss.11(1)-(2) from the remainder of the section, as the former provisions deal with administrative issues around the selection of the Information Commissioner, while the latter set out the Commissioner's investigation and appeals activities.

Insert new: Part VI – Appeals

37. Section 11(4) appears to allow for an internal review/appeal, prior to complaints being sent to the Information Commissioner. However, this section is written in general terms, leaving the details of the internal appeals process to be set out in regulations. This is not appropriate. An effective and internally consistent appeals framework is essential to a proper functioning of the entire access regime. The primary legislation should set out such important details. It is notable in this context that the current provisions dealing with receiving and responding to requests do not make it clear who will be responsible for applications within each body (see s.5(2)-(5)). This could cause additional confusion when determining who will be responsible for the reviewing the initial decision. To ensure clarity and ease of implementation, the entire procedure for applying for information, determining applications and submitting and handling appeals should be developed holistically and captured in a single legislative instrument.

If it is decided that an internal review must be undergone before appeals can be made to the Information Commissioner, CHRI recommends that this process should be detailed in the draft Bill. This will provide clarity for the public and the bureaucracy. Alternatively, s.11(4) could be deleted, with the Information Commissioner operating as the first point of appeal (assuming that the Information Commissioner develops procedural rules under s.12(4) which ensure appeals are cheap, simple and quick).

38. Section 11(3) sets out the functions of the Information Commissioner. However, while providing detail on the Commissioner's investigative functions (which is then elaborated in very good detail in ss.11(5)-(7)), the section fails to clearly set out the Commissioner's appeals mandate. It is assumed however, that the Commissioner has such an appeal function; otherwise, it is not clear of what use there is in providing the Commissioner with extensive investigative powers. This shortcoming is also to some extent reflected in s.12(1) which empowers the Commissioner to make orders, but is not worded so as to explicitly enable the Commissioner to compel disclosure.

CHRI recommends that ss.11(3) and 12(1) be redrafted to make it clear that the Information Commissioner operates as an appeal body and has powers to compel disclosure and impose penalties for non-compliance.

39. The current provisions detailing the Information Commissioners functions do not set out a time limit for deciding on complaints. Best practices and international requirements indicate that no more than 30 days should be allowed for a response.

CHRI recommends that a time limit be included for disposal of appeals to the Information Commissioner.

40. It is positive that the draft Bill explicitly allows appeals under the law to the High Court. Consideration should be given to making it clear that the High Court has the power to consider the case de novo, and will not be restricted to considering only points of law.

41. It is positive that ss.12(2) and 12(5) allow for the imposition of penalties. Paragraph 19 above suggests improvements to this current penalties regime. Additionally, consideration

should be given to reworking s.12(5)(b) as providing an 'intention' to prevent disclosure may be a difficult standard to meet in practice.

Insert new: Part VII –Promotion of the Act

42. It is increasingly common to include provisions in access laws mandating a body to promote the new law and the concept of open governance. Such provisions often specifically require that the Government ensure that programmes are undertaken to educate the public and the officials responsible for administering the Act. These bodies are also often mandated to monitor and support the implementation of the Act and/or to act as mediators between requesters and agencies. Section 11(3)(d) currently makes the Information Commissioner responsible for reporting to the Parliament annually on the operation of the law.

CHRI recommends that additional provisions be included in the draft Bill which clearly detail the parameters of the Information Commissioner's monitoring role, as well as making the Information Commissioner responsible for training and public education on the new law. A number of model provisions are listed below:

- Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999*:

40.(1) *The Minister shall, as soon as practicable after the end of each year, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.*

(2) *Each responsible Minister shall, in relation to the public authorities within his portfolio, furnish to the Minister such information as he requires for the purposes of the preparation of any report under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.*

(3) *A report under this section shall include in respect of the year to which the report relates the following:*

