

Analysis of the Government of the Republic of Kenya

Draft Freedom of Information Policy and Draft Freedom of Information Bill 2007

Recommendations for Amendments

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."

--- Kofi Annan



Submitted by the

Commonwealth Human Rights Initiative
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**GENERAL COMMENTS ON THE REPUBLIC OF KENYA'S DRFT FREEDOM OF
INFORMATION POLICY AND FREEDOM OF INFORMATION BILL 2007**

1. The Kenyan Chapter of the International Commission of Jurists forwarded the Commonwealth Human Rights Initiative (CHRI) the Government of the Republic of Kenya's draft Freedom of Information Policy Paper and Freedom of Information Bill 2007 for comment. It is understood that the Government of Kenya has released both documents on their website (www.information.go.ke) for stakeholder comment.
2. The documents are a very positive step toward implementing an effective freedom of information law in Kenya. It is evidence of the Government's increasing commitment to good governance through transparency and accountability that all play an integral role in achieving a successful society, economy and democratic environment.
3. CHRI takes this opportunity to support the Government's efforts to undertake consultation with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public.
4. CHRI has now examined the Policy Paper and the draft Freedom of Information Bill (the Bill). Based on CHRI's experience in drafting and reviewing access to information legislation across the Commonwealth, this paper suggests some amendments to the draft Bill to ensure that it is in line with recent international best practice on access to information.

COMMENTS ON THE GOVERNMENT OF KENYA FREEDOM OF INFORMATION POLICY

5. CHRI commented on the Government of Kenya's draft Freedom of Information Policy (the Policy Paper) in January of 2007. The draft that has now been released for stakeholder comment has not been altered substantially and therefore the great majority of the comments that were made by CHRI in January still apply. As such, CHRI's comments that were made at that time are attached to this critique (Annex 1). However, it is positive to see that not all of the concerns that CHRI had with the policy paper have flowed through to the drafting of the Bill. Nonetheless, the final policy paper will be a document that lives to indicate Government's intention for the law and may influence the court's interpretation of the final law if it is ever uncertain. For these reasons, CHRI would strongly suggest that the Policy Paper continues to be developed despite the drafting of a Bill, and should be amended to reflect the key principles of the right to information (see Annex 2) in the ways CHRI has recommended.

6. In summary, CHRI's major concerns with the January version of the Kenya Government Policy Paper were¹:
 - Of primary concern is the language throughout the draft Policy Paper. Although many of the necessary provisions for a somewhat effective right to information law appear to be covered, the language throughout the paper tends to undermine the status of the right to information as a fundamental human right that is the foundation of many other rights and attaches to the individual as a member of society.
 - The draft Policy Paper refers to only minimal proactive disclosure requirements. Routine publication and dissemination of information is a key mechanism for increasing government transparency and accountability, promotes efficient public sector records management and aids public participation in government.
 - The exemptions referred to in the draft Policy Paper are broadly worded and all are weakened by the lack of an overriding requirement that where disclosure is in the public interest, information will be released if the public interest in disclosure outweighs the public interest in withholding the information.
 - The lack of detail about how the Information Commissioner will be appointed and dismissed is concerning. The independence from political interference is essential to the operation of the Information Commissioner and should be dealt with at this level. In addition, the Policy Paper should recognise that the Information Commissioner is not simply an appeals mechanism but should be established as the champion of the move to transparency and open governance and the functions and powers of the office should reflect that.
 - The draft Policy Paper lacks an effective penalties regime to sanction non-compliance with the law. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

¹ See page 3-4 of CHRI's critique of the Government of Kenya's draft Freedom of Information Policy Paper.

- The Policy Paper should also address how the Government will prepare for implementation. This is something that is best dealt with as early as possible, particularly as it allows much greater preparation time for the Bill which can then be implemented at a sooner date. For example, specifying which department will be responsible for overseeing the implementation of the law.

ANALYSIS OF THE REPUBLIC OF KENYA'S DRFT FREEDOM OF INFORMATION BILL
2007

7. Overall, CHRI's assessment is that the Bill is relatively strong and the Bill's provisions go a long way toward ensuring the right to information can be realised in line with the best practice principles of maximum disclosure and minimum exemptions (see Annex 2). Nevertheless there are a number of areas where the Bill could be strengthened in order to ensure the law establishes an effective and well-implemented right to information.

GENERAL COMMENTS

8. At the outset, the order of the provisions in the Bill is generally problematic. The Bill sets up the Commission – its functions, powers, establishment etc... even before people are granted the right to access information. This ordering is such that it may be very difficult and confusing for both the public and officials to understand the law and its objective. In addition, the fact that the Bill doesn't establish the right to information (the most important and integral provision in the law) until section 25 implicitly portrays that the Government gives a low and secondary priority to the right to information. This provision should be one of the first sections of the law – it is not only a fundamental right, but it is the key provision from which the remaining provisions stem.
9. It is crucial that any right to information law is drafted in a user-friendly way and the ordering of the provisions is integral. Many laws around the world follow a similar logical progression which would be recommended to be followed in the Kenya Bill.

Recommendation

Amend the order of the provisions of the law to ensure that it reads in a logical manner ensuring the Bill can be understood easily. Most importantly, the people's right to access information should be established at the very beginning of the Bill. A recommended order of the provisions would be:

- 1. Preliminary (the current Part I)*
- 2. Right to Information (the current Part III)*
- 3. Applications to Access Information (the current Part IV)*
- 4. Internal Review of Decisions (the current Part V)*
- 5. Establishment, Powers and Functions of the Information Commission of Kenya (the current Part II)*
- 6. Miscellaneous (the current Part VI)*

PREAMBLE

10. The Bill currently provides a very short preamble that effectively provides a literal summary of the main provisions/parts of the law. However, best practice preambles across the world are drafted to establish the objectives or overall intention for the law. The preamble establishes a frame of reference within which the remaining provisions should be

interpreted and while such statements are not usually enforceable, nonetheless they can be a useful guide for the judiciary if the law is ever challenged in the courts.

11. Therefore, it is recommended that consideration is given to referring to more general purposes/objectives of the law such as promoting public accountability, providing transparency, creating an informed citizenry which in turn enables more effective public participation and promoting democratic governance. In addition, in Kenya, the right to information is implicit in the rights enshrined in the Constitution – in Article 79. The fact that this law will be implementing a constitutionally enshrined right should also be recognised in the preamble.
12. Many right to information laws around the world take this approach and a suggested phrasing is given below.

Recommendation

Amend the current preamble (or insert an objects clause) which states specifically the broader purposes of the law and its intended impact. A suggested wording would be:

The objects of this Act are -

- (a) *to implement and enable people to realise their fundamental and constitutionally enshrined right to the freedom to receive and communicate ideas and information.*
- (b) *to promote open government through maximum disclosure of information;*
- (c) *to facilitate the right of all persons to have access to information held by public authorities and private bodies in certain circumstances and to require that public authorities proactively publish and disseminate as much information as possible to the public in a useful form and manner in order to further the public interest by promoting-
 - (i) *public participation in democratic and development processes;*
 - (ii) *greater accountability of public and private authorities*
 - (iii) *better informed discussions and the free interchange of opinions;**
- (d) *to ensure that persons are given reasons for decisions taken by public authorities which affect them;*
- (e) *to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost; and*
- (f) *to enable individuals to see information held by public authorities about their affairs and to ensure that it is accurate.*

PART 1 – PRELIMINARY

Section 1 – Short Title and Commencement

13. The title of the Bill is the Freedom of Information Bill. However, the Constitution of Kenya includes the *right* to receive and communicate ideas as part of another right – the right to freedom of expression. Therefore, consideration should indeed be given to renaming the law the “Right to Information Act”. Although some may argue that such a focus on terminology is pedantic, it is a fact that international law as well as the Constitution of Kenya recognises access to information as a right². This should be reflected in any legislation on the matter to ensure that implementing bodies are clear that access to information is not a discretionary gift granted to the people by a benevolent government,

² Article 79 of the Constitution of Kenya includes the freedom to receive and communicate ideas and information as part of the right to freedom and expression.

but rather it is a constitutionally mandated obligation on the Government, which must implement the corresponding right.

14. It is recommended that section 1 of the proposed law clearly specify a date on which the Act will come into force. Failure to specify a commencement date in the legislation itself can otherwise undermine the use of the law in practice. In India for example, the *Freedom of Information Act 2002* was passed by Parliament and even assented to by the President but never came into force because no date for commencement was ever notified in the Official Gazette. CHRI is not aware of whether local regulations require publication of laws in the Official Gazette within a set time. If so, then this regulation read with section 1 would appear to constitute a *de facto* commencement date. However, to avoid this possibility, it is preferable to include a specific date in the law.
15. Notably, while it is understandable that the Government of Kenya may wish to allow for more time to prepare for implementation, best practice shows that the law itself should specify a *maximum time limit* for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of one year between passage of the law and implementation is sufficient (see Mexico's law for example). Alternatively, in Jamaica, because the Government believed that full implementation could take time, their legislation incorporated a phased approach which required key Ministries to implement in the first year, and other agencies to implement 12 months later. These approaches could be considered and included in the law, along with a definitive maximum time frame for implementation.

Recommendations

- *Amend the name of the Bill to the "Right to Information Act 2007" to reflect the fact that the law implements a fundamental human right.*
- *Amend Section 1 to include a maximum time limit for the Act coming into force, which is no later than twelve months from the date the Act receives Presidential assent.*

Insert new provision – Legislation affecting disclosure

16. In order to establish the legal framework in which the new law will operate, it would be preferable to establish early on how the law will interact with existing laws that affect the disclosure of information. Officials applying the law need to be clearly directed that the new openness law overrides *all* other inconsistent legislation, common law and any other instrument that has the force of law.
17. In this respect, it is positive that the Bill repeals the *Official Secrets Act* in section 43, however it would be beneficial to the reader of the law to establish its primacy straight away – setting up the framework in which the law will operate. Consequently, the Bill that is drafted should clarify that the new law takes precedence over other laws and policies and provide for how it operates in conjunction with existing provisions or practices.
18. A clause similar, but strengthened clause to that found in the Model Freedom of Information Law³ could be inserted into the Bill, such as:

³ The Model Freedom of Information Law was drafted by Article 19 and a number of other organisations in 2001 (including CHRI) and can be found at <http://www.article19.org/publications/law/standard-setting.html>.

'(1) This Act applies to the exclusion of any provision of other legislation, common law or other instrument that has the force of law, that prohibits or restricts the disclosure of a record by a public or private body.

(2) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.'

19. In addition, the provision repealing the Official Secrets Act (currently section 43) should be brought forward and combined with this provision – resulting in a specific clause establishing at the beginning of the Bill that this law over-rides inconsistent legislation that prevents access to information and provides a new framework for accessing information.

Recommendations

- *Insert a new provision that provides explicitly for the over-riding effect of the law and to clarify how the law operates in conjunction with existing laws and policies that affect the disclosure of information. Such a provision could be drafted as such:*

(1) This Act applies to the exclusion of any provision of other legislation, common law or other instrument that has the force of law, that prohibits or restricts the disclosure of a record by a public or private body.

(2) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.

- *Move section 43, which repeals the Official Secrets Act, forward to the beginning of the law.*

Section 2 – Interpretation

Definition of “Commissioner”

20. The section 2 definition of “commissioner” refers to a Commissioner appointed under section 4. However, section 4 states that the head office will be in Nairobi. Should the section 2 reference in the definition of “Commissioner” be to the Commissioners appointed under section 7?

Definition of “Edited copy”

21. The definition of “edited copy” refers to a copy of the document from which deletions have been made under a section which is not given. The term is then never used again throughout the law, and the provision referred to does not exist. Ideally, a provision allowing for the severability of exempt information from non-exempt information should be explicitly provided for in the law (see below at paragraph 83) and if a term to which this action refers is included, then this definition should be included in section 2 if need be.

Definition of “historical record”

22. Section 2 defines “historical record” but the term is not used in the rest of the Bill. Section 26(6) refers to information that is no longer exempt after thirty years, however this section never uses the term “historical record”. Therefore, if it is this section that is intended to be linked to through this definition (and the definition will be used elsewhere) then this should be made explicit, otherwise the term could be removed from section 2.

Definition of “personal information”

23. The definition of “personal information” in section 2 is very broad however the term is never used again in the Bill. The exemption provided in section 26(1)(c) to which this definition may be intended to be used, actually refers to the invasion of the privacy of an individual, and not to “personal information”. Comments on section 26(1)(c) below discuss limiting the applicability of such an exemption when dealing with government officials.

Definition of “public authority”

24. The section 2 definition of “public authority” is very positive and in line with the best practice of applying the law to the judiciary, the legislature and the executive. In addition, the definition goes along way toward the international best practice of applying the full extent of the law to bodies in which the government has an interest through paragraph (i) which states that a public authority includes any body carrying out a statutory or public function.
25. This definition could be expanded a little further to apply the full extent of the law to other bodies that are undertaking public functions. Otherwise, as has happened in Canada at the federal level, other forms of entity may be set up by government departments to avoid the application of the act, for example, trusts or joint ventures. Consideration could be given to replicating section 5(1) of the United Kingdom *Freedom of Information Act 2000*, which is slightly more descriptive than the current paragraph (i).

Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State.

Definition of “public record”

26. Section 2 defines “public record” which refers to information which a “public body” has a connection with. However, the term “public body” is not used in the Bill, the definition should refer to “public authority”.

Definition of “Whistle blowing”

27. Section 2 defines “whistle blowing” but the term is not used in the rest of the Bill. Therefore, it can be removed from section 2.

Insert a new definition of “access”

28. The draft Bill refers to the “right to information” and “access” to information throughout the provisions, but no where does it clarify what exactly that “right” entails or what “access” is. To help clarify the breadth of the right to access information – and what that actually and practically implies for the person seeking the information, the law should insert a definition of the term “access” to information. Notably, the law should be drafted to permit access not only to documents and other materials via copying or inspection. It should also permit the inspection of public works and taking of samples of materials used in public works. It should allow for taking of samples of any materials that a public authority purchases with the use of tax payer’s money. Such an approach has been incorporated into the India *Right to Information Act 2005* through section 2(j) in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation. Example:

“access” to information includes the right to-

- (i) inspect work, documents, records;
- (ii) take notes extracts or certified copies of documents or records;
- (iii) take certified samples of materials
- (iv) obtain information in the form of diskettes, floppies, tapes, video, cassettes or in any other electronic mode through printouts where such information is stored in a computer or in any other device.

Insert a new definition of “private body”

29. Section 25 provides that a person has a right to access information from a private body where it is necessary for the protection of any right. However, the Bill does not define who a private body is. To avoid confusion, it is recommended that a definition of “private body” is inserted in to the law. It is recommended that such a definition should refer to any business, trade or profession that has legal personality, but not individuals. However, in order to ensure that the law doesn’t apply to very small business holders consideration should be given to giving a size minimum to which the law will apply. Some countries do this by using a term that is defined in other legislation such as ‘small business’ – if this is the case in Kenya, then this link could be made.

Insert a new definition of “third party”

30. Consistent with the recommendations made below at paragraph #, a definition of third party should be included in the law. Ideally this definition would not include another public authority as doing so would mean that one government body can be a third party in respect of an application to another public authority. All public authorities form part of the same bureaucracy and as such, should be considered as a single functioning entity for the purpose of processing applications. As such, a suggested definition of “third party” is:
“a person other than the person making a request for information, but does not include other public bodies where the request is received by a public body”.

Recommendations

- Amend the definition of “Commissioner” to refer to section 7, not section 4.
- Amend the definition of “edited copy” to refer to a newly inserted provision (see below), if relevant.
- Amend the definition of “public record” to refer to “public authorities” not “public bodies”.
- Amend the definition of “public authority” to be slightly broader and more descriptive in its inclusion of bodies which are undertaking public functions or are contracted by Government. A suggested paragraph which could be added to the existing paragraph (i) is:

Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State.
- Insert a definition of the term “access”:

“access” to information means the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.
- Insert a definition of “private body”, a recommended formulation would be:

For purposes of this Act, a private body includes any body, excluding a public body, that: –

 - (a) Carries on any trade, business or profession, but only in that capacity; or

(b) has legal personality.

- *Insert a definition of “third party”, a recommended formulation would be:
a person other than the person making a request for information, but does not include other public bodies where the request is received by a public body”.*
- *Delete the definitions of terms that are not used later in the Bill, that is, the definitions of “historical record”, “personal information”, “public record” and “whistle blowing”.*

PART II – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE INFORMATION COMMISSION OF KENYA

Section 4 – Headquarters

31. Section 4 states that the headquarters of the Commission shall be in Nairobi. To ensure that this provision doesn't restrict the Commission from opening other offices if necessary, the provision could state explicitly that the Commission can establish additional offices outside of Nairobi if necessary to undertake its functions.

Recommendation

Amend section 4 to explicitly state that the Commission can establish as many offices around Kenya as are necessary to undertake its functions effectively.

Section 5 – Functions of the Commission

32. The list of the Commission's functions in section 5 is quite positive and are in line with international best practice. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Western Australia, has shown that Information Commissions have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness. Section 5 generally recognises these functions however many of the provisions provide over-arching statements but leave much discretion on the Information Commission as to how these functions should be performed. Therefore, some improvements could be made to section 5 or its surrounding provisions that will detail the functions of the Commission in greater detail and give more guidance as to what is expected of the Commission in order to fulfil its role in promoting open governance.
33. The first observation is that section 5(e) refers to the Commission acting as 'the chief agent of the Government'. This is directly contrary to the independence of the Commission (see paragraphs 41-42). This clause should be amended to simply state 'to ensure that all public authorities comply...'

Appellate function:

34. Section 38(2)(b) of the Bill refers to the ability of an applicant to lodge an application to appeal against a decision they've received (after an internal review has been undertaken). In doing so, this section provides a second level of appeal, after the internal review, to the Commission. Yet this appellate function is not specified in the list provided in section 5. However, section 5(1)(a) does provide that the Commission can investigate into a complaint made. International best practice provides that a Commission has both these functions - an appellate function and a separate (but related) function of inquiring into

complaints or undertaking its own-motion inquiries into compliance with the law. These functions should both be specifically listed in section 5. An example of this approach is India's *Right to Information Act* which separates out these functions into two different sections – section 18, which sets out the function of the Commission to 'receive an inquire into a complaint from any person', and section 19, which sets out the function of the Commission to hear appeals from any person aggrieved by a decision of a public authority.

35. It is a concern that the appeals function of the Commission is not provided for in any detail in the Bill. The only detail that is given is that under section 13(3) a person who is dissatisfied with an order made by the Commission can appeal within 21 days to the High Court. However, there is no requirement that the appeal be heard by the Commission within a certain period, nor are any procedural aspects of the Commission hearing appeals dealt with in the law. These aspects should be considered including: What of the application of the principles of natural justice? Is the applicant allowed to be heard? What are the time limits that apply to a decision of the Commissioner? This last issue is crucial because often, the value of information is related to its timeliness. Experience has shown that delays in processing applications and appeals can be very problematic and in practice, undermines the effectiveness of an FOI law. Therefore, it is strongly recommended that more detail on the appeals process and function of the Information Commission is inserted into the law.
36. Part of this detail should include a provision that reverses the burden of proof for any appeal under the law. In accordance with best practice, the burden of proof should be placed on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model.

Education & Training:

37. An integral element of the implementation of a Freedom of Information Policy is mandating a body to not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. Such a requirement ensures that programmes are undertaken to educate the public and the officials responsible for administering the law. Section 5 does not prevent the Commission from undertaking training and education, and in fact it requires the Commission to undertake some education programmes under section 5(1)(c). However, it is recommended that the Bill specifically provide that the Commission has a role in education and training and what that function entails. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model of how this could be drafted for the new Freedom of Information Bill:

South Africa: 83(2) [Insert name], 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 by 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 [under] 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;
- 10(1) The [Information Commission] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.
- (2) The guide must, without limiting the generality of subsection (1), include a description of--
- (a) the objects of this Act;
 - (b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of every Public Authority or Private Body; and
 - (c) the manner and form of a request for...access to a record of a Public Authority...[or] a Private Body...;
 - (d) the assistance available from [and the duties of] the Information Officer of a Public Authority or Private Body in terms of this Act;
 - (e) the assistance available from the [Information Commission] in terms of this Act;
 - (f) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--
 - (i) an internal appeal; and
 - (ii) an application with [the Information Commission and] a court against a decision by the information officer of a Public Authority or Private Body, a decision on internal appeal or a decision of the head of a Private Body;...
 - (g) the provisions...providing for the voluntary disclosure of categories of records...;
 - (h) the notices...regarding fees to be paid in relation to requests for access; and
 - (i) the regulations made in terms of [under the Act].
- (3) The [Information Commission] must, if necessary, update and publish [see the discussion re the meaning of "publish" at paragraph 20 above] the guide at intervals of not more than two years.

38. Section 10 of the South African Act furthers this role by requiring the Commission to compile a guide on how the public can exercise their rights under the Act:

- (1) The [Insert name of body] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.
- (2) The guide must, without limiting the generality of Article (1), include a description of--
 - (a) the objects of this Act;
 - (b) the postal and street address, phone and fax number and, if available, electronic mail address of:
 - (i) the information officer of every public body; and
 - (ii) every deputy information officer of every public body...;
 - (d) the manner and form of a request for...access to a record of a public body...[or] a private body...;
 - (e) the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;

- (f) the assistance available from the [Insert name of body] in terms of this Act;
- (g) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--
 - (i) an application with [the Ombudsman and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;...
 - (ii) the provisions...providing for the voluntary disclosure of categories of records...;
 - (j) the notices...regarding fees to be paid in relation to requests for access; and
 - (k) the regulations made in terms of [under the Act].
- (3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.

Monitoring:

39. Section 5 requires the Commission to undertake some monitoring of the law, such as Section 5(1)(b) which requires the Commission to inspect and assess implementation by public authorities. This role as a monitor could be assisted by adding additional functions to the Commission with regard to monitoring the law and reporting on it could be added. In particular, the Commission should be required to:

- Identify and make recommendations for reform of other Acts, laws and administrative systems that affect the implementation of right to information.
- Identify and make recommendations for reform of the Act itself, particularly where administrative policies are developing that are not in the spirit of the law.
- Report on findings made as a result of inquiries and submit these reports to Parliament or a relevant Parliamentary committee for consideration.

Records Management:

40. Finally, another function the Commission should be required to perform is examining and prescribing systems and procedures for improving records management. It would be ideal to support this role by giving the Commission the function of preparing a code of practice on records management.

Recommendations

- Amend section 5 by separating out the existing functions of the Information Commission into separate provisions, including more specific detail on the functions the Commission should undertake. Separate provisions should deal with the role and functioning of the Commission as an Appellate Body (including time frames and procedural issues), as a body that receives complaints, undertakes inquiries, its role in education and training, its role as a monitoring body and in records management.
- Amend the phrasing of section 5(e) – remove the words ‘the chief agent of the Government’ and replace them with ‘to ensure all public authorities comply’.
- Insert a new section into the law stating that the burden of proof lies with the body withholding the information. For example:

In proceedings under this [Part], the public authority to which the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Information Commission or High Court should give a decision adverse to the applicant.

Section 6 – Independence of the Commission

41. Oversight of the law by an umpire independent of government pressure is integral to the effective implementation and administration of the law. It is a safeguard against administrative lethargy, indifference or intransigence, and the fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed.
42. The Independence of the Commission is therefore essential to its integrity and ability to perform its functions and section 6 recognises this to an extent. However, the independence is so integral that the law should ideally specify that the independence of the Commission extends to all powers, budgets and staff of the Commission - all of which are essential to the operation of Commission.

Recommendation

Amend section 6 to specifically to also provide for the Commission's independence in the areas of budget making, recruitment of staff, offices, and that it will be resources appropriately to undertake its functions. Suggested wording for such an amendment would be:

The Information Commission is independent of the control, direction or interference of any other person or entity, including the government and its agencies and will be free from interference of any other person or authority other than the courts.

- (1) The Information Commission must have budget autonomy, and at a minimum, the Information Commission must be treated under a separate line in the preparation of the national budget.*
- (2) The Information Commission shall have such budget and administrative support as is necessary for the Information Commission to effectively discharge its functions under this Act.*
- (3) The Information Commission must have all powers directly or incidental, including full legal personality, as are necessary to undertake the functions of the office as provided for in this Act.*
- (4) The Information Commission must have the power to recruit its own staff in accordance with open and fair recruitment processes.*
- (5) The Information Commission may for the better discharge of the functions of the office establish provincial or district offices.*

Section 7 – Membership of the Commission

43. Section 7 provides that the Commission will be made up of nine Commissioners in total (one Chairperson Commissioner and eight other Commissioners).
44. While there are many benefits to having a multi-member Commission to oversee and monitor the law, there are difficult process and practical issues which should be considered when deciding on the number of Commissioners. Firstly, the cost of supporting a group of Commissioners will be noticeable and therefore in deciding on the number of Commissioners, cost should certainly be borne in mind. In this context, the proposal for 9 Commissioners may be very large. In Mexico, a country with a population of around 100 million people, the national information commission has only 5 Commissioners. Notably, if the number of Commissioners has been suggested to deal with an anticipated large workload, consideration should be given to how support staff could be used to support

Commissioners to undertake their investigations, do research and promote the law. In the office of most information commissions, staff have considerable delegated power to help process appeals.

45. A serious procedural hurdle that needs to be overcome in establishing a whole Commission is how the various Commissioners work together and relate to each other. If all Commissioners hear appeals and make inquiries under the Act separately then there needs to be a mechanism to ensure that decisions are consistent and predictable – that is, some form of binding precedent should be created in decisions. Consideration of a Commissioner hierarchy for decisions may be necessary to enable orders to be made by the Chief Commissioner and to assist in administration and delegation of the Commission's functions and powers. Alternatively, or in addition, some form of majority rule may need to be set out in the law. In Mexico, the Commission actually sits as a collegiate body and makes decisions by majority. This approach is felt to strengthen the quality and defensibility of decisions. In India however, the Commissioners can sit as either a singular Commissioner or a multi-member Commission yet this approach has resulted in conflicting and inconsistency in the interpretation and application of the provisions of the law.

Recommendations

- *Consider reducing the number of Commissioners to be appointed, and whether support staff may be used to support the Commissioners in undertaking their functions.*
- *Include in the Bill how decisions of the Commission are going to be made and how precedents can be set by the Commission.*

Section 8 – Qualifications of Commissioners

46. It is essential to appoint Commissioners who have the integrity and experience to be champions of the move to open government and transparency, lead by example and implement the law effectively. Accordingly, in addition to the requirements for candidates which are listed under section 8, it may be useful to elaborate further upon the character requirements to encourage the selection of Commissioners who are utterly impartial and well-respected by the public as upstanding citizens who are pro-transparency and accountability. For example, section 12(5) of India's *Right to Information Act 2005* requires that "...the Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance." Alternatively, consideration could be given to including requirements such as:

The person to be appointed as the Information Commission shall –

- (a) be publicly regarded as a person who can make impartial judgments;*
- (b) have a demonstrated commitment to open government*
- (c) have sufficient knowledge of the workings of Government;*
- (d) be otherwise competent and capable of performing the duties of his or her office.*

Recommendation

Insert additional character requirements into the qualifications for Commissioners, such as:

The person to be appointed as the Information Commission shall –

- (a) be publicly regarded as a person who can make impartial judgments;*
- (b) have a demonstrated commitment to open government;*
- (c) have sufficient knowledge of the workings of Government; and*

(d) *be otherwise competent and capable of performing the duties of his or her office.*

Section 9 – Procedure for Appointment of Commissioners

47. The procedure for appointing Information Commissioners must be impartial and independent of government interference, to ensure that Information Commissioners are seen as non-partisan and can act as an independent body. In this context, it is very positive that section 9 proposes a very open and consultative nomination process for the initial appointment of Commissioners. However, there is one improvements that could be made to the provisions to ensure that the whole process is transparent.

48. Section 9(7) the President chooses the Commissioners from a list of twelve nominations received and there is no need for the President to give reasons for the choice made. Yet, it is essential that the procedure for appointing members of the Information Commission is impartial and independent of political suasion. As such, it would be preferable for the National Assembly to play a more active role and appoint the Commissioners, perhaps by a two-thirds majority. The model adopted in Canada's *Access to Information Act 1982* could be considered:

Canada: Section 54(1) - The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons.

49. If this approach is not adopted, at the very least the President should be required to give reasons for his or her decision.

50. However, section 9 only deals with the initial appointment of Commissioners and not the situation in which a Commissioner vacates office or is removed and needs to be replaced. This situation should also be envisaged by the law – whether this be by amending section 9(1) (which limits the whole of section 9 to the first appointment of Commissioners) or by including new provisions for this scenario. In particular, some method of notifying the National Assembly of a pending vacancy or dealing with an unexpected vacancy should be included in the law in order to trigger the appointment process.

Recommendations

- *Amend section 9 to provide that the National Assembly will appoint the Commissioners by a vote of a two-thirds majority.*
- *Amend section 9 to ensure it envisages the situation of needing to replace a Commissioner who vacates or is removed from office.*

Insert new section – Removal of Commissioners

51. Although the Bill deals in some detail with the appointment of Commissioner's, it is silent on how a Commissioner can be removed from office. Just as appointment, dismissal of a Commissioner should also be transparent and independent, and the underlying reasoning why a Commissioner can be dismissed should be laid out clearly and publicly so that the Commissioner and the public can be confident of their position and its independence from politics.

52. Ideally the law would state specific reasons why a Commissioner can be removed from office. The India *Right to information Act 2005* lists a number of specific reasons for removal in section 14(3):

...the President may by order remove from office the Chief Information Commissioner, or any Information Commissioner if the Chief Information Commissioner or a Information Commissioner, as the case may be, -

- (a) is adjudged insolvent; or*
- (b) has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or*
- (c) engages during his term of office in any paid employment outside the duties of his office; or*
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or a Information Commissioner.*

53. Alternatively, as section 9(9) puts the Commissioners on par with a Court of Appeal or High Court judge (consistent with international practice), then the Bill could require that removal of a Commissioner be dealt with in the same way as a judge of this standing. There are usually constitutionally enshrined provisions for removal of a High Court or Court of Appeal judge that could be referred to, in the case of Kenya removal of these judges it is dealt with in Article 62 of the Constitution.

Recommendation

Insert a new section dealing with the removal of Commissioners from office. A suggested clause would be:

...the President may by order remove from office the Chief Information Commissioner, or any Information Commissioner if the Chief Information Commissioner or a Information Commissioner, as the case may be, -

- (a) is adjudged insolvent; or*
- (b) has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or*
- (c) engages during his term of office in any paid employment outside the duties of his office; or*
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or a Information Commissioner.*

Section 11 – Terms and Conditions of Service of the Commissioners

54. In order to ensure the independence of the Commissioners throughout their term, the salaries of the Commissioners should be set in as objective manner as possible and not subject to change during their term. However, the section 11 could be used to undermine the Commissioner's independence as it makes their salaries subject to political interference. Therefore, in order to ensure the Commissioner's independence is guaranteed, and consistent with section 9(9), the salary of the Commissioners could be pegged to the status of their office being equivalent to either a judge of the Court of Appeal or a judge of the High Court, as the case may be.

Recommendation

Delete the current section 11 and replace it with a section that ensures greater independence of the Commissioners salaries, such as:

The salaries and allowances payable to and other terms and conditions of service of the Information Commissioners must be the same as that of a judge of the High Court and the salaries, allowances and other conditions of service of the Information

Commission must not be varied after his or her appointment.

Section 12 – Staff of the Commission

55. Section 12 refers to the Commission being able to appoint officers or servants as they need. It is assumed that the reference to servants should actually be to “public servants”, a term that is defined in section 2.

Recommendation

Amend section 12 to refer to “public servants”, not “servants”.

Section 13 – Commission to Have Powers of a Court

56. It is very positive that section 13 provides the Commission with some of the powers necessary to undertake its functions. Section 14 provides more powers when the Commission is to undertake an investigation. However, the role of the Commission is broader than that of an adversarial court. It requires extensive investigation, search and evidence powers to enable it to effectively undertake all of its functions, including undertaking own motion inquiries. Therefore, the power provisions in sections 13 and 14 should be reviewed, and depending on the powers courts in Kenya are granted, broaden the powers of Commission where necessary. To avoid the confusion that may be generated by having more than one provision that grants powers, sections 13 and 14 could then be combined.

57. Section 13(2) then goes on to detail the orders that the Commission has the power to make. Again, although this list is an inclusive list that allows the Commission to order any lawful remedy, the provision can only be invoked where there has been an infringement of the provisions. However, there may be broader circumstances in which the Commission should be able to make an order, for instance where a public authority does not comply with the proactive disclosure provisions. Therefore, it would be beneficial to extent the powers under section 13(2) to provide for all circumstances where the law has not been complied with. Particularly if the recommendations below regarding penalties and offences (see paragraphs 122-126) are adopted, then the imposition of penalties should be envisaged here.

Recommendations

- *Review, and where necessary, amend section 13(1) (and combine it with section 14) to provide one section that provides the full range of powers necessary for the Commission to undertake its full range of functions envisaged in section 5, including its own motion investigations. What amendments are needed will depend on what powers the courts in Kenya are granted.*
- *Amend section 13(2) to provide the Commission with the powers necessary to enforce all provisions of the law when they haven't been complied with. A suggested provision would be:*

The Information Commission has the power to:

- (a) *require a Public Authority to take such steps as the Commission considers necessary to secure compliance with the requirements of this Act, within such period as the order may specify, including -*

- (i) *providing access to information, and if so requested, in a particular form;*
- (ii) *publishing or disseminating certain information or categories of information;*
- (iii) *making necessary changes to its practices in relation to the maintenance, management and destruction of records;*
- (iv) *enhancing the provision of training on the right to information for its officials;*
or
- (v) *providing the Commission with an annual report in compliance with section X;*
- (b) *require a Public Authority to compensate the appellant for any loss or other detriment suffered;*
- (c) *impose any of the penalties provided for in this Act [see below]; or*
- (d) *dismiss an appeal.*

Section 15 – Annual Reports to Parliament

58. Requiring the Commission to prepare an Annual Report is in line with international best practice and is consistent with its role as a monitor and assisting in the implementation of the law, as provided for in section 5. However, there are a few improvements that could be made to the section to ensure the report has the effect that is intended. Firstly, a time frame in which the Annual Report must be given to the Minister could be inserted – perhaps that the Commission could be required to submit the annual report within two months of the end of the financial year.

59. Although the general contents of the annual report is referred to in section 15(2), that is, the report shall 'include an overall assessment by the Commission of the performance of the Government with regard to access to information during the period under review', there is no further detail on what the report should contain at a minimum. This detail could also be included in the law and combined with the existing section 39 which provides for annual reporting by public authorities .

Recommendation

Amend section 15 to insert more detail on the annual report, including when it must be provided to the Minister by and what it must include. A recommended provision that could be included in the Bill is the following:

- (1) *The Commission must, within sixty days of the end of each financial year, prepare a report on the administration and implementation of the right to access information in Kenya during that year.*
- (2) *The Commission must cause a copy of the report to be tabled in each House of Parliament and disseminate it to the public.*
- (3) *The Committee must consider the report and submit views, comments and recommendations on the report to Parliament as soon as practicable following tabling of the report.*
- (4) *Each responsible Department must, in relation to the public bodies within their jurisdiction:*
 - (a) *collect and provide such information to the Information Commission as is required to prepare the annual report; and*
 - (b) *comply with any prescribed requirements concerning the furnishing of that*

information to the Information Commission and the keeping of records to facilitate the purposes of the annual report.