 - (a) *the number of requests made to each public authority;*
 - (b) *the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
 - (c) *the number of applications for judicial review of decisions under this Act and the outcome of those applications;*
 - (d) *the number of complaints made to the Ombudsman with respect to the operation of this Act and the nature of those complaints;*
 - (e) *the number of notices served upon each public authority under section 10(1) and the number of decisions by the public authority which were adverse to the person's claim;*
 - (f) *particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
 - (g) *the amount of charges collected by each public authority under this Act;*
 - (h) *particulars of any reading room or other facility provided by each public authority for use by applicants or members of the public, and the publications, documents or other information regularly on display in that reading room or other facility; and*
 - (i) *any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.*
- Section 20 of the Article 19 *Model FOI Law*

Every public body shall ensure the provision of appropriate training for its officials on the right to information and the effective implementation of this Act.
- Section 83 of the South Africa *Promotion of Access to Information Act*

(2) [Insert name of body], to the extent that financial and other resources are available--

- (a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;
- (b) encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and
- (c) promote timely and effective dissemination of accurate information by public bodies about their activities.

(3) [Insert name of body] may--

- (a) make recommendations for--
 - (i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and
 - (ii) procedures in terms of which public and private bodies make information electronically available;
- (b) monitor the implementation of this Act;
- (c) if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act;
- (d) recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;
- (e) train information officers of public bodies;
- (f) consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;

Replace Part II: Part VIII – Protection for Persons Making Public Interest Disclosures

43. In order to support maximum information disclosure, it is positive that the draft Bill contains specific protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.
44. Notably however, the current provisions in the draft Bill are extremely tightly drafted and run the risk of being too restrictive in their application. This may reduce their ability to effectively protect whistleblowers.
- Section 13(1) should include a catch-all in respect of types of discrimination by adding after “or the holding of any office” the phrase “or in any other way”.
 - Section 13(2)(b), while apparently trying to ensure false disclosures are not made in pursuit of monetary gain, could still have the practical effect of removing from the protection of the law legitimate whistleblowers. Although in an ideal situation, a whistleblower will be motivated purely by the public interest, they should not be disqualified from protection just because they also obtained personal gain from the disclosure *so long as the disclosure was in the public interest*. This should be the fundamental test.
 - Section 13(2)(c) sets too high a test for whistleblowers in practice. Section 13(2)(c)(i) to take account of the fact that there are many cases where the very person to whom the whistleblower owes an obligation of confidence (ie. their Minister or department head) is complicit in the wrongdoing about which they are concerned. Similarly, s.13(2)(c)(ii) does not account for the fact that whistleblowing may be retrospective, for example where a government employee leaks information about a bad policy decision; the wrongdoer can no longer rectify the harm, but it remains important to blow the whistle to ensure that they are held to account for their wrongdoing.

CHRI recommends that Part VII be reconsidered and redrafted to ensure that it does not impose unreasonable requirements on whistleblowers before protection is extended.

Insert new: Part VIII – General

45. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level.

In order to encourage openness and guard against this possibility, CHRI recommends that a new provision be included to protect officials/bodies acting in good faith to discharge their duties under the law. Some model provisions are listed below:

- Section 89 of the South African Promotion of Access to Information Act 2000
No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.
- Section 38 of the Trinidad and Tobago Freedom of Information Act 1999
 - (1) *Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –*
 - (a) *no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;*
 - (b) *no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –*
 - (I) *any person who was the author of the document; or*
 - (II) *any person as a result of that person having supplied the document or the information contained in it to the public authority;*
 - (c) *no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.*
 - (2) *The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.*
 - (3) *Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.*

46. Section 14 should be redrafted taking into account the recommendations above.

47. Section 15 lists several laws which are 'to be amended', but fails to actually amend them or set a timetable for their amendment. In itself, this provision therefore appears to have little practical use. (NB: CHRI has not done a comprehensive review of the secrecy provisions in Kenya's laws and does not purport to endorse the list of provisions at s.15 as complete list of provisions requiring amendment.)

CHRI recommends that s.15 be redrafted so that the relevant provisions which require amendment are specifically listed and explicitly amended by the draft Bill.

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