(5) Each annual report must, at a minimum include:

- (i) the number of requests made to each Public Authority and Private Body;*
- (ii) the number of decisions in which an applicant was not entitled to access any or part of the information requested from each Public Authority, the provisions of this Act under which this decision was made, and the number of times each provision was invoked;*
- (iii) the number of appeals sent to Internal review of each Public Authority, Commission and the courts for review, the nature of the complaints and the outcome of the appeals;*
- (iv) the average response time of each Public Authority, each Internal review, the Commission and the courts;*
- (v) particulars of any offences committed, penalties imposed and/or disciplinary action taken against any officer or public body in respect of the administration of this Act;*
- (vi) any facts which indicate an effort by public bodies to administer and implement the spirit and intention of this Act; and*
- (vii) recommendations for reform, including recommendations in respect of particular public authorities for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law or any other matter relevant to operationalising the right to access information, as appropriate.*

Section 16 – Inquiry into Complaints

60. The role of the Information Commissioner to undertake inquiries into complaints is in line with international best practice, however, the provisions should ensure that this option is as accessible to people as requesting information from the public authority in the first instance. However, section 16(2) refers to the complaint being made in ‘such form and contain such particulars as the Commission may, from time to time, prescribe’. Forms can easily inhibit people from being able to make a complaint – what if they have difficulty in filling out the form, or if the form is not available?

61. One way to ensure section 16(2) doesn’t limit the ability of anybody to make a complaint, a clause such as section 28(7) could be included. Section 28(7) of the Bill applies to applications for information and states that any form prescribed must not be such as to unreasonably delay requests or put an undue burden upon applicants, and no application may be rejected on the ground only that the applicant has not used the prescribed form. This principle should equally be extended to those wanting to make complaints to the Commission.

Recommendation

Insert a new subsection to section 16 to ensure that any forms required to make a complaint to the Commission do not limit its accessibility. Section 28(7) could be altered slightly and replicated in section 16, providing:

A public authority may prescribe a form for making a complaint to the Commission, but any such form must not be such as to unreasonably delay an inquiry or place an undue burden upon complainants, and no complaint may not be accepted on the ground that

the complainant has not used the prescribed form.

Section 17 – Guiding Objects and Principles

62. The inclusion of a provision detailing some guiding objects and principles is very positive, however, in order to ensure the law is read and interpreted easily, these principles could perhaps be moved closer to the list of functions of the Information Commission (currently section 5).

Recommendation

Move section 17 to the beginning of the provisions detailing the functions and role of the Commission.

Section 18 – Funds of the Commission

63. As stated above, the independence of the Commission is imperative to its ability to operate. If there is a provision such as section 18 dealing with the funds of the Commission, it would be in line with international best practice to add to this provision to state that the Commission will be sufficiently funded by Government to undertake its functions.

Recommendation

Amend section 18 to state that the Commission will be sufficiently funded by Government to undertake its functions.

PART III – RIGHT TO INFORMATION

64. As stated above, it is strongly recommended that given the importance of these sections, that they are moved to the beginning of the Bill.

Section 25 – Right to Information

65. The inclusion of a specific provision stating clearly the people's right to information is very positive. So too is the right to information from private bodies – this provision is in line with international best practice. However, there are a number of improvements that could be made.
66. The right to information as provided under this section is granted to citizens only. Yet, the right to information is an internationally recognized individual human right that attaches to an individual, not because of their citizenry of a particular nation, but because of their humanity. There is no reason why non-citizens should be excluded from the purview of the draft Bill as the exceptions provided would cover any situation in which there is serious danger posed by the dissemination of information. In addition, introducing notions of citizenship would require the person applying for information to prove citizenship – this can cause immense difficulty, time delays and inconvenience for the applicant to prove and creates inequities before the law for residents and other individuals with a legal status different to "citizenry".

67. Good international practice supports the extension of the Act to allow *all persons* access to information under the law, whether citizens, residents or non-citizens (such as asylum seekers) and to bodies, rather than only individuals. This approach has been followed in a number of jurisdictions, including the United States and Sweden, the two countries with the oldest access laws. Alternatively, if the Government considers this formulation too broad, consideration could be given to following the example of Canada which allows access to information to citizens and permanent residents (see s.4(1), *Access to Information Act 1982*) or New Zealand which allows requests to be made by citizens, permanent residents or any person who is in New Zealand. (see s.12(1)(c) *Official Information Act 1982*). This latter formulation is particularly useful because it removes the need for proof of residence documents from applicants, while still limiting access only to people in Kenya.
68. In respect of the right to access information from private bodies mentioned in section 25(2) the right is limited to information that is necessary for the protection of any right. It is recommended that in order to ensure there is no confusion in the interpretation of this provision, that the Bill refer to “information necessary for the exercise of protection of any right or liberty recognised under the Constitution of Kenya, Kenyan common law or any international treaty to which Kenya is a signatory”.
69. Section 25(4) very positively reflects the status of the right to information as a fundamental human right – and consequently that no person should need to give reasons for accessing information. However, this provision may be an issue when it is practically applied to private bodies who are deciding whether to grant information that is necessary for the enforcement or protection of any right under section 25(2). To ensure the right to information from private bodies can be implemented effectively, the requirement that no reasons be sought in section 25(4)(a) should only apply to the right to information from public authorities under section 25(1).
70. It would also be an improvement to explicitly link the right stated in the law to the Constitution provision to which it relates – in order to ensure that it is given the weight of the fundamental human right that it is.
71. Finally, section 25(4) is incorrectly numbered – it should be section 25(3).

Recommendations

- *Amend section 25 to provide all people a right to information.*
- *Amend section 25(2) to permit access to information “necessary for the exercise of protection of any right or liberty recognised under the Constitution of Kenya, Kenyan common law or any international treaty to which Kenya is a signatory”.*
- *Apply section 25(4) only to the right to information held by or under the control of a public authority, and not to the right to information held by a private body.*
- *Renumber section 25(4), section 25(3).*

Section 26 – Exempt Information

72. One of the key principles of a right to information law is that there will be minimum exemptions. Therefore, all of the exemptions should be reviewed to ensure that they accord with the best practice principle that the purpose of all exemptions must be to genuinely protect and promote the public interest. All exemptions should be aimed at

examining whether disclosure would actually cause or be likely to cause harm. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected. In accordance with international best practice, every exemption should be considered in 3 parts:

- (i) Is the information covered by a legitimate exemption?
- (ii) Will disclosure cause substantial harm?
- (iii) Is the likely harm greater than the public interest in disclosure?

73. These provisions are very positive as they are generally consistent with international best practice, but there are some amendments that could be made to improve them.

Decisions on applicability of exemptions

74. Section 26(1) states that information may be withheld '*where the public authority concerned is satisfied that disclosure of such information is reasonably likely to...*'. This drafting places a very subjective power on the public authority itself to determine whether it thinks the information is reasonably likely to cause the harm or have the effect stated in each separate exemption. This drafting can create issues for the Commission and the Courts and questions their ability to scrutinize the public authority's decisions. A more objective application of the exemptions would be much more preferable. A suggestion would be that section 26(1) state that '*where disclosure of such information would...*'. This not only makes the applications of the exemptions more objective, and not a subjective decision of the public authority, but it also requires a higher bar for the information to be withheld in that the disclosure of the information must be considered to cause the harm stated in each objection, not that it is simply 'reasonably likely' to.

Section 26(1)(a) – national security

75. The harm required to be produced if information is disclosed under this exemption – that it causes serious prejudice to the national security – is very low. What constitutes prejudice? It would be greatly improved if the clause required that serious harm be caused by the disclosure. This term is slightly harder to prove than simply 'serious prejudice'.

Section 26(1)(c) – unwarranted invasion of privacy

76. Although this provision is well-worded in that it only protects information where the information would be *an unwarranted invasion of personal privacy*, it would be useful to limit the applicability of this exemption to information about government officials. One of the primary benefits of a right to information law is its use as a tool in fighting corruption and misuse of public funds. To avoid the possibility for this exemption to curtail the realisation of this benefit, the exemption could be drafted to limit its applicability where government officials are at hand. A suggested tightening of the provision would be:

Where disclosure would constitute an unreasonable invasion of privacy of a person who is not a government official or where the information is about a government official but has no relation whatsoever to their official position or duties.

Section 26(1)(d) – commercial interests

77. Again, the harm required to be produced if information is disclosed under this exemption – that it causes serious prejudice – is a very low harm to be required before information can be withheld. What constitutes serious prejudice? This clause would be improved if it were more tightly worded, such as "disclosure would violate the legitimate protection of trade

secrets or other intellectual property right protected by law or harm the competitive position of a third party”.

Section 26(1)(e) – economy

78. Once again it is suggested that the term ‘seriously prejudice’ be replaced with a higher harm test. Perhaps that used in section 26(1)(f), that is, seriously undermine, be used in this paragraph too.

Public interest override

79. It is extremely positive that all exemptions outlined in the Bill are subject to the blanket “public interest override” in section 26(4), whereby information which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. However, to ensure that the provision is properly applies, it is recommended that private bodies also be required to disclose information if disclosure is in the public interest. Considering that the Bill requires private bodies to disclose information where “rights” issues are involved, the public interest is arguably even more important in that context.

80. It would also be beneficial to add one further consideration regarding what the public interest is to section 26(5), and that is to ‘ensure that any aggrieved person shall be able to pursue a remedy available at law’. This ensures that the term ‘public’ is not simply seen as a larger group, but that the ability of individuals to pursue justice may also be in the public interest.

Time-limit for applicability of exemptions

81. Section 26(6) provides a 30 year time period after the record was made after which the exceptions no longer apply. Although this provision is a positive inclusion, 30 years is a very long time and best practice provides for a shorter time frame (10-20 years) and this is recommended for Kenya.

Recommendations

- *Amend the wording of section 26(1) to make the application of exemptions more objective and to remove any uncertainty about the reviewability of a decision that an exemption applies. A suggested wording would be:
...may be withheld by a public authority where disclosure of such information would -*
- *Amend the wording of section 26(1)(a) to require that serious harm be caused if the information were to be disclosed.*
- *Amend section 26(1)(c) to ensure that the exemption for the unwarranted invasion of privacy does not apply to officials. Suggested wording would be:
Where disclosure would constitute an unreasonable invasion of privacy of a person who is not a government official or where the information is about a government official but has no relation whatsoever to their official position or duties.*
- *Amend the wording of section 26(1)(d) to require that legitimate interests only are protected by the provision and that real harm must be done by disclosing the information. Suggested wording would be:
Where disclosure would violate the legitimate protection of trade secrets or other intellectual property right protected by law or harm the competitive position of a third*

party.

- Amend the wording of section 26(1)(e) to require that the information would seriously undermine the ability of the Kenyan Government to manage the economy.
- Apply the public interest override in section 26(4) to private bodies.
- Move section 26(4) and section 26(5) forward to the beginning of the exemption provisions and amend section 26(5) to include consideration of an individual being able to pursue a remedy available at law.
- Amend section 26(6) to provide that the exceptions do not apply to a record which is more than 10 years old.

Insert new section – Severability

82. In line with international best practice, the draft Bill should explicitly provide for exempt information to be severed from information able to be disclosed if possible. Allowing for severability of information is in line with the key principles of maximum disclosure of information, and minimal exemptions – which apply to each bit of *information* and not to a document or record. An example of such a provision is in the Model Freedom of Information Law:

If a request for information relates to a record containing information which, subject to this Part, falls within the scope of an exception, any information in the record which is not subject to an exception shall, to the extent it may reasonably be severed from the rest of the information, be communicated to the requester.

Recommendation

Insert a new section allowing for severability of exempt information from a document such as:

If a request for information relates to a record containing information which, subject to this Part, falls within the scope of an exception, any information in the record which is not subject to an exception shall, to the extent it may reasonably be severed from the rest of the information, be communicated to the requester.

Section 27 – Proactive Disclosure

83. The new generation of access laws recognise that proactive disclosure can be a very efficient way of servicing the people's information needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public.
84. Given the importance of proactive disclosure, a few amendments could be made to section 27 to ensure it is as effective as it could be. Firstly, an additional subsection could be included to provide an over-arching duty on public authorities to provide as much information proactively as possible, reducing the need of people to use the mechanisms for applying for information.
85. The list of information required to be given out proactively under section 27 includes much of the information essential to enabling transparent and open governance however, it falls short of international best practice and should be extended. Section 4 of India's *Right to Information Act 2005* and Article 7 of Mexico's *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They

require the disclosure of information regarding budgets etc... that will assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny.

86. Section 27(1)(b) requires that the information be updated annually. However, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated very regularly. Accordingly, a maximum time limit of six months should be allowed for updating and regulations should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).

87. Finally, in line with the other functions of the Commission as an overseer and monitor of implementation of the law, it would also be beneficial to require the Commissioner to publish a guide to assist public bodies in publishing information proactively under section 27 of the Bill. Such a guide to be published within no more than six months of the Act coming into force, and thereafter updated regularly, so that early on in the Act's implementation, public bodies have guidance on how best to meet their proactive disclosure obligations.

Recommendations

- *Insert a new subsection into section 27 that provides an overarching duty on public authorities to provide as much information proactively to the public as possible. Suggested wording for such a provision is:*

It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information proactively to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.

- *Insert additional proactive disclosure requirements into section 27 based on the provisions from the India's and Mexico's laws:*

“(1) Every public body shall

(a) publish within 3 months the amendments coming into force:

- (i) the powers and duties of its officers and employees;*
 - (ii) the procedure followed in the decision making process, including channels of supervision and accountability;*
 - (iii) the norms set by it for the discharge of its functions;*
 - (iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;*
 - (v) a directory of its officers and employees;*
 - (vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations*
 - (vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*
 - (viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;*
 - (ix) particulars of concessions, permits or authorisations granted by it;*
 - (x) details in respect of the information, available to or held by it, reduced in an electronic form;*
 - (xi) the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;*
 - (xii) such other information as may be prescribed;*
- and thereafter update their publications within such intervals in each year as may be prescribed;*

(b) publish all relevant facts while formulating important policies or announcing the

- decisions which affect public;*
- (c) provide reasons for its administrative or quasi judicial decisions to affected persons;*
 - (d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby 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 interest of natural justice and promotion of democratic principles.*
 - (e) Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:

 - (i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
 - (ii) The amount;*
 - (iii) The name of the provider, contractor or individual to whom the contract has been granted,*
 - (iv) The periods within which the contract must be completed.**
- (2) Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.*
- (3) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information proactively to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.*

- Amend section 27(1)(b) to provide for more regular updating of all the proactive disclosure provisions in section 27. A suggested subsection that could be included is:

Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.

- Include a subsection in section 27, or in the section 5 functions of the Commission, requiring the Commission to publish a guide on the proactive disclosure provisions – including how public authorities can best meet their obligations under this section.

PART IV – APPLICATIONS TO ACCESS INFORMATION

Section 28 – Submission of applications

88. The provisions dealing with the submission of applications are very positive and are drafted to ensure the greatest accessibility for the people who want to access information. There are however, a few very minor amendments that could be made to the provisions to ensure they are administered well.
89. Firstly, section 28(2) refers to reducing an oral request to writing. It would be preferable to add a few words to state that this should be done either immediately or within a set number of days (for example, within five days of receiving the application).
90. Section 28(3) is once again, very positive. It would be beneficial to state in the law that this translation will be made free of charge to avoid the possibility of the public authority charging for the translation and undermining the intention of the clause (particularly as section 28(4) which deals with assistance, expressly states that this assistance be given free of charge).
91. Finally, many of these provisions refer to the public servant dealing with the application – what if the application is made to a private body? This possibility should be dealt with by

also referring to an employee, or alternatively by requiring all public authorities and private bodies to nominate an Information Officer who is responsible for the application (see below).

Recommendations

- *Insert a requirement into section 28(2) that the oral request be put into writing immediately.*
- *Insert a requirement into section 28(3) that the translation will be given free of charge.*
- *Ensure the application provisions also apply to private bodies to the extent appropriate for a private body to deal with the application.*

Insert new section – Information Officers

92. Currently the Bill leaves a very big question mark as to who has the ultimate responsibility for ensuring compliance with the law – who is the decision maker within the public authority? Who has responsibility for dealing with the application (and can thereby be held accountable for it)? Is it the head of a public authority? Is it a public servant? This issue needs to be made clear to ensure that implementation and administration of the law occurs.
93. So who should be responsible for applying the law? It is highly unlikely that the head of the public body will personally be applying the law. International best practice recognises this practicality and requires every public authority to nominate specific officials who are given primary responsibility for handling requests for information. Commonly, an Information Officer is appointed within each department to act as the contact point for applications and for internal information queries for other officials (with a default that if no such Information Officer is appointed, the head of the public authority is deemed to be the Information Officer). The names of these officers should be proactively disclosed for the convenience of the public. Powers can then be delegated by the Information Officers to other officers within the department or regional offices, if resources require it.
94. This approach makes it easier for the public to know who to submit their application to, as well as identifying someone who can be contacted if follow-up is necessary. Information Officers can also be targeted for specific information disclosure training and can act as a disclosure expert who other officials can call on for advice. This approach is highly recommended and has perhaps been considered by the Government but not put in the law as section 36(b) of the Bill even refers to Information Officers.
95. The Information Officer's roles and responsibilities can be given in detail in the law. Section 17 of the South African *Promotion of Access to Information Act 2000* provides one useful model.

South Africa: (1) For the purposes of this Act, each public body must, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.

- *The information officer of a public body has direction and control over every deputy information officer of that body.*
- *The information officer of a public body may delegate a power or duty conferred or imposed on that information officer by this Act to a deputy information officer of that public body.*

- *In deciding whether to delegate a power or duty in terms of subsection (3), the information officer must give due consideration to the need to render the public body as accessible as reasonably possible for requesters of its records.*

96. Where the Bill provides for the designation of Information Officers tasked with dealing with information requests, it should also provide statutory powers to such officers to seek the assistance of any other officer (any senior or junior colleague of any rank) for dealing with the information request. The law should place a corresponding duty on all such officers whose assistance has been sought to provide such assistance. Wherever such assistance is not forthcoming without sufficient reason such other officer must be made liable for facing consequences for contravention of the provisions of the law and be made a party to all review/appeals and penalty proceedings. Such a stringent provision is necessary as the IO or the head of the public institution may not always be the custodian of the information requested. In this context the meaning of the term 'assistance' should also include any advice or opinion sought by the IO from any of his colleagues within the same institution or any other public body.

97. Another improvement that could be made to Paragraph 3.4.1 is that, as it is anticipated that there will be appropriate exemptions for private information in the Freedom of Information Bill, there does not need to be a reference to the Head of the organisation 'striking a balance between the rights of individuals to privacy and family life...'. The inclusion of such a role explicitly, that may imply more than simply a considerations of the exemptions that is drafted for the bill, can only serve to confuse the interpretation of what the person's responsibilities are. The only responsibility such a person should have under the freedom of information policy is to ensure compliance with the Freedom of Information Bill that is eventually drafted. Other responsibilities should come under the legislative framework established for that particular law.

Recommendations:

- *Insert provisions that require a public authority and private body to designate an Information Officer (or as many Information Officers as necessary to administer the law) who will act as the contact point for applications and for internal information queries for other officials.*
- *Give the Information Officers the power to seek assistance off any other officer for the purposes of administering the law.*
- *Amend all the other provisions of the law to refer to the Information Officer as having responsibility to deal with the application – for example, change references from “public servant” to Information Officer.*

Section 29 – Providing Access to Information

98. Section 29 recognises the international best practice of providing information within forty-eight hours if the information concerns the life or liberty of a person. This is a very positive inclusion, but to ensure that this provision has the intended impact, it is recommended that this time frame be consistent (or shorter) than the time period before which a person must be brought before a judge or magistrate. Essentially this provision is intended to enable a person who has been detained to be taken for committal or other hearing in full knowledge of the accusations against him or her. If forty-eight hours is longer than the minimum time period before which one needs to be brought before a court, then the purpose of the provision is defeated.

99. When the request is especially complex or relates to a large volume of information, then section 29(1) allows the person dealing with the request to seek an extension of time from an Information Commissioner. This provision could be improved slightly to require that before an extension of time is granted, the public authority must first consult the applicant and ask for them to limit the request if possible. This could be done either by contacting them over the telephone or inviting them to inspect the records and identify those that are specifically required. Thereafter, if the application still can't be processed within the fifteen day time limit then the public authority should consider extending the time limit on approval of a Commissioner, recording the reasons for doing so in writing.

Recommendations

- *Ensure the requirement for information to be given within forty-eight hours is the same, or shorter than, the time before which a person must be brought before a court of law.*
- *Amend section 29 to require that a public authority may only extend the time limit for dealing with requests subject to the public authority making every effort to first assist the applicant to modify his/her request if possible.*

Section 30 – Transfer of Application

100. Section 30 provides the procedure for transferring an application for information. The section is generally in line with international best practice but improvements could be made.

101. Currently a public authority can transfer the application if the information requested 'is held' by the other public authority. The ability to transfer the application therefore does *not* depend on whether the public authority who received the request doesn't actually have access to the information. The drafting of this provision could easily be abused by public authorities who could have access to the information but still transfer it – avoiding responsibility for dealing with the application. It is preferable for the public authority to only be able to transfer an application when they don't hold or cannot access the information themselves.

102. Under section 30(2) the public authority must notify the applicant of the transfer. It would be beneficial to state that the public authority must notify them not only that the transfer occurred, but provide the applicant with details of the public authority and a contact person within the authority for questions regarding their request.

103. Consideration should also be given to adding another section that deals with the case where no public body is believed to hold the information requested. Ideally, to prevent abuse of the provision, a statutory declaration should be signed by the head of the public authority where it is claimed that no public authority holds the information. This will ensure that officials take their responsibilities more seriously and make every effort to locate the information.

Recommendations

- *Amend the wording of section 30(1) to state that 'if the information requested is not held or under the control of the public authority, but is believed to be held by or under the control of another public authority'.*
- *Amend section 30(2) to require the public servant to give contact details of the new*

public authority to the applicant.

- *Insert a new subsection into section 30 that provides that 'where the public servant believes that no public authority holds the information requested, the head of the public authority shall sign a statutory declaration to that effect'.*

Section 31 – Advice to Applicant

104. Section 31(2) refers to section 14 – section 14 deals with the powers of the Commission to undertake investigations. Should the reference in section 31(2) be to another provision? Perhaps it should refer to the regulations for fees set by the Minister in section 42 to ensure that fees can only be set by the Minister and not charged in an ad hoc way by public authorities?

Recommendation

Amend the reference in section 31(2) to refer to the correct section (perhaps section 42?).

Section 32 – Rejected Applications

105. The provisions in section 32 do not deal with the possibility that some of the information may have been severed and exempted from disclosure but that partial access to the information requested has been granted. It is recommended that these provisions be amended appropriately to deal with that possibility (that is, stating that partial access may have been granted, how the applicant can go about accessing the information, fees, and appeals procedures).

Recommendation

Amend section 32 to ensure that the situation in which partial access has been granted can be dealt with.

Section 33 – Fees

106. Fees can create a barrier to accessibility and can frustrate the whole policy if they are imposed at a cost that deters applicants. International best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes.
107. Section 33 reflects the best practice that no fees should be charged for making an application for information and that the fees that may be imposed are only to recover the costs of supplying the information, not collation/compilation time. Section 33 also provides that the fee will be waived in certain circumstances – all of these provisions are in line with international best practice and are very positive. However, in order to ensure that flexibility is given in the waiving of fees, an additional subsection could be included that grants the head of the public authority the discretionary power to waive fees in other circumstances. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model.
108. A further situation in which fees should be waived is where the cost of collecting the fee exceeds the amount of the fee itself.

Recommendation

Insert additional subsections into section 33 that provide the head of the public authority the discretion to waive fees and that all fees should be waived where the cost of collecting the fee exceeds the amount of the fee itself.

PART V – INTERNAL REVIEW OF DECISIONS

Section 35 – Right of Internal Appeal

109. Section 35 provides the circumstances in which an applicant may apply for review of a decision made by the public authority whether to grant access to information or not. There are a few minor amendments that could be made to this section. The first is that section 35(1)(g) refers to a ‘decision to grant access to information only to a qualified person’. The Bill never refers to how such a decision would be made or in what circumstances this may apply. In order to avoid confusion, this paragraph should be deleted.

110. In a similar vein, section 35(1)(d) refers to ‘a decision to defer the provision of access to information’. Again, there is no provision in the law that would allow for such a delay in giving access. The only provision that deals with timing is the time within which a response to the application must be made. Therefore, this paragraph should be deleted.

111. Finally, sections 35(1)(h) and (i) refer to section 35, when they should refer to section 34.

Recommendations

- *Delete section 35(1)(g) as the concept of granting information to a qualified person is not dealt with anywhere else in the law.*
- *Delete section 35(1)(d) as the concept of deferring access is not dealt with anywhere else in the law.*
- *Change the section reference in sections 35(1)(h) and (i) from a reference to section 35, to section 34.*

Section 36 – Manner of Internal Appeals

112. Similar to the recommendations made above regarding the appeals function of the Commission, the internal appeals process should be as accessible and user-friendly as the original application for information. However, the provisions in section 36 only very briefly deal with an application for internal appeal and refer to the application needing to be in writing and in a prescribed form. It is recommended that at the very least consideration be given to removing the reference to a form, and stating in the law what information is necessary for an appeal, for example they must:

- specify the applicant’s contact details,
- attach a copy of the original application;
- attach a copy of any decision notice received, if possible; and
- include any other information the applicant considers relevant.

113. In addition, it is concerning that section 36(c) refers to the applicant being required to give reasons for the appeal. This is against international best practice and the earlier provisions of the Bill that no reasons for an application for information be given. It is evident that if a person is appealing the decision, that they are not satisfied with the decision and

no further reasons should be required. Therefore it is recommended that this reference to reasons be removed.

Recommendations

- Remove the reference in section 30(a) to a prescribed form and all of section 36(c) and replace it with a requirement that the applicant provide the following details when appealing the decision of a public authority:

- the applicant's contact details,
- a copy of the original application;
- a copy of any decision notice received, if possible; and
- any other information the applicant considers relevant.

- Remove the reference to giving reasons for the appeal in section 36(c).

Section 37 – Notice to and Representation by Other Interested Persons

114. Section 37 refers to an internal appeal where the information requested relates to a third party. This section is very confusing as this is the first reference to a third party in the Bill, and the term third party is not a defined term. The section refers to a request for information contemplated in section 30 – which deals with the transfer of an application – and therefore looking at this section does not help us to interpret the provision.

115. It is assumed therefore that a key provision dealing with third party consultations has been accidentally left out of the draft Bill. If some specific mechanism is to be included in the Bill to deal with third party rights then a number of amendments need to be made. Specifically:

- o A definition of “third party” needs to be included in the Bill. In this context though, it is imperative that the definition is very narrowly worded. For the purposes of appeals, it is not every third party who should have the right to intervene. This would never work in practice as almost every piece of information held by government concerns more than two parties. In practice, third party rights should only be granted to (i) individuals who believe that their personal and private information is going to be released; (ii) private bodies who are believe that information which was provided in confidence or which is a secret may be released.
- o The request provisions need to recognise that third parties may have rights to make representations to the original decision-maker before a decision is made. It is inconsistent to give some third parties appeal rights, without giving them the same right to be involved in the original decision process.

Recommendation

Insert more detail into the draft Bill as to who are third parties, how and in what circumstances should their representations be considered before the first decision to grant access is made, and how their representations could be heard at the appeal stage if a person has already accessed the information.

Section 38 – Decisions on Internal Appeal

116. Section 38 provides for the public authorities decision on an internal appeal. However, a number of essential provisions are missing.
117. Section 38 does not specify the time frame within which the public authority must decide on the internal appeal. This is a key requirement as otherwise there is no limit on how quickly the public authority must consider the appeal, and the internal appeal is a pre-requisite to being able to appeal to the Commission. Therefore, this provision must be inserted into the law. International practice usually allows 15-30 working days for this level of appeal.
118. Section 38(2) also lists what the notice of the decision on the appeal must include, however the contents of the notice is not consistent with the contents of the notices required to be given at the first level of decision making under sections 31 and 32. Key requirements such as whether access to information has been granted or not, any applicable fees, how access will be granted etc... are not included in the notice requirements under section 38(2). These key requirements should be included in section 38, or at least the contents of the notice should be made consistent with sections 31 and 32 by referring back to these provisions.

Recommendations

- *Insert into section 38 the time frame within which the public authority must make a decision on an internal appeal. A suggestion would be that this time frame should be as soon as possible, but no later than fifteen days from when the application for internal appeal is received.*
- *Insert greater detail into the section 38 requirements of what detail must be provided to an appellant when the decision is made. These requirements should be consistent with the detail that had to be provided to the applicant under sections 31 and 32.*

PART V – MISCELLANEOUS

119. The first observation about this Part is that it is incorrectly numbered – it should be Part VI – not Part V.

Section 39 – Annual Reports by Public Authorities

120. This requirement is consistent with international best practice and is very positive. One minor improvement could be made however, and that is to ensure accessibility, the report should be made available not only in electronic form (as stated in section 39(3)) but in other forms as well. Preferably the information should be made widely available in the form that is most appropriate to ensure it is accessible and in the languages necessary to make it accessible. At a minimum, this should include its availability in an electronic form.

Recommendation

Amend section 39(3) to require that the reports are made widely available in a form and language that is most appropriate to enable it to be widely accessible, including, at a minimum, being available electronically.

Section 42 – Regulations

121. Section 42 provides an inclusive list of what regulations the Minister may make for the purposes of the law. This list is missing the requirement of the Minister to make regulations regarding the fees to be charged under section 33. Even though section 33(6) states that the Minister has this power, it would be beneficial to include this in the list of regulations to be made in section 42.

Recommendation

Amend section 42 to include the Minister's power to make regulations regarding fees.

Insert new Part – Penalties and Offences

122. Experience has shown that, particularly in the early days of implementation and/or in relation to politically or bureaucratically sensitive issues, officials will often fail to comply with freedom of information provisions. Unless there are sanctions available to punish such conduct there is little deterrent to resistant officials who wish to flout the law. Consequently, it is important to provide for offences and penalties for the actual of acts of non-compliance that resulted in the issuing of a notice. Otherwise, there is no incentive for bodies subject to the law to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose the information if the applicants goes to the trouble of lodging an appeal. Article 20 of the Indian *Right to Information Act 2006*; Article 54 of the UK *Freedom of Information Act 2000*; Article 34 of the Jamaican *Access to Information Act 2002*; and Article 42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.

123. Offences should be created by the draft Bill for egregious criminal acts and negligent disregard for the law. This is important in a bureaucracy which is likely to be resistant to openness and may stop short of criminal acts, but may still delay and undermine the law in practice. Additional offences need to be created, for example:

- unreasonable refusal to accept an application,
- unreasonable delay, which in India incurs a daily fine,
- unreasonable withholding of information,
- knowingly providing incorrect information,
- concealment or falsification of records,
- destroying information which was the subject of a request for information,
- non-compliance with the Information Commissioner's orders, which in the UK is treated as a contempt of court.

124. When developing penalties provisions, lessons learned from Indian are illuminating. In India, penalties can be imposed on individual officers, rather than just their department. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. Instead, the official responsible for the non-compliance should be punished.

125. In addition to the possibility of fines and/or imprisonment, the policy should state that where a penalty is imposed on any officer under the Bill, "*the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him*". This possibility of

imposing additional disciplinary sanctions for persistent violation of the law is permitted under the Indian *Right to Information Act 2006*.

126. In order to ensure that public bodies properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their organisation undertake their duties properly. An additional provision should be included in the law to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public body fails to implement the proactive disclosure provisions in a timely manner, does not appoint Information Officers or appellate authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent and should be deducted from the budgetary funds approved for the department.

Recommendations

- *Insert a new section on penalties to empower the Commission to impose sanctions on non-compliant officials and public authorities.*
- *Insert a comprehensive list of offences for example:*
 - (1) *Where any official has, without any reasonable cause, failed to supply the information sought within the period specified they will be fined a daily amount.*
 - (2) *Where it is found in appeal that any official has:*
 - *Refused to receive an application for information*
 - *Mala fide denied a request for information;*
 - *Knowingly given incomplete or misleading information,*
 - *Knowingly given wrong information, or*
 - *Destroying information, that is not the subject of a request, without lawful authority;*
 - *Destroying information which is the subject to a request for information;*
 - *Obstructed access to any record contrary to the Act;*
 - *Obstructed the performance of a public body of a duty under the Act;*
 - *Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or*
 - *Failed to comply with the decision of the Information Commissioner or Courts;**They have committed an offence and the Information Commissioner or the Courts shall impose a fine of a penalty of imprisonment or both.*
 - (3) *Any fines shall be recoverable from the salary of the concerned officer.*
 - (4) *Any officer on whom a fine is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her.*

Insert new section – Regular Parliamentary Review of the Act

127. To ensure that the law is being implemented effectively, it is strongly recommended that the draft Bill state that the law will provide for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the law, plus regular five year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of Kenya. It would enable legislators to take cognizance of some of the good

and bad practice in how the law is being used and applied and enable them to better protect the people's right to information.

Recommendation

Provide that there will be regular Parliamentary review of the new law.

Annex 1: CHRI critique of Kenya Government draft Freedom of Information Policy Paper, January 2007

GENERAL COMMENTS ON THE REPUBLIC OF KENYA'S DRFT FREEDOM OF INFORMATION POLICY

128. The Kenyan Chapter of the International Commission of Jurists forwarded the Commonwealth Human Rights Initiative (CHRI) the Government of the Republic of Kenya's draft Freedom of Information Policy Paper for comment. It is understood that the Government of Kenya intends on finalising the policy paper before drafting a Freedom of Information Bill and reviewing existing laws, regulations and procedures that affect accessibility of information.
129. The Government Policy Paper is a very positive step toward implementing an effective freedom of information law in Kenya. It is lasting evidence of the Government's increasing commitment to good governance through transparency and accountability that play an integral role in achieving a successful society, economy and democratic environment. A Freedom of Information law would implement Article 79 of the Constitution of Kenya which includes the freedom to receive and communicate ideas and information as part of the right to freedom and expression. However, if the cautious and narrow approach to providing access to information that permeates the Policy Paper is reflected in the law that is drafted then the effectiveness of such a law will be seriously undermined.
130. Based on CHRI's experience in drafting and reviewing access to information legislation across the Commonwealth, this paper suggests some amendments to the Policy Paper to ensure that the final legislation which is drafted on its basis is in line with recent international best practice on access to information. CHRI would like to offer its assistance in reviewing the draft Freedom of Information Bill when it is available, so recommendations for improvement can be made to the specific provisions.

Public participation in drafting the Freedom of Information Bill

131. CHRI takes this opportunity to recommend that the Kenyan Government ensure that any law that is drafted, is drafted with society's participation. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. This does not necessarily mean that the law must be written by consensus. But participation – whether directly via submissions from the public, or indirectly via awareness-raising by the media - *during* the law-making process can provide a good foundation on which to build a strong platform for implementation.
132. Best practice requires that policy-makers proactively engage civil society groups and the public during the legislative process. This can be done in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

International and regional standards on Freedom of Information

133. One of the major concerns CHRI has with the Policy Paper is that the language used throughout the Paper does not reflect the status of the right to information as a

fundamental human right to which Kenya has publicly committed itself. This commitment is not only evidenced through the Kenyan Constitution, but international and regional standards including:

- The United Nations, and in this context, having ratified both the International Covenant on Civil and Political Rights (Article 19) and the UN Convention Against Corruption (Article 13 and others).
- The Commonwealth, which has recognised the right to information as early as 1980 and in 1999 through the adoption of the Commonwealth Freedom of Information Principles by the Commonwealth Law Ministers.
- The African Union and as a signatory to the African Charter on Human and Peoples' Rights, which explicitly recognises the right to receive information. In 2002, the African Union's African Commission on Human and Peoples' Rights adopted the Declaration of Principles on Freedom of Expression in Africa and reiterated that 'public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information'.

134. Kenya is a member of many organisations who have repeatedly endorsed the importance of realising the people's right to information, including the International Monetary Fund, the World Bank and the African Development bank. These international and regional standards, in addition to evolving State practice and the general principles of law recognised by the community of nations have been distilled into key principles that underpin any effective right to information law at Annex 1.

135. It is with these commitments and key principles in mind that the Policy Paper should be read and can be improved.

Summary of major concerns with the Policy Paper

136. Overall, although the Policy Paper reads well and may appear to fulfil the very basic requirements for a right to information law, there are serious concerns regarding the content and the Policy Paper could be improved substantially.

137. Of primary concern is the language throughout the draft Policy Paper. Although many of the necessary provisions for a somewhat effective right to information law appear to be covered, the language throughout the paper tends to undermine the status of the right to information as a fundamental human right that is the foundation of many other rights and attaches to the individual as a member of society. For example, paragraph 1.7 refers to 'claims' to access information that have the potential to be 'illegitimate'. Such terminology is inconsistent with the *right* to information. If these nuances flow through to the drafting of the Freedom of Information Bill then the law may not have the effect of changing the way government operates.

138. Other major concerns are:

- In contrast to developing best practice, the draft Policy Paper fails to recognize the increasing role private bodies play in providing public services and accordingly fails to bring private bodies within the access to information regime.
- The draft Policy Paper has only minimal proactive disclosure requirements. Routine publication and dissemination of information is a key mechanism for increasing government transparency and accountability, promotes efficient public sector records management and aids public participation in government. At the very least, more information about government services, processes and decision-making processes

should be provided. Additionally, the routine publication of government contracts would be a big step forward for public accountability.

- The exemptions referred to in the draft Policy Paper are currently broadly worded and all are weakened by the lack of an overriding requirement that where disclosure is in the public interest, information will be released if the public interest in disclosure outweighs the public interest in withholding the information.
 - The lack of detail about how the Information Commissioner will be appointed and dismissed is concerning. The independence from political interference is essential to the operation of the Information Commissioner and should be dealt with at this level. In addition, the Policy Paper should recognise that the Information Commissioner is not simply an appeals mechanism but should be established as the champion of the move to transparency and open governance and the functions and powers of the office should reflect that.
 - The draft Policy Paper lacks an effective penalties regime to sanction non-compliance with the law. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.
 - The Policy Paper should also address how the Government will prepare for implementation. This is something that is best dealt with as early as possible, particularly as it allows much greater preparation time for the Bill which can then be implemented at a sooner date. For example, specifying which department will be responsible for overseeing the implementation of the law.
 - A number of other important elements of a Freedom of Information Bill are not referred to in the Paper and should be addressed at this level. These include the charging of fees for access to information and protection of whistleblowers.
139. At a more technical level, much of the draft policy paper is broadly and vaguely worded, and again, if the Freedom of Information Bill is drafted in a similar manner then concerns regarding interpretation may arise unless more guidance is given about the appropriate interpretation and application. Although drafting a less lengthy law which is potentially easier to read does have its benefits, an access to information regime requires a paradigm shift of the whole bureaucracy from one of secrecy, to openness in recognition of the fact that information is owned by the people. Consequently, experience has shown that public authorities will not always interpret principles drafted in a law in favour of the openness and transparency intended, such that it is recommended that specific direction or guidelines as to what is appropriate behaviour should be detailed in the law itself.
140. Finally, a number of terms throughout the Policy Paper are used inconsistently, for example the paper refers to public bodies, public organisations and public authorities. Even the title of the Bill that will be drafted is referred to as the Freedom of Information Bill and the Access to Information Law throughout the document. These should be amended to ensure ease of reading and to avoid confusion.

ANALYSIS OF THE REPUBLIC OF KENYA'S DRFT FREEDOM OF INFORMATION POLICY

PART I: INTRODUCTION

141. The title of the Bill intended to be drafted is the Freedom of Information Bill. However, the Constitution of Kenya includes the freedom to receive and communicate ideas as part of the right to freedom of expression. Therefore, consideration should indeed be given to renaming the law the "Right to Information Act". Although some may argue that such a focus on terminology is pedantic, it is a fact that international law as well as the Constitution of Kenya recognises access to information as a *right* (see above). This should be reflected in any legislation on the matter to ensure that implementing bodies are clear that access to information is not a discretionary gift granted to the people by a benevolent government, but rather it is a constitutionally mandated obligation on the Government, which must implement the corresponding right.
142. Paragraph 1.5 refers to the institutions that will be subject to the law. It refers to examples that include the legislature and the executive, however the judiciary, is not referred to. The Policy Paper should make it clear that the policy covers all arms of government. All organisations and bodies supported by taxpayer funds and all bodies financed by public money or mandated to perform certain functions or actions for the benefit of the public should be covered by the law. Exclusions for bodies, for example the Courts are not in keeping with good international practices - Court documents by nature are public documents and court proceedings must be conducted in public view unless the court orders in camera hearing in certain sensitive cases.
143. Paragraph 1.5 also refers to 'private bodies that carry out statutory functions'. Consideration should be made to broadening the applicability of the law, see below at paragraphs 54-58 below for a more detailed explanation.
144. The Policy Paper is lacking any definition of 'public body' yet it is integral to the operation of the law. Clear criteria should be specified so organisations can assess whether they are covered by the provisions and then appeal to the Information Commissioner for a decision as to whether they are covered or not.
145. Paragraph 1.7 refers to illegitimate claims to access to information and that a 'framework' will be put in place to adjudicate such a claim. The next Paragraph goes on to detail that an appeals mechanism will be established. Therefore, the inclusion of Paragraph 1.7 is confusing and its purpose is not clear. Therefore it is recommended that paragraph 1.7 is removed.
146. Paragraph 1.9 refers to the law that will be drafted being designed to 'balance the goal of open government against competing societal values.' While the conclusion reached in here is proper and laudable the premise on which it is based is flawed. Openness in government cannot and must not be balanced against a vague notion such as 'societal values.' Society is always a complex web of competing values some more progressive than others and some others with more divisive or destructive potential than the rest. In a democratic set up the State and its institutions and agencies are vested with the responsibility of upholding the rule of law, protecting and promoting human rights and guaranteeing equal treatment before the law for every person mainly because such conflicting values and interests coexist in society. The State as the primary political organisation responsible for maintaining law and order cannot identify with or support a set of values that have the innate potential for destroying the very fabric of democracy and the

rule of law. The competing concerns for balancing openness should all be based in protecting genuine public interest rather than any vested interest.

Recommendations:

- *Amend the title of the law to be drafted to a Right to Information Bill.*
- *Review the Policy Paper to ensure that its provisions are drafted in language which makes it clear that the public have the right to access information and the government a duty to ensure they can obtain such access.*
- *Amend paragraph 1.5 to explicitly refer to the laws application to all three arms of government – the executive, the judiciary and the legislature.*
- *Amend paragraph 1.5 to refer to ‘certain private bodies’ as opposed to ‘private bodies that carry out statutory functions’.*
- *Include more detail on what constitutes a public body for the purpose of the policy.*
- *Remove paragraph 1.7 or at the very least clarify its meaning.*
- *Remove paragraph 1.9.*

PART 2: EXISTING FRAMEWORK FOR MANAGING INFORMATION HELD BY PUBLIC ORGANISATIONS

147. Part 2 deals with currently existing laws affecting information held by public bodies. It is positive that the Kenyan Government will draft its Freedom of Information Bill in a holistic manner, considering the framework for managing access to information that currently exists. However, in order for the access to information regime to work effectively - for officials of public authorities to be clear about their duties and for the public to be clear about their rights – a single law should establish the framework for *all* information held by various arms of the government, pertaining to all subject matter. As such, it is of particular concern that the Bill to be drafted will be drafted to work in parallel with, rather than consolidate, existing access or secrecy laws. It is preferable for a comprehensive framework for accessing information to be developed.

148. There may be many difficulties and hurdles to effective implementation and administration of the new Freedom of Information Bill if there are many laws dealing with essentially the same matter. For example:

- The existing laws and the new Bill will presumably have different definitions of public body (and applicability to private bodies) and therefore the effect of the combination of laws will differ for different bodies.
- The National Archives and Documentation Act allows for the public can access information over thirty years old on payment of a prescribed fee. How will this interact with the method of accessing all information (be it over thirty years or under) under the new Freedom of Information Bill? Archiving a record should ideally mean that the record is accessible to all people on demand for no charge.
- There is a reference to accessing statutory registers and fees payable for accessing information on registers of licensees. Again, without further clarification as to which law takes precedence, how will these laws interact?

- Paragraph 2.11.1 refers to 'some laws' providing the protection from disclosure of certain information. What are these laws and how will they be affected by the new Freedom of Information Bill?
- Although the Policy Paper states that the *Official Secrets Act* does not bar officers from giving information to the public, the one provision preventing disclosure is quite broad. The existing provision relies on it an offence to use information in a way that is 'prejudicial to the safety or interests' of Kenya. Again, the broad drafting of such a clause leaves a great deal of room for interpretation.

149. Drafting a Freedom of Information Bill gives the Government of Kenya an opportunity to develop a comprehensive access regime. For this reason, the research into other access laws captured in the Policy Paper should be used as the basis for repealing other information laws and ensuring that the new Freedom of Information Bill will comprehensively deal with access and secrecy issues. The whole point of the law is to reassess old secrecy laws and update them. To retain any secrecy provisions in existing laws, may severely restrict its effectiveness, particularly because experience tends to support the idea that while laws such as an *Official Secrets Act* remain on the books, bureaucrats will be less likely to release information, no matter what other legislation exists.

150. In addition to amending the existing laws, the Bill that is drafted should clarify that the new law takes precedence. Such a clause could be drafted like the clause in the Model Freedom of Information Law⁴:

'(1) This Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body.

(2) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.'

151. To support the primacy of the new Freedom of Information Bill and evidence the Government's commitment to openness, the Oath of Office and Secrecy referred to in Paragraph 2.12 should be removed. It is essential that any oath require the highest standards of public service and a commitment to transparency and accountability. Further, the terms and conditions of service of public servants should be improved to also reflect the new environment of openness and transparency and functioning under the Freedom of Information Bill. Paragraph 2.12.2 of the Policy Paper refers to these terms and conditions listing disclosure of information without authorisation as a ground for summary dismissal. This should be amended to reflect the primacy of openness and include the potential to penalise officers for their non compliance with the new Freedom of Information law (see paragraphs 115-116 below).

Security of Official Documents

152. Security classification of documents can continue to coexist with a freedom of information law. However the existing grounds for classifying documents are unjustifiable in any government that aspires to be truly democratic. It is now a well established norm in countries with properly functional transparency laws that 'embarrassment' to government or to public institutions cannot be adequate reason for withholding access to a record. The only justification should be endangering the security of the public. Secrecy in government often is a major cause for corruption; it protects poor decision making and provides

⁴ The Model Freedom of Information Law was drafted by Article 19 and a number of other organisations in 2001 (including CHRI) and can be found at <http://www.article19.org/publications/law/standard-setting.html>.

impunity to offenders. It is obvious that transparency brings such instances to light and rightly so. Accountability before the law and making public institutions answerable for every decision and action of theirs to Parliament and ultimately to the citizenry are prerequisites of good governance. Only when a government governs in this manner can it be said to be governing responsibly. Good governance requires that public institutions take corrective steps when there is evidence of wrongdoing. A good freedom of information policy aids the taxpaying citizen in verifying whether everything is truly done in the public interest and public monies spent in his/her name according to the established norms and procedures. The existing criteria for classifying documents are clearly opposed to the very philosophy of accountable governance. A public institution should derive respect from the citizenry by governing responsibly and in an accountable manner not by keeping evidence of poor or flawed decision making secret, because it fears embarrassment in public. Therefore such criteria for classifying documents need to be revised.

153. Furthermore the security classification itself should be in tune with the exemptions to disclosure permitted in the FOI law. If this harmony is not brought about it will lead to confusion as to which law/rule will prevail and invariably end up curtailing the rights of the citizen. Again, this requires that the Freedom of Information law prevails over existing laws that are inconsistent with or contravene its requirements of openness.

Disposal of Public Records

154. When developing a record-keeping system, government must consider not only the short-term challenge of creating information in response to daily activities but also the long-term requirement to protect evidence that (1) supports the decision-making process, (2) ensures the continued operation of public services, and (3) renders the government accountable to the public for its actions⁵. Therefore, existing record-keeping systems should be redeveloped to facilitate the aims of the new Freedom of Information Policy.

155. In particular, part of any good record-keeping policy is the destruction/disposal of obsolete records. The Public Policy paper refers to the current policy of disposing records that are value-less and non-current. Yet these terms are unnecessarily vague and broadly worded leaving potential for the destruction of records to be abused as a method of avoiding granting access to information. Particular care should be given to not only giving guidance as to what these terms mean in an environment of openness, but also to ensure that the offices given the authority to approve the disposal of records are politically independent and trained in archiving.

156. The Policy Paper also refers to the offence created for the wilful destruction or disposal of public records without written consent of the Director of Kenya National Archives. As the inclusion of penalties for abuse, neglect or mismanagement of records is crucial to the law, this is a positive step. Yet it could be improved by including more specific penalties for obstructing access. See below at paragraph 114.

157. A new provision should also be included in the Policy Paper that requires appropriate record keeping and management systems to be in place. At a minimum, a specific duty should be included stating that *“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.”*

⁵ Millar, L, *The Right to Information – the Right to Records: The relationship between record keeping, access to information, and Government accountability*, May 2003, see http://www.humanrightsinitiative.org/programs/ai/rti/articles/record_keeping_ai.pdf.

158. Similar to the Code of Practice, the Information Commissioner could be tasked with developing a Code of Practice on Records Management. The huge volume of information in governments' 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. Under section 46 of the United Kingdom *Freedom of Information Act 2000*, the Lord Chancellor is actually made responsible for developing a Code of Practice or other such regulation to provide guidance to bodies covered by the Act on how to keep, manage and dispose of their records. A time frame should be stipulated for producing such a code, preferably a maximum of twelve months from the Act's commencement so that it is of use to public authorities.

Recommendations:

- *Revise the existing laws that affect the disclosure of information held by the government and clarify the precedence of the new Freedom of Information policy. For example:
(1) This law will apply to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body.
(2) Nothing in the law will limit or otherwise restrict the disclosure of information pursuant to any other legislation, policy or practice.*
- *Remove the Oath of Office and Secrecy referred to in Paragraph 2.21 and replace it with an Oath that evidences the government's commitment to transparency and accountability.*
- *Amend Paragraph 2.12.2 to remove the ground for dismissal for disclosure of information without authorisation and include a new ground for dismissal being non compliance with the new Freedom of Information law.*
- *Amend the existing security classifications to be in tune with the exemptions to disclosure in the new Freedom of Information law.*
- *Amend the rules on disposal of information that is 'value-less and non-current' to better reflect a culture of openness.*
- *Include a requirement that appropriate record keeping and management systems to be in place for the administration and implementation of the Freedom of Information law.*
- *Insert a requirement that the Information Commissioner be tasked with developing a Code of Practice on Records Management.*

PART 3: THE ACCESS TO INFORMATION POLICY

3.2 Right of Access

159. The description of the right of access is integral to the policy as it establishes the framework on which the law will be drafted. However, the current wording is such that the right to access information appears to be somewhat limited – and the Policy Paper fails to give any impression that individuals have a right to receive information and that the key principle is that of maximum disclosure. It is suggested that in order to recognise the importance of the access to information and establish the framework in which the law will operate, the Paragraph should be reworded to mirror the core principle of any right to information law – that of maximum disclosure.

- It is important to make a clear statement that as much information as possible will be released to the public: The principle of maximum disclosure should underpin any access to information regime and this has been recognised by international and regional standards. In practice, this presumption in favour of access means that all people have a *right* to access information and all bodies covered by the policy have a corresponding *duty* to provide access in accordance with the law. All arms of government, for example, the Head of State (eg. President, monarch, Governor-General), parliament, the courts, and the armed services should all be covered.
- Any denial of information is based on proving that disclosure would cause serious harm to a legitimate interest and that denial is in the overall public interest: The principle of maximum disclosure nonetheless recognises that the right of the public to access information is not absolute. Exemptions from disclosure are usually allowed where release of information would cause serious harm to national security, international relations, law enforcement activities or the competitive position of a company. Unreasonable disclosure of personal information is also usually not permitted. However, a right to information law needs to be carefully drafted to avoid broadly defined exemptions applying to whole classes or types of information. In most cases, each document and the context of its release is unique and needs to be judged on its merits. Accordingly, exemptions are applied on a content-specific case-by-case review. Non-disclosure is only justified where, on balance, withholding the information is in the public interest. A good law will also not permit non-disclosure simply to protect a government official from embarrassment or because disclosure might be confusing for the public. In such cases, governments may consider disclosing additional information to put the requested information into context. There is always be a strong public interest in disclosures which lead to the exposure of wrongdoing in public authorities.
- Information which is of general relevance to constituents is routinely published and disseminated: At a minimum, basic information needs to be published about government organisations, such as the names of the responsible Minister, key staff, contact details, organisational structure, the services provided and programmes run, the departmental budget and ongoing updates on expenditure. To promote better development outcomes, information can also be published about proposed activities, as well as updates about the implementation of current programmes (eg. budget, beneficiaries, proposed outcomes). Governments should also publish information about opportunities for the public to participate in organisational consultations and activities, and keep them updated on general government business. This proactive disclosure is integral to the right to information and should therefore form part of the right of access in the Policy Paper. (See paragraphs 60-66 below)

160. The Policy Paper should be reviewed and amended to reflect these principles. In particular, references to specific exemptions should be removed as Section 3.14 deals with exemptions in detail.

Recommendations:

- *Rephrase Section 3.2 to emphasise and establish in the Policy Paper that individuals have a right to access information:
“Every person has a right to access information held by or under the control of a public*

authority unless that information is exempted from disclosure by this Act.”

- *Include a reference to the principle that in order to maximise disclosure, certain information will be routinely published and disseminated.*
- *Remove references to the exemptions for deliberations and personal data as they are dealt with later in the Policy Paper.*

3.3 Manner of Access

161. Another core principle of a right to information policy is that access to information should be simple, cost-effective and timely. It applies to both the procedures for requesting information and the actual giving of access to the information. Request procedures need to be clear and uncomplicated so that the public are not confused or burdened by complex bureaucratic requirements. In addition, information that is disseminated, whether through proactive disclosure or in response to a member of the public's specific request for access to information, needs to be accessible.

Requesting information:

162. The Policy Paper does not deal specifically with the application process however more consideration should be made to this issue. Applications should be able to be submitted in writing (electronically, by mail or by hand) or even orally where the applicant is illiterate or where geographic difficulties might mean that requests by telephone are the most practical method.

163. In addition the Policy Paper should specify at the outset that, In line with the key principles of any good access to information law and the status of the right to information as a fundamental human right, applicants should never be required to give reasons for their request. This is a fundamental principle that should be stated in the Policy Paper to make it clear that people can access information from public authorities for any reason whatsoever. There should be a corresponding obligation on the public authority or its representatives not to demand a justification or an explanation for seeking information from a requestor. This avoids the possibility for such a requirement being introduced by a public authority or any future Ministers. For the purpose of drafting the law, Section 11 of the *Australian Freedom of Information Act 1982* provides a useful model:

- (1) *Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to: [insert details of information covered:*
 - (a) *The bodies and institutions of the public administration and public companies*
 - (b) *Private bodies (see paragraphs 21-23 above)*
- (2) *Subject to this Act, a person's right of access is not affected by:*
 - (a) *any reasons the person gives for seeking access; or*
 - (b) *the agency's or Minister's belief as to what are his or her reasons for seeking access.*

164. The reference to public bodies being required assist applicants is very positive as there may be many people in any society who have trouble making an application and such a provision attempts to ensure the law is accessible by all. However, this could be strengthened to ensure that the aim of making the law as accessible as possible is fulfilled by ensuring that the officials provide such reasonable assistance to the person free of charge.

165. Finally, it should be clarified that the right to information extends not merely to records in the form in which they exist. The right extends to applying for access to information that may be compiled or collated from disaggregate sources so long as such an exercise does not result in a disproportionate diversion of the resources of the public institution or harm the safety and preservation of the record.

Manner in which access is granted

166. For the manner of access to information when the government is proactively disseminating information, see below at paragraphs 65 to 66.
167. When access to information is given in response to an application, it is positive that section 3.3.2 requires that access to be given in the manner preferred by the applicant. However, there are a number of ways the policy could be improved.
168. Firstly, it is deeply troubling that it permits the giving of information as a 'summary'. This provision could easily be abused by officials who do not wish to disclose a document, and will therefore provide a (appropriately censored) summary that cannot be acted upon by the requester.
169. The remainder of the list of ways in which information can be received in 3.3.2 does not reflect the variety of 'information' available to the applicant as defined in Part 6. Therefore, 3.3.2 needs to be amended to reflect that people may want to access information that is not in hard or electronic form - that is for example, through a site visit or through a sample.
170. Finally, the reasons in Paragraph 3.3.3 for not giving access in the preferred manner are too broadly worded. For example, it allows officials to provide an alternate form of access if the requested form if the body deems it 'unreasonable' to supply information in the form requested. Again, a law based on this policy would give the public body a great deal of discretion as to how they will provide access to the information and is not appropriate. A public body should be required to consult an applicant where these provisions might be used and the applicant should then be able to choose between alternative methods of access to the information. This puts the power back in the hands of the applicant so that it is them, and not the public body as referred to in 3.3.3, who determines what manner they will receive the information given the options that are available.

Recommendations:

- *Insert more detail on the procedures and requirements for applying for information, and that these procedures maximise the accessibility of the law, including that oral requests will be accepted and that reasons for requesting the information will not be required.*
- *Extend the forms in which access to information can be given to better reflect the definition of 'information' in Part 6 of the Policy Paper.*
- *Require the public body to consult an applicant where access to information cannot be given in the manner requested.*

3.4 Accountability of Public Officers

171. While it is positive that the Policy Paper nominates the Head of the public body as having the ultimate responsibility for ensuring compliance with the law there are a number of improvements that could be made to ensure the law is administered effectively by the public body.
172. Firstly, the Policy Paper states that the Head of the public body will have ultimate responsibility for compliance with the law but that they can enlist other staff to ensure the law is implemented. It is highly likely that the Head of the public body will not personally be

applying the law and will make use of the power to delegate in Paragraph 3.4.2. International best practice recognises this practicality and requires every public body to nominate specific officials who are given primary responsibility for handling requests for information. Commonly, an Information Officer (IO) is appointed within each department to act as the contact point for applications and for internal information queries for other officials (with a default that if no such IO is appointed, the Head of the public body is deemed to be the IO). The names of these officers should be proactively disclosed for the convenience of the public. Powers can then be delegated by the IO to other officers within the department or regional offices, if resources require it. This approach makes it easier for the public to know who to submit their application to, as well as identifying someone who can be contacted if follow-up is necessary. IOs can also be targeted for specific information disclosure training and can act as a disclosure expert who other officials can call on for advice. This approach is recommended.

173. The IO's roles and responsibilities can then be given in more detail in the law. Section 17 of the South African *Promotion of Access to Information Act 2000* provides one useful model.

South Africa: (1) For the purposes of this Act, each public body must, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.

- *The information officer of a public body has direction and control over every deputy information officer of that body.*
- *The information officer of a public body may delegate a power or duty conferred or imposed on that information officer by this Act to a deputy information officer of that public body.*
- *In deciding whether to delegate a power or duty in terms of subsection (3), the information officer must give due consideration to the need to render the public body as accessible as reasonably possible for requesters of its records.*

174. Where the policy provides for the designation of IOs tasked with dealing with information requests, it should also provide statutory powers to such officers to seek the assistance of any other officer (any senior or junior colleague of any rank) for dealing with the information request. The law should place a corresponding duty on all such officers whose assistance has been sought to provide such assistance. Wherever such assistance is not forthcoming without sufficient reason such other officer must be made liable for facing consequences for contravention of the provisions of the law and be made a party to all review/appeals and penalty proceedings. Such a stringent provision is necessary as the IO or the head of the public institution may not always be the custodian of the information requested. In this context the meaning of the term 'assistance' should also include any advice or opinion sought by the IO from any of his colleagues within the same institution or any other public body.

175. Another improvement that could be made to Paragraph 3.4.1 is that, as it is anticipated that there will be appropriate exemptions for private information in the Freedom of Information Bill, there does not need to be a reference to the Head of the organisation 'striking a balance between the rights of individuals to privacy and family life...'. The inclusion of such a role explicitly, that may imply more than simply a considerations of the exemptions that is drafted for the bill, can only serve to confuse the interpretation of what the person's responsibilities are. The only responsibility such a person should have under the freedom of information policy is to ensure compliance with the Freedom of Information Bill that is eventually drafted. Other responsibilities should come under the legislative framework established for that particular law.

Recommendations:

- *Reconsider delegating the responsibility to the Head of the public body but instead requiring a public body to designate an Information Officer (or as many Information Officers as necessary to administer the law) who will act as the contact point for applications and for internal information queries for other officials.*
- *Give the IO the power to seek assistance off any other officer for the purposes of administering the law.*
- *Remove the reference to 'striking a balance between the rights of individuals to privacy and family life...' in Paragraph 3.4.1.*

3.6 Handling Applications

176. It is assumed that the time limits referred to in Paragraph 3.3.1 will be set in the law. International best practice requires these provisions state the specific time frame for such a response - usually information must be provided or refused within 5-30 days from when the application is made (the reference to 'registration' in Paragraph 3.3.1 is confusing). In addition, the public body should notify the applicant of *all* further rights of appeal, both internal and through the Information Commissioner and ultimately the courts.

Recommendations:

- *Insert more detail as to how applications will be handled, including specifying a time limit for responding to the application (between 5 and 30 calendar days).*
- *Require the notice to include information on all levels of appeal available to the applicant.*

3.7 Transfer of requests

177. Imposing a duty on public authorities to transfer applications is in line with international best practice and is very positive. However, Paragraph 3.7.1 permits the transfer of an application if the information is 'more closely connected with the functions of another institution than those with the institution to which the request is made'. In practice, this means that even if the public body holds the information, if the person dealing with the application believes it is 'more closely connected' to another public body, they may transfer it. This provision could easily be abused by officials trying to delay or prevent access. And public bodies should be considered as a single entity as far as the public is concerned. In reality, if an official holds information but is uncertain about how sensitive it is, they can simply call another official who might know more and consult them for advice. This is far simpler than permitting a transfer which will require the public to run around for authority to chase up their application.

178. Ideally, the public body should only transfer the request if the information is not held or under the control of the body who receives the request. This ensures that applications cannot be passed on simply because it is not physically in the possession of the public body, something that is increasingly common with government out-sourcing. In addition, the Policy Paper states that the public body *may* transfer the request. Yet, if the public body cannot access the information, and they believe another public body may have the information, then they should be required to transfer the request – it should not be an option.

179. When the Freedom of Information Bill is drafted, care should be taken to require such a transfer to take place within a specific time frame of the public body receiving the application. International best practice requires such information to be transferred, and the applicant notified of the transfer, within 5 days of receiving the request.

Recommendations:

- *Remove the public bodies ability to transfer an application if it is 'more closely connected with the functions of another institution than those with the institution to which the request is made'.*
- *Require the Information Officer to transfer the application if they do not hold or have access to the information but believe another public body may.*
- *Require such a transfer to occur within 5 calendar days of receipt of the application and that the applicant is notified.*

3.8 Third Party Notification

180. Protecting the interests of third parties is good practice. However, the Policy Paper would again benefit from more detail, for instance it should prescribe a maximum time limit within which to invite the representation from the third party. Similarly the third party should also be required by the law to respond within a specific time limit.

Recommendation:

- *Insert more detail as to the procedure for consulting with a third party, including time limits.*

3.10 Application to Private Organisations

181. The effectiveness of the Freedom of Information Policy is seriously undermined by the lack of application to private organisations, to only those that 'carry statutory functions and those that are contractors to public organisations'.

182. Governments around the world are working through other organizations in a variety of forms, whether it be through contracts or other more informal arrangements and these bodies can effect the public as much as government itself. In order to achieve the aims of public participation, transparency and accountability in all forms of decision making that effect the public, consideration should be made to broadening the definition of a public body to broaden the coverage of the Act to include more bodies in which the government has an interest (not only those over which 'carry statutory functions and those that are contractors to public organisations'). Otherwise, as has happened in Canada at the federal level, other forms of entity may be set up by government departments to avoid the application of the act, for example, trusts or joint ventures.

183. International experience demonstrates that, with more and more private companies providing public services with public money, previously clear distinctions between information held by public and private bodies may need to be reconsidered for the public good. Thus, a number of countries have accepted that some measure of private confidentiality must be legitimately forgone in order to ensure that corruption, for example, in the tendering and implementation of government contracts, cannot be kept hidden through the use of so-called "commercial-in-confidence" provisions. Prioritising transparency and accountability may *sometimes* require that commercial and/or contractual information, including financial details, must be disclosed.

184. This approach is being reflected in current best practice international standards in access to information laws. South Africa has set an example by extending the application of the *Promotion of Access to Information Act 2000* to private bodies where the information requested is “required for the exercise or protection of any rights”⁶. The South African Act recognises that the application of an access to information law should be “resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested information.”⁷ While this is a novel approach in some economies, it has much to recommend it to a Government which prioritises the protection of human rights over corporate rights. People should not be forced to worry about who is affecting their rights – be it a public or private body – they should simply be able to *protect* their rights by accessing whatever information they need. It is recommended that the draft Bill provide a right to access information from private bodies.

185. A number of countries around the world have already brought private bodies within the ambit of their right to information regimes. South Africa’s law is the most progressive, but a number of other formulations could also be considered:

- *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right.* [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size, determined according to turnover or employee numbers]
- *India (RTI Act 2005): Any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government.*
- *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
- *Maharashtra, India s.2(6): Any body which receives any aid directly or indirectly by the Government and shall include the bodies whose composition and administration are predominantly controlled by the Government or the functions of such body are of public nature or interest or on which office bearers are appointed by the Government.*
- *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

Recommendation:

- *Extend the application of the policy to private bodies where the information is required for the protection of human rights.*

3.11 Reuse of Public Information

186. The purpose and effect of this Paragraph is unclear. It appears that the policy will allow the Minister a broad and unfettered discretion to limit the application of the law when there is a concern that information will be used for ‘commercial exploitation’. This is not appropriate. Firstly, the interpretation of ‘commercial exploitation’ is unclear and could easily be used to withhold information. One of the main benefits of the right to information flows from the power that information holds being transferred to the people. This clause appears to undermine the whole policy by retaining that power in the hands of the public

⁶ Part 3. See Currie, I. & Klaaren, J. (2002) *The Promotion of Access to Information Act Commentary*, SiberInk, Cape Town, for a more detailed discussion.

⁷ Lewis, D. (2003) “The Need and Value of Access to Information from Non-State Agencies”, CHRI unpublished, p.9.

body when their commercial competitiveness may be tested. In addition, the exemptions provided in Paragraph 3.14 allow an exemption for commercial interests of public bodies, it is unclear therefore what this Paragraph adds to this exemption? Considering that corruption often occurs exactly in the areas of government finances and property interests (especially regarding property procurement), this clause could far too easily be abused by corrupt officials

Recommendation:

- Remove Paragraph 3.11.

3.12 Proactive Disclosure

187. The new generation of access laws recognise that proactive disclosure can be a very efficient way of servicing the community's information needs efficiently, while reducing the burden on individual officials to respond to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public.

188. Paragraph 3.12 requires some proactive disclosure, however very little detail is given as to what this information should be and the reference to 'publication schemes of public organisations' in Paragraph 3.12.2 implies this detail will be left to the public body to determine. There are improvements that could be made to this policy.

189. Firstly, what information is published should not be left to the public body itself to determine. Newer access to information laws establish a comprehensive list of information that should be proactively published by *all* public bodies as a minimum. Although Paragraph 3.12.1 refers to some general types of information, it suffers from the fact that it is not very comprehensive. Therefore, it is recommended that Section 3.12 refer to a specific list of information which will form the minimum list of types of information that must be published by the public body. Article 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require a greater deal of transparency by the government, requiring the disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny.

190. In addition, this information will be of little use if it is not accurate or up to date. Therefore, it should be regularly updated (at least annually) and some of the information which changes often should be updated more regularly as appropriate (for example, new government contracts should be published weekly or monthly).

191. In line with the role the Information Commissioner as an overseer of the proactive disclosure requirements, consideration could be given to requiring the Information Commissioner to publish a guide to assist public bodies in publishing information proactively under the law. Such a guide should be published within no more than six months of the Act coming into force, and thereafter updated regularly, so that early on in the Act's implementation, public authorities have guidance on how best to meet their proactive disclosure obligations.

192. Even where information is released to the public, it will have little useful impact in terms of improving development and governance outcomes unless it is released in a form which can be understood by ordinary people. Therefore, copies of the information that is proactively disclosed should be available with the public body that generated the information publication and accessible to every person who wishes to obtain a copy. Access to these documents should not be made subject to formal procedures for seeking information or copies of records under the law. As these documents are printed they are meant for public consumption and should be easily available to every person at a reasonable cost. In addition:

- At the very least information needs to be released in languages other than English, so that people who speak different languages or dialects are not effectively excluded.
- More specifically, technical government information, such as information about budgets and expenditure needs to be explained in simple language so that people can make sense of it.

193. In countries with minimal internet access, web publishing may not have a significant impact. The opportunities presented by existing government and community outreach networks need to be explored. For example, community noticeboards, village meetings and provincial government offices can all be used as dissemination points. Local government or NGO fieldworks can also be utilised to disseminate information to the public. Broadcasting key information on commercial and community radio and television is also an option that can be pursued.

Recommendation:

- *Amend Paragraph 3.12 to include a comprehensive list of the information every public body will be required to disclose. Such a list could be based on the Indian & Mexican access laws:*

“(1) Every public body shall

(f) publish within 3 months the amendments coming into force:

(xiii) the powers and duties of its officers and employees;

(xiv) the procedure followed in the decision making process, including channels of supervision and accountability;

(xv) the norms set by it for the discharge of its functions;

(xvi) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(xvii) a directory of its officers and employees;

(xviii) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations

(xix) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xx) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xxi) particulars of concessions, permits or authorisations granted by it;

(xxii) details in respect of the information, available to or held by it, reduced in an electronic form;

(xxiii) the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;

(xxiv) such other information as may be prescribed;

and thereafter update their publications within such intervals in each year as may be prescribed;

(g) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

- (h) *provide reasons for its administrative or quasi judicial decisions to affected persons;*
- (i) *before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby 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 interest of natural justice and promotion of democratic principles.*
- (j) *Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:*
 - (v) *The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;*
 - (vi) *The amount;*
 - (vii) *The name of the provider, contractor or individual to whom the contract has been granted,*
 - (viii) *The periods within which the contract must be completed.*
- (4) *Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.*
- (5) *It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-Article (1) to provide as much information proactively to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.*
- *Insert a section requiring the Information Commissioner to publish a guide on proactive disclosure within six months of the law coming into force.*
- *Insert a requirement that the information above is disseminated broadly and is accessible by the people.*

3.13 Disposal of Records

194. The maintenance and disposal of records is integral to the Freedom of Information policy and consequently the record-keeping policy should be standard across all departments. See above at paragraphs 27-31.
195. Of particular concern is the inclusion of Paragraph 3.13.5(c) in the Policy Paper that appears to allow public bodies the discretion to dispose of records pertaining to 'letters of transmittal and acknowledgements, announcements and notes pertaining to reservations of accommodation or scheduling of personal visits or appearances' without any authorisation. Granting public bodies this power to destroy such information is not acceptable. Uncovering corruption at the highest levels of officialdom is one of the very reasons for the right to information which allows the people to hold their government accountable. Examples from all over the world can be given about officials that have had 'personal visits' from people with whom they also have a close business association and whom have been granted high cost contracts and received benefits from the government. This form of information should also be subject to a rigorous decision making process by an independent body/person formally trained in archival before it is destroyed.

Recommendation:

- *Remove Paragraph 3.13.5(c).*

3.14 Exceptions/Protected Information

Overriding public interest test

196. The Policy Paper commits the Kenyan Government to the principle of maximum disclosure, however this means that there is a presumption that access to the information will be allowed, unless the release of information would be genuinely likely to cause harm to the public through the key interests listed as exemptions to the law. All exemptions should be aimed at examining whether disclosure would actually cause or be likely to cause harm. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected. In accordance with international best practice, every exemption should be considered in 3 parts:

- (iv) Is the information covered by a legitimate exemption?
- (v) Will disclosure cause substantial harm?
- (vi) Is the likely harm greater than the public interest in disclosure?

197. To ensure this is the case, international best practice requires that *all* exemptions to access are subject to a ‘public interest override’ whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the “public interest” is always at the core of a right to information regime. See for example s.8(2) of the Indian *Right to Information Act 2005* that includes this type of broad public interest override.

198. The meaning of “public interest” is variable according to the facts of each case. However, consideration may be given to including a *non-exhaustive* list of factors which may be taken into consideration when weighing the public interest, to give officials some guidance on what they should be taking into account when weighing the public interest. For example a clause such as the following could be inserted:

In determining whether disclosure is justified in the public interest, the public authority shall have regard to considerations, including but not limited to, obligations to comply with legal requirements, the prevention of the commission of offences or other unlawful acts, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorised use of public funds, the avoidance of wasteful expenditure of public funds or danger to the health or safety of an individual or the public, or the need to prepare and protect the environment, and the need to improve public participation in, and understanding of, public policy making.

Paragraph 3.14(a) National Security, Defence and International Relations

National and international interests

199. While it is appropriate to exempt documents which will harm key national security and international interests, the current wording of Paragraph 3.14.1 is too broad. The terms ‘national and international interests’ are vague terms that could be applied in any manner of circumstance, especially when read in conjunction with the list of examples which includes the very broad subject matter of ‘tax collection’ or ‘financial obligations’. This protection of ‘national interests’ is not appropriate. Consideration should be given to re-phrasing this Paragraph to ensure that it only applies to situations in which disclosure of the information would seriously jeopardise national security or international relations. If there are specific national interests that should be protected then they should be specified

as separate exemptions, for example information that would breach commercial confidentiality, or information that would undermine law enforcement activities.

200. The reference to 'information received in confidence' should also be deleted because the key issue for any exemption should be whether harm would be caused by disclosure not whether the information was confidential at the time it was provided. Just because information was given to the Government of Kenya in confidence does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. As long as the more general protection which guards against disclosures that would prejudice international relations, is retained, the relevant interests will be protected. This also reduces the chances that the provision will be abused by corrupt officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. What if the confidential information that was passed on relates to a corrupt deal undertaken by a previous administration? Is it really legitimate that it be withheld? What harm will it cause the nation – in fact, will it not be of benefit in exposing corrupt dealings and making government more accountable?

Undermine law enforcement activities

201. The inclusion of an exemption to protect law enforcement activities is positive. However, the paragraph could be improved by amending the wording which is currently too broad. At the moment, the policy is to exempt information, the disclosure of which would 'undermine' an investigation or trial. This is not a sufficiently stringent harm test. It should be necessary for the disclosure of the requested information should actually cause 'serious' or 'substantial' prejudice to warrant continued secrecy. In addition, the exemption should be limited to *lawful* investigations, apprehensions or prosecutions by a law enforcement agency.

Paragraph 3.14(c) Commercial Confidentiality

202. While it is positive that Paragraph 3.14.5 appears to only exempt information from disclosure where it is protected by other statutes (such as trade marked or intellectual property), there are some concerns with the broader exemption in Paragraph 3.14.6. This latter paragraph is confusing to read and unclear. What are the commercial interests of public bodies with significant commercial interests? And who would determine what they are?

203. If this paragraph intends to exempt from disclosure a wide variety of information that is related to the commercial undertakings of a public body then it is too broadly worded. In particular, there is no harm test for these provisions to apply. This is a key deficiency, because private bodies have a huge impact on public life such that the public increasingly feels the need to exercise their right to know in respect of private business information as well as Government information. International experience has demonstrated that, with more and more private companies providing public services with public money, previously clear distinctions between public and private information may need to be reconsidered for the public good. Thus, a number of countries have accepted that some measure of private confidentiality must be legitimately forgone in order to ensure that corruption, for example, in the tendering and implementation of government contracts, cannot be kept hidden through the use of so-called "commercial-in-confidence" provisions. Prioritising transparency and accountability may *sometimes* require that commercial and/or contractual information, including financial details, must be disclosed.

204. At the very least therefore, the Policy Paper should make the so-called 'commercial confidentiality' *expressly* subject to a public interest override and provide more detail as to

what should be considered in applying the public interest test in this case. There are many right to information laws around the world that do this, for example, s.26(6) of the Canadian *Freedom of Information Act 1982* expressly allows the head of a government institution to disclose a record that contains commercial information (other than a trade secret) “if the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party”. Section 9(1) of the New Zealand *Official Information Act 1982* states that a good reason for withholding confidential commercial information will be taken to exist “unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

Paragraph 3.14(d) Safety of Individuals and the Public

205. As stated above, the key principle of a right to information law should be that of maximum disclosure, subject only to limited exemptions that themselves are ultimately designed with the protection of the public interest in mind – as evidenced by the overriding public interest test. *All* exemptions should be subject to a “public interest override” whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. It is through this mechanism that the public interest is protected. Therefore this paragraph is unnecessary and contrary to best practice on how and why exemptions from access to information should be applied.

Paragraph 3.14(e) Information Supplied in Confidence

206. It is unclear how this exemption from disclosing access to information differs from the more specific exemption of commercial confidentiality. If there is confidential information provided to the public body then it has already been dealt with, on the other hand if it intends to cover consultations with third parties then that too has been covered in Paragraph 3.8.

Paragraph 3.14(f) Decision Making and Advice

Deliberations

207. An exemption from disclosure for information used in developing policy and other deliberations as suggested in Paragraph 3.14.9 is not appropriate. This exemption could too easily be abused by secretive officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. 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 to argue that disclosure 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.

Cabinet Documents

208. Although it has historically been very common to include blanket exemptions for Cabinet documents in right to information laws, in a contemporary context where governments are committing themselves to more openness it is less clear why the status of a document as a Cabinet document should, in and of itself, be enough to warrant non-

disclosure. Considering all of the exemptions already contained in the law, it is not clear in addition why such a broad Cabinet exemption needs to be included. One of the primary objectives of a right to information law is to open up government so that the public can see how decisions are made and make sure that they are made right. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions – particularly in the most important decision-making forum in the country, Cabinet.

209. It is therefore recommended that the reference to Cabinet exemptions in Paragraph 3.14.10 be deleted. Cabinet documents can be protected under other exemptions clauses as necessary. At the very least, the Cabinet exemption will need to be drafted in a tight and specific way to ensure it cannot be abused. Currently, the wording would imply a very broad exemption, exempting whole documents from disclosure if it is a 'related advisory service'. This could capture a huge number of documents and could easily be abused by the bureaucracy.

210. Of course, it will generally not be appropriate to disclose advice to Cabinet *prior* to a decision being reached. In this context, protection should be provided for "premature disclosure, which could frustrate the success of a policy or substantially prejudice the decision-making process". Notably though, relevant information should still eventually be disclosed – it is only premature disclosure that should be protected. In Wales and Israel for example, Cabinet documents are routinely disclosed and in India, such documents are at least required to be disclosed after decisions have been made.

211. Thus Paragraphs 3.14.9 and 3.14.10 could be combined and be tightened as the circumstances in which both Cabinet documents and such deliberative documents should be withheld from disclosure will evidence many similar characteristics, such as where disclosure would, or would be likely to:

- cause serious prejudice to the effective formulation or development of government policy; or
- seriously frustrate the success of a policy, by premature disclosure of that policy; and
- disclosure would be contrary to the public interest.

Recommendations:

- *Insert an overriding 'public interest test' that applies to all exemptions and consider including a non-exhaustive list of factors which may be taken into consideration when weighing the public interest.*
- *Amend Paragraph 3.14(a) National Security, Defence and International Relations to ensure that it only applies to situations in which disclosure of the information would seriously jeopardise national security or international relations.*
- *Amend Paragraph 3.14(a) National Security, Defence and International Relations regarding undermining law enforcement activities to be limited to where disclosure of the requested information would actually cause 'serious' or 'substantial' prejudice to warrant continued secrecy and where the investigations, apprehensions or prosecutions by a law enforcement agency are lawful.*
- *Amend Paragraph 3.14(c) Commercial Confidentiality so that the exemption is expressly subject to a public interest override and provide more detail as to what should be considered in applying the public interest test in this case.*
- *Remove Paragraph 3.14(d) Safety of Individuals and the Public.*
- *Remove Paragraph 3.14(e) Information Supplied in Confidence.*
- *Amend Paragraph 3.14(f) Decision Making and Advice to, at the very least, limit the exemption to where disclosure would, or would be likely to:*
 - *cause serious prejudice to the effective formulation or development of government*

policy; or

- *seriously frustrate the success of a policy, by premature disclosure of that policy; and*
- *disclosure would be contrary to the public interest.*

PART 4: POLICY ON PROTECTION OF PERSONAL DATA

212. In an age where governments and private bodies are collecting and holding increasing amounts of information about members of the public, it is essential that proper policies are in place to ensure that personal information is appropriately protected from disclosure and cannot be misused by officials. Privacy issues are complex particularly now that considerable information is held in electronic databases and shared between the private and public sectors, between levels of government, and between countries.

213. Specific attention and expert resources need to be dedicated towards developing appropriate national privacy regimes.

- Is there any constitutional right to privacy? Is there a national Privacy Policy or Act in place? If not, have any sectoral policy documents or issues papers been produced or commissioned? What safeguards are in place currently to ensure that personal information held by government and private bodies is not incorrectly released or misused?
- Are there any legislative reform programmes in place currently which could be developed/ redesigned to include an examination of privacy issues? Is the Attorney-General's Office/ Law Ministry/Law Reform Commission equipped (in terms of personnel, expertise and resources) to undertake such an exercise?

214. The current draft Policy Paper does not appear to contemplate these issues and it is recommended that a more comprehensive and separate (but complementary) personal privacy policy (and potentially a specific law) is developed.

215. However, the exemption for personal data in Paragraph 3.14.4, when read in conjunction with Part 4 of the Policy Paper appears to exempt 'personal information' (see Paragraph 4.3.1). Yet there does not appear to be a definition of personal information. Yet not all personal information should be exempted - only information that would constitute an unwarranted invasion of personal privacy should be protected from disclosure. In particular, it is worrying that a broad exemption could be misused to permit non-disclosure of information about public officials. It is vital to government accountability that public officials can individually be held to account for their official actions. As such, a new provision should also be inserted making it clear that in certain instances privacy rights must still give way to openness.

PART 5: REVIEW AND APPEALS

5.1 Introduction

216. It is positive that the Policy Paper establishes that the government intends on establishing both an internal and external review process which will involve the establishment of an Information Commissioner. However, the specific provisions could be improved as essential elements of the review and appeals process are not currently dealt with.

217. Firstly, the section of the Policy Paper dealing with appeals should be separate to the section dealing with the Information Commissioner. International best practice is that the Information Commissioner is not simply an appeals mechanism, but a champion of the new transformation to open governance. As such, the office should have the powers and functions to spearhead the campaign for transparency and include functions such as education and training on the new law. Therefore it is not appropriate to have the office of the Information Commissioner established solely for the purposes of review and appeals as the current Policy Paper implies.

218. Secondly, the appeals remit should be made explicitly broad to permit complaints to be submitted in relation to the proactive disclosure requirements and in fact, in relation to *any* act of non-compliance under *any* part of the new law. Thus appeals or complaints should be able to be made not only about specific decisions, but procedural aspects such as the manner in which the information is given or a public body's failure publish certain information.

Recommendation:

- *Insert a new Part that deals with the Policy of establishing an Information Commissioner and move the paragraphs on establishment and the functions and powers of such an office to this section.*
- *Clarify that the appeals remit will cover any act of non-compliance under any part of the new law.*

5.2 Internal Review Process

219. Paragraph 5.2.1 states that if an applicant is not satisfied with the public body's decision, then they can apply to have the decision reviewed, and the first step is to have the decision reviewed by an officer who was not involved in the initial decision. This would be a precondition to appealing for review of the decision by the Information Commission.

220. However, the Policy Paper fails to give any detail on what this process would involve, and appears to allow public authorities to prescribe their own internal review procedures. When coupled with the inability of the Information Commissioner to review a decision until any internal procedure has been satisfied, this ultimately gives the public authority a wide and inappropriate power over how – and indeed, how quickly - an application will be processed. An effective and internally consistent appeals framework is essential to a proper functioning of the entire access regime. The legislation itself should set out such important details. 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 an internal appeal process is envisaged, this should be determined by the Kenyan parliament, not individual public.

Recommendation:

- *Provide more detail about the internal review process and the procedures that will be involved.*

5.3 Establishment, Function and powers of the Information Commissioner

221. As noted above in paragraph 90, the establishment of the Information Commissioner and his or her functions and powers should be separated into another section of the policy, cementing the office's role as the information champion of the Freedom of Information Policy.

Establishment of the Information Commissioner

222. Although Paragraph 5.3 is titled 'establishment, function and powers of the Information Commissioner' there is currently no detail on the establishment of the Information Commissioner beside the simple point that such an office will be created. Yet, it is essential that the procedure for appointing the Information Commissioner is impartial and independent of government interference, to ensure that the Information Commissioner is seen as non-partisan and can act as an independent body. As such, these provisions are not sufficient as it leaves too much room for how the Information Commissioner will be appointed and removed.

223. To promote public confidence in the Information Commission and to ensure that the Information Commissioner is carefully selected, ideally, the selection process should include some element of public participation. For example, when a list is being drawn up by the bureaucracy of possible candidates for the positions, it should be required that the relevant department also call for nominations from the public. At the very least, any list which is put together by the bureaucracy should also be published at least one month prior to consideration by Parliament and the public should be permitted to make submissions on this list. Notably, at a minimum, the list prepared by the bureaucracy should also include a detailed explanation of the reasons for the candidate being nominated, in accordance with agreed criteria.

224. It is essential to appoint an Information Commissioner who has the integrity and experience to be the champion of the move to open government and transparency, lead by example and implement the law effectively. Therefore, in addition to technical requirements for appointment it would be ideal to also include broader experience and skills as it is essential that the Commissioners are utterly impartial and well-respected by the public as an upstanding citizen who is pro-transparency and accountability. For example, s.12(5) of India's *Right to Information Act 2005* requires that "...the Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance." Minimum requirements could be:

The person to be appointed as the Information Commission shall –

- (e) be publicly regarded as a person who can make impartial judgments;*
- (f) have a demonstrated commitment to open government*
- (g) have sufficient knowledge of the workings of Government;*
- (h) have not been declared a bankrupt;*
- (i) be otherwise competent and capable of performing the duties of his or her office.*

225. Also integral to the office of the Information Commissioner and its independence is the power to remove the Commissioner. There should be a transparent system in place for why a Commissioner can be dismissed so that the he or she can be confident of their position and its independence from politics. Many laws around the world place their Information Commissioner's on par with a Justice of the High Court and therefore require that a Commissioner can only be removed under the provisions (usually constitutionally enshrined) for removal of a High Court Justice. Alternatively, the law could provide a list of such reasons, for example the India *Right to information Act 2005* lists a number of specific reasons for removal in Article 14(3):

...the President may by order remove from office the Chief Information Commissioner, or any Information Commissioner if the Chief Information Commissioner or a Information Commissioner, as the case may be, -

- (a) is adjudged insolvent; or
- (b) has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or
- (c) engages during his term of office in any paid employment outside the duties of his office; or
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or a Information Commissioner.

226. To entrench the Commissioner's independence, the Policy Paper should explicitly state that the office of the Information Commissioner will be independent and that this includes :

- budget making autonomy;
- that the office is completely independent of the interference of any other person or authority other than the courts;
- able to employ its own staff and define their job descriptions, etc;
- able to open additional offices if necessary to undertake its functions.

and that consequently, the Information Commissioner will be properly resourced to handle appeals and undertake training and public awareness activities.

Functions and powers of the Information Commissioner

227. The Commissioner's role is integral to the implementation of the law and the functions referred to in Paragraph 5.3.2 (perhaps incorrectly numbered 4.3.2?) are positive. Given the importance of this function, the Policy Paper would ideally provide more detail regarding what minimum activities are required of the Commissioner.

228. For example, in accordance with international best practice, the Commissioner should compile a guide on how the public can exercise their rights under the Act. Article 10 of the South African *Promotion of Access to Information Act 2000* provides a good example of how to easily include this level of detail in the law:

- (1) *The [Insert name of body] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.*
- (2) *The guide must, without limiting the generality of Article (1), include a description of--*
 - (a) *the objects of this Act;*
 - (b) *the postal and street address, phone and fax number and, if available, electronic mail address of:*
 - (i) *the information officer of every public body; and*
 - (ii) *every deputy information officer of every public body...;*
 - (d) *the manner and form of a request for...access to a record of a public body...[or] a private body...;*
 - (e) *the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;*
 - (f) *the assistance available from the [Insert name of body] in terms of this Act;*
 - (g) *all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--*
 - (i) *an application with [the Ombudsman and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;...*
 - (i) *the provisions...providing for the voluntary disclosure of categories of records...;*
 - (j) *the notices...regarding fees to be paid in relation to requests for access; and*

- (k) the regulations made in terms of [under the Act].
(3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.

229. Other functions the Information Commissioner should be required to perform are examining and prescribing systems and procedures for improving records management. It would be ideal to support this role by giving the Information Commissioner the function of preparing a code of practice on records management (see paragraph 31 above).
230. The Information Commissioner currently has the power to investigate complaints that a public body has failed to comply with the requirements of the Act (see Paragraph 4.3.2 (b)). However, an additional and very important function is that the Commissioner can undertake his or her own motion inquiries into compliance with the Act. It should not simply be limited to where it has received a complaint.
231. In a similar vein, the Information Commissioner should also have the power to make recommendations as to good practice under the draft Bill. To strengthen the policy, if the Commissioner does undertake a review of a public body and makes recommendations, these recommendations should also be tabled in Parliament, submitted to a relevant parliamentary committee and published on the Commissioner's website. Perhaps the policy could require the Commissioner's annual report and other reports to be tabled in Parliament and then considered by a committee. This would ensure the reports are actively considered rather than simply tabled and ignored.
232. In order to ensure that the Information Commissioner can perform his/her appeal functions effectively, it is imperative that the Commissioner is explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of his/her orders. The power to order disclosure of records and information (under Paragraph 5.3.3) is not sufficient for this purpose – for example, what if the Commissioner simply wants to order a different *form* of access should be granted? Powers granted to the Canadian Information Commissioner under s.36 of the *Canadian Access to Information Act 1982* provide a better model.
233. In order to function effectively, the Information Commission also needs to have the power to enter and search any premises and interview persons on such premises during the course of an investigation.
234. Further other procedural questions regarding the Information Commissioner should be considered including: What of the application of the principles of natural justice? is the applicant allowed to be heard? What are the time limits that apply to a decision of the Commissioner? This last issue is crucial because often, the value of information is related to its timeliness. Experience has shown that delays in processing applications and appeals can be very problematic and in practice, undermines the effectiveness of an FOI law.
235. Another important function that the Commissioner should be to undertake training and education. This is dealt with below at paragraph #.

Information Commission

236. Another consideration that should be made in determining the Freedom of Information Policy is whether an Information Commission (as opposed to a singular Commissioner) may be a better fit for the specific context. Interestingly, while Commissioners have been appointed in many developed jurisdictions, a Commission with multiple Commissioners, rather than a single Commissioner as in Canada, is often considered more appropriate in contexts where it is felt that a strong group of Commissioners may be needed to fight

strong bureaucratic resistance. A single Commissioner can otherwise become a target for officials and other powerful parties who are hostile to transparency and accountability. Furthermore, a Commission which makes decisions as a group is considered to have benefits for countries with a history of corruption at official levels, because it has been recognised that by requiring more than one Commissioner to endorse a decision, the possibility for capture of Commissioners is reduced. As a national Commissioner once recognised anecdotally, while it may be possible to corrupt one Commissioner, it will be harder to corrupt two or three on a Commission.

237. Nonetheless, while there are benefits to a Commission, there are also some difficult process and practical issues which will need to be considered. Firstly, the cost of supporting a group of Commissioners may be noticeable more than a single Commissioner, and this may be a major lobbying hurdle to overcome, particularly in jurisdictions where there is already resistance to setting up any new external oversight body. In Kenya this may be less of a problem because there is already the precedent of multiple Commissioner set by the Kenya National Human Rights Commission. In deciding on the number of Commissioners however, cost should certainly be borne in mind. In this context, the proposal for up to 7 Commissioners would seem unnecessarily large. In Mexico, a country with a population of around 100 million people, the national information commission has only 5 Commissioners.

238. Another issue with multiple Commissioners is the question of how decisions will be taken. In Mexico, the Commission actually sits as a collegiate body and makes decisions by majority. This approach is felt to strengthen the quality and defensibility of decisions. Again, in this context, the Kenyan proposal of up to 7 Commissioners would seem excessive. Notably, if the extra Commissioners have been suggested to deal with an anticipated large workload, consideration should instead be given to how support staff could be used to support Commissioners to undertake their investigations, do research and promote the law. In most information commissions, staff have considerable delegated power to help process appeals.

Recommendation:

- *Include more information on the appointment and removal of the Information Commissioner, including that the selection process will be done with public participation, what skills and qualifications such a person should have and the grounds for removal.*
- *Clarify the Information Commissioner's independence, including budgetary and staffing independence and that they will have the resources to support that.*
- *Expand the functions and powers of the Commissioner to envisage the Commissioner compiling a User Guide on the law, examining systems and procedures, undertaking own motion inquiries into compliance with the law, making recommendations to Parliament and various powers needed to support these roles such as search and enter powers.*
- *Consider the applicability of an Information Commission (as opposed to a singular Commissioner).*

ISSUES NOT DEALT WITH IN THE PAPER

239. Although the Policy Paper may not be intended to be exhaustive for the purposes of what will be drafted as the new Freedom of Information Bill, there are a number of essential elements to a right to information policy that have not been dealt with at any level in the Policy Paper and should be considered by government at this stage of the policy development.

Penalties

240. Experience has shown that, particularly in the early days of implementation and/or in relation to politically or bureaucratically sensitive issues, officials will often fail to comply with freedom of information provisions. Unless there are sanctions available to punish such conduct there is little deterrent to resistant officials who wish to flout the law. Consequently, it is important to provide for offences and penalties for the actual of acts of non-compliance that resulted in the issuing of a notice. Otherwise, there is no incentive for bodies subject to the law to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose the information if the applicants goes to the trouble of lodging an appeal. Article 20 of the Indian *Right to Information Act 2006*; Article 54 of the UK *Freedom of Information Act 2000*; Article 34 of the Jamaican *Access to Information Act 2002*; and Article 42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.
241. Offences should be created by the draft Bill for egregious criminal acts and negligent disregard for the law. This is important in a bureaucracy which is likely to be resistant to openness and may stop short of criminal acts, but may still delay and undermine the law in practice. Additional offences need to be created, for example:
- unreasonable refusal to accept an application,
 - unreasonable delay, which in India incurs a daily fine,
 - unreasonable withholding of information,
 - knowingly providing incorrect information,
 - concealment or falsification of records,
 - non-compliance with the Information Commissioner's orders, which in the UK is treated as a contempt of court.
242. When developing penalties provisions, lessons learned from Indian are illuminating. In India, penalties can be imposed on individual officers, rather than just their department. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. Instead, the official responsible for the non-compliance should be punished.
243. In addition to the possibility of fines and/or imprisonment, the policy should state that where a penalty is imposed on any officer under the Bill, "*the officer shall also be liable to appropriate disciplinary action under the service rules applicable to him*". This possibility of imposing additional disciplinary sanctions for persistent violation of the law is permitted under the Indian *Right to Information Act 2006*.
244. In order to ensure that public bodies properly implement the law, they too should be liable for sanction for non-compliance. This would ensure that heads of department take a strong lead in bedding down the law and ensuring that staff across their organisation undertake their duties properly. An additional provision should be included in the law to penalise public authorities for persistent non-compliance with the law. A fine could be imposed for example, where a public body fails to implement the proactive disclosure provisions in a timely manner, does not appoint Information Officers or appellate

authorities, consistently fails to process applications promptly and/or is found on appeal to consistently misapply the provisions of the law to withhold information. The minimum fine should be sufficiently large to act as a deterrent and should be deducted from the budgetary funds approved for the department.

Recommendations:

- *Insert a new section on penalties to empower the Information Commissioner to impose sanctions on non-compliant officials and public authorities.*
- *Insert a comprehensive list of offences for example:*
 - (3) *Where any official has, without any reasonable cause, failed to supply the information sought within the period specified they will be fined a daily amount.*
 - (4) *Where it is found in appeal that any official has:*
 - *Refused to receive an application for information*
 - *Mala fide denied a request for information;*
 - *Knowingly given incomplete or misleading information,*
 - *Knowingly given wrong information, or*
 - *Destroyed information, without lawful authority;*
 - *Obstructed access to any record contrary to the Act;*
 - *Obstructed the performance of a public body of a duty under the Act;*
 - *Interfered with or obstructed the work of an Information Officer, the Information Commissioner or the Courts; or*
 - *Failed to comply with the decision of the Information Commissioner or Courts;*
 - They have committed an offence and the Information Commissioner or the Courts shall impose a fine of a penalty of imprisonment or both.*
 - (5) *Any fines shall be recoverable from the salary of the concerned officer.*
 - (6) *Any officer on whom a fine is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him or her.*

Fees

245. Currently the Policy Paper's only reference to fees is in Paragraph 5.3.3 (incorrectly numbered 4.3.3 currently) which gives the Information Commissioner the ability to waive charges and adjust charging systems. Yet the remainder of the Policy Paper states no position on the imposition of fees and how they will be determined.

246. Fees for accessing information should be dealt with specifically in the Policy Paper as fees can create a barrier to accessibility and can frustrate the whole policy if they are imposed at a cost that deters applicants. International best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. At the very least, no application fee should be levied because the initial work required to locate information and determine its sensitivity to disclosure is a routine and expected task of government. This is the case in Trinidad & Tobago where s.17(1) of the *Freedom of Information Act 1999* specifically states that no fees shall be imposed for applications. Notably, s.17(3) of the Trinidad & Tobago Act and s.7(6) of the *Indian Right to Information Bill 2004* go further and state that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge.

247. If any fees are imposed, the law needs to make it explicit that the rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. It should be additionally clarified that this means that at the most, fees

should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Best practice supports that charges should only cover reproduction costs, not collation/compilation time. Imposing fees for this could easily result in prohibitive costs, particularly as it enables officers of the public authority to, potentially deliberately, drag their heels when collating information in order to increase fees.

Fee Waiver

248. Furthermore, a provision should be included in the Bill allowing for fees to be waived in certain circumstances. The head of the public authority could be given the power to waive fees and could delegate that power as necessary or his/her delegate (who may be responsible for processing applications more generally) could be given the power to waive fees and internal guidelines developed to assist with decision-making. Section 29(5) of the Australian *Freedom of Information Act* actually provides a good model. Many access to information laws around the world include specific provision for such circumstances, and worlds best practice laws allow the public authority to waives fees, including in the following circumstances:

- Where the cost of collecting the fee exceeds the amount of the fee itself.
- Where it would cause financial hardship to an individual. Including such a provision will go a long way to ensuring that some of the underprivileged in society will have equal benefit of the use of this Act.
- Where disclosure of the information is in the public interest. This is to ensure that those individuals who are applying for the information that is in the public interest are not deterred or discouraged in any way from being the person who actually goes through the process to receive the information.
- Where the time limits for providing information as stated in the law are not complied with. This approach has been adopted in India and Trinidad and Tobago.

Fee Regulations

249. The Minister should then be given the power to make regulations about the payment of a fee and the requirement to pay it on providing the information and to prescribe reasonable charges for this fee or a scale of reasonable charges. It would be preferable for the policy to *require* such regulations to be made within a certain time period. At the very least, it should be explicit that only the Minster can make fees regulations and that each public body is not permitted to impose their own fees, as this will undoubtedly lead to inconsistencies, and resistant authorities may use fees as one way of deterring requests.

Recommendations:

- Clarify in the Policy Paper whether fees will be charged for accessing information, and if so, the policy on how they will be charged. If fees are to be charged, provide for their imposition in limited circumstance (the reproduction costs of the information) and that they will be waived in certain circumstances.

Whistleblower protection

250. In order to support maximum information disclosure, the Policy Paper should state the government's position on protecting '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 pubic 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.

251. This protection is particularly important in the continuing presence of the *Official Secrets Act* which makes it an offence to communicate information without proper authorisation which could discourage potential whistleblowers from bringing wrongdoing to the notice of the people or the appropriate authorities. If the *Official Secrets Act* is not specifically overridden (as suggested in paragraph 23 above) then the secrecy required by it may perpetuate impunity for the wrongdoers and could encourage 'disaffection' amongst persons and groups which are at the receiving end.

Recommendations:

- Provide that whistleblowers will be protected under the new law.

Regular Parliamentary Review of the Act

252. To ensure that the law is being implemented effectively, it is strongly recommended that the Policy Paper state that the law will provide for a compulsory parliamentary review after the expiry of a period of two years from the date of the commencement of the law, plus regular five year reviews after that. Internationally, such reviews of legislation have shown good results because they enable governments, public servants and citizens to identify stumbling blocks in the effective implementation of the law. Identified areas for reform may be legislative in nature or procedural. In either case, a two year review would go a long way in ensuring that the sustainability, efficacy and continued applicability of the law to the changing face of Kenya. It would enable legislators to take cognizance of some of the good and bad practice in how the law is being used and applied and enable them to better protect the people's right to information.

Recommendations:

- Provide that there will be regular Parliamentary review of the new law.

Education & Training:

253. An integral element of the implementation of a Freedom of Information Policy is mandating a body to not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. Such a requirement ensures that programmes are undertaken to educate the public and the officials responsible for administering the law. Such a policy is recommended for Kenya. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model of how this could be drafted for the new Freedom of Information Bill:

South Africa: 83(2) [Insert name], 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 by 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 [under] 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;
- 10(1) The [Information Commission] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.
- (2) The guide must, without limiting the generality of subsection (1), include a description of--
- (a) the objects of this Act;
 - (b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of every Public Authority or Private Body; and
 - (c) the manner and form of a request for...access to a record of a Public Authority...[or] a Private Body...;
 - (d) the assistance available from [and the duties of] the Information Officer of a Public Authority or Private Body in terms of this Act;
 - (e) the assistance available from the [Information Commission] in terms of this Act;
 - (f) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--
 - (i) an internal appeal; and
 - (ii) an application with [the Information Commission and] a court against a decision by the information officer of a Public Authority or Private Body, a decision on internal appeal or a decision of the head of a Private Body;...
 - (g) the provisions...providing for the voluntary disclosure of categories of records...;
 - (h) the notices...regarding fees to be paid in relation to requests for access; and
 - (i) the regulations made in terms of [under the Act].
- (3) The [Information Commission] must, if necessary, update and publish [see the discussion re the meaning of "publish" at paragraph 20 above] the guide at intervals of not more than two years.

Recommendations:

- Provide for a policy of education and training on the new policy and law including who will be responsible for such a task.

Preparing for Implementation

254. Finally, an essential aspect of a Freedom of Information Policy that is particularly pertinent to consider at the policy stage is the planning for the implementation of the policy. Currently the Policy Paper fails to mention any preparations or plans for the policy to be implemented.

255. There are many considerations that should be made at this level, including:

- Coverage of the policy – whether the policy will be phased in or implemented immediately on enactment of the law.
- Responsible officers – which ministry is responsible for overseeing the implementation (and preparation for implementation) of the policy. The Minister responsible should identify officials who will be responsible for overseeing the day to day implementation of the Policy.
- This group (a Right to Information Unit) would be responsible for providing practical guidance and advice to officials working at the department level to implement the policy.
- The Right to Information Unit should develop a detailed Action Plan for the first few years of the policy even before the law is enacted.
- The Head of each body covered by the policy will have primary responsibility for ensuring that the policy is implemented within their organisation. This responsibility may be delegated to Information Officers (IOs) as appropriate (see above at paragraph 44 to 48).

256. Further information is available in CHRI's publication *Implementing Access to Information: A practical guide for operationalising freedom of information laws* available on www.humanrightsinitiative.org.

Annex 2: Best Practice Freedom of Information Principles

- **Maximum Disclosure:** The value of access to information legislation comes from its importance in establishing a framework of open governance. In this context, the law must be premised on a clear commitment to the rule of maximum disclosure. This means that there should be a presumption in favour of access. Those bodies covered by the Act therefore have an *obligation* to disclose information and every member of the public has a corresponding *right* to receive information. Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.

To ensure that maximum disclosure occurs in practice, the definition of what is covered by the Act should be drafted broadly. Enshrining a right to access to “information” rather than only “records” or “documents” is therefore preferred. Further, the Act should not limit access only to information held by public bodies, but should also cover private bodies “*that carry out public functions or where their activities affect people’s rights*”. This recognises the fact 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 therefore cannot be beyond their scrutiny. Part 3 of the South African *Promotion of Access to Information Act 2000* provides a very good example to draw on.

Bodies covered by the Act should not only have a duty to disclose information upon request, but should also be required to proactively publish and disseminate documents of general relevance to the public, for example, on their structure, norms and functioning, the documents they hold, their finances, activities, any opportunities for consultation and the content of decisions/policies affecting the public.

In order to support maximum information disclosure, the law should also provide 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. It is important in order to send a message to the public that the government is serious about opening itself up to legitimate scrutiny.

- **Minimum Exceptions:** The key aim of any exceptions should be to protect and promote the public interest. The law should therefore not allow room for a refusal to disclose information to be based on trying to protect government from embarrassment or the exposure of wrongdoing. In line with the commitment to maximum disclosure, exemptions to the rule of maximum disclosure should be kept to an absolutely minimum and should be narrowly drawn. The list of exemptions should be comprehensive and other laws should not be permitted to extend them. Broad categories of exemption should be avoided and blanket exemptions for specific positions (eg. President) or bodies (eg. the Armed Services) should not be permitted; in a modern democracy there is no rational reason why such exemptions should be necessary. The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions.

Even where exemptions are included in legislation, they should still ALL be subject to a blanket “public interest override”, whereby a document which is presumed exempt under the Act should still be disclosed if the public interest in the specific case requires it.

- **Simple Access Procedures:** A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure 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. Any fees which are imposed for gaining access should also not be so high as to deter potential applicants. Best practice requires that fees should be limited only to cost recovery, and that 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. The law should provide strict time limits for processing requests and these should be enforceable.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Likewise, provisions should be included in the law which require that appropriate record keeping and management systems are in place to ensure the effective implementation of the law.

- *Independent Appeals Mechanisms*: Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access.

In practice, this requires that any refusal to disclose information is accompanied by substantive written reasons (so that the applicant has sufficient information upon which to appeal) and includes information regarding the processes for appeals. Any such process should be designed to include a cheap, timely, non-judicial option for mediation with review and enforcement powers. Additionally, final recourse to the courts should be permitted.

The powers of oversight bodies should include a power to impose penalties. Without an option for sanctions, such as fines for delay or even imprisonment for wilful destruction of documents, there is no incentive for bodies subject to the Act to comply with its terms, as they will be aware that the worst that can happen is simply that they may eventually be required to disclose information.

- *Monitoring and Promotion of Open Governance*: Many laws now include specific provisions empowering a specific body, such as an existing National Human Rights Commission or Ombudsman, or a newly-created Information Commissioner, to monitor and support the implementation of the Act. These bodies are often be empowered to develop Codes of Practice or Guidelines for implementing specific provisions of the Act, such as those relating to records management. They are also usually required to submit annual reports to Parliament and are empowered to make recommendations for consideration by the government on improving implementation of the Act and breaking down cultures of secrecy in practice.

Although not commonly included in early forms of right to information legislation, it is increasingly common to actually include provisions in the law itself mandating a body to promote the Act 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.