

## FREEDOM OF INFORMATION IN KENYA

*Priscilla Nyokabi*  
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The right to information underpins and is the cornerstone of all other human rights. Priscilla Nyokabi assesses the newly proposed Freedom of Information Act of Kenya.

The Kenyan section of the International Commission of Jurists (ICJ) and the Freedom of Information Network celebrates the dawn of an era in Kenya marked by the introduction of the Freedom of Information Bill, 2007 in parliament yesterday, 17 May 2007, by Hon. Gideon Moi on behalf of Hon. Prof. Anyang' Nyong'o.

The painstaking efforts of the Freedom of Information Network of drafting and publicising the Freedom of Information Bill have finally come to fruition through the tabling of the bill. This has been an ongoing campaign since the year 2000 spearheaded by ICJ-Kenya in consultation with various stakeholders, members of the Freedom of Information Network, and supported by many Kenyans countrywide. The 9th parliament has brought us to the peak of the Right to Know Campaign by embarking on the legislative process.

We are happy to note that even the government is keenly committed to this cause, as evidenced by the publication of the recent Draft Kenya Freedom of Information (FOI) Bill 2007. Indeed all stakeholders are reading from the same script, the government, the media, the civil society, MPs and all Kenyans of good will. We therefore envisage a smooth passage of the bill long before elections.

The published bill has very progressive provisions. It promises to usher in an era of openness, transparency and accountability in Kenya. Enactment of the FOI Act will confirm Kenya as a leading democracy in Africa, and among the top five countries to have an FOI Law. Only South Africa, Angola and Uganda have access to information regimes.

We are now at the finishing line towards having an FOI Act in Kenya. The clock is ticking and we urge all members of the 9th parliament both in opposition and in government to rise to the occasion and put the interests of this great nation forward by enacting the bill in its entirety.

Why an FOI law?

There are many reasons for having freedom of information legislation: to make government more accountable, increase public participation, promote the involvement of all in public life, including those currently marginalised, like women; to make private companies more accountable, monitor and expose corruption, lead to better decision making, protect privacy, expose human rights violations, and promote workers' rights; and to make the country more secure. Access to information is instrumental to parliament's oversight role.

Access to information makes the government more sensitive and responsive to the needs and demands of the ordinary people. A freedom of information law increases public participation, because the public can regularly engage with government officials and parliamentary representatives.

Freedom of information entails the rights of citizens of a country to access official information held or in the custody of their government. It invokes an obligation on the government to facilitate easy access to information under its docket, and, significantly, to publish important

information pro-actively and regularly for the general public.

Good governance, an essential component of any thriving democratic state, is premised on a system of openness, trust and government accountability. This can only be achieved if the public is involved in the process of governance. If the general public knows the functions, policies and decisions made, they can question the government on the basis of the information obtained, and, most importantly, the reasons for the government's actions. It is thus necessary that the government develops a clear policy on the freedom of information in a bid to ensuring that subsequent legislation – freedom of information laws - are implemented effectively and based on accepted international principles and best practices.

The right to information underpins all other human rights; it is the cornerstone of all other rights. The right is encapsulated in the 1948 Universal Declaration of Human Rights (UDHR) under Article 19. It is similarly enshrined in the International Convention of Civil and Political Rights (ICCPR), to which Kenya is a party.

Though the Kenyan constitution does not expressly provide for the freedom of information, section 79 of the constitution makes provision for the freedom of expression which includes among other things: 'freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of person)'.

The right to information is enshrined in the section 79 of the constitution, which provides for freedom of expression. The right is however derogated from through various pieces of legislation, chief among them is the Official Secrets Act. This position was sought to be corrected in the draft constitution, article 51 of which expressly provides for the right of access to information, and requires an enabling law be enacted within six months of the coming into force of the new constitution.

As can be reasonably inferred from the constitution, the right to receive ideas and information without interference affords the citizens of Kenya a right to access information, including government information. Similarly Kenya has ratified and adopted the UDHR and the ICCPR; and the government is under an obligation to promote and preserve the right to information. One end of achieving such means is by putting in place the necessary policies to promote the right and the enactment of a freedom of information law to guarantee the said right to the citizenry.

The implementation and operationalisation of both a policy and freedom of information law will be the essential building blocks towards creating an open, free and accountable culture in Kenya and the foundation of a successful democratic state.

#### International principles and best practices

For the proposed freedom of information policy 2007 to be effective in implementing a FOI regime, they must be premised on international principles and best practices, which have been developed over the years by countries that have adopted FOI laws, borne out of their experiences in respect to operationalising the enjoyment of the right to know. As we are getting into FOI jurisprudence after many other countries, let us learn from them and adopt best practices.

In borrowing international practice for the FOI regime, let us borrow from the most progressive jurisdictions in application of the FOI Law. Australia and United Kingdom are known to be conservative regimes. South Africa and India provide more progressive models.

Let us at look at drawing lessons from closer home in South Africa.

There are the minimum standards that any proposed FOI law should adopt in order for a state to fulfil its obligations of promoting and preserving the right to information. These principles are set out below.

#### Maximum disclosure

This principle provides for a strong presumption in favour of disclosure of information. Simply put, it advocates for the disclosure of all government or public information. It covers the access of information in all public bodies and private bodies that carry out public functions or where their activities affect the public rights or civil liberties.

Under this principle disclosure and access to information is the norm; the exception being non-disclosure. In addition this principle imposes an obligation on the state to pro-actively and regularly publish information in its possession without any prompting from the public. It establishes minimum standards under which public records are to stored and maintained by public bodies. It provides for offences for the obstruction of access of information or the wilful destruction of records.

#### Minimum exemptions

Closely linked to the principle of maximum disclosure, this principle advocates for limited exceptions of information that should not be disclosed. It provides that exceptions should be precise and narrowly drafted to protect a legitimate interest from harm, often referred to as the 'harm' and 'public' test. Exceptions should be based on the content rather than on a particular class such as 'national security'. In short, no blanket exemptions are allowed. A refusal to disclose information must be justified by a public body and should meet a strict three-part test, including:

- \* information must relate to a legitimate interest/aim listed in the law
- \* disclosure must threaten to cause substantial harm to that aim
- \* the harm to that interest must be greater than the public interest in having the information disclosed.

It should be noted that even though the information in question meets the above mentioned three-part test, it might still be disclosed if it is shown that the public interest in disclosing that information is greater than the harm that may befall the protected interest. This is what is referred to as the public override test.

#### Simple, easy and inexpensive access

Any freedom of information law should provide for a mechanism for simple and cheap access to information. The process of deciding upon requests for information should be defined at three main stages: within the relevant public body; appeals to an independent administrative body; and an appeal method to the courts. Where applicable, the provision should ensure full access to certain disadvantaged groups such as the disabled. The cost of obtaining information should not be dear as to prevent the realisation of the objectives of the law.

#### Promotion of open government

This principle mainly advocates the promotion of the right to information by the government,

and creating a culture of openness within government circles. This entails the provision of public education, dissemination of information relating to FOI to the general public, informing the public about the scope of the information that is covered by the law, information available and the manner in which the public may exercise their rights.

In addition, this principle places an obligation on the government to provide training to their officers on the freedom of information, the scope of the right, procedures for allowing access of information to the public, maintenance and preservation of public documents, information that should be pro-actively disclosed and the scope of whistleblower protection.

#### Disclosure takes precedence

This international principle simply provides that existing laws, which are in contrast with the principle of maximum disclosure, should be amended or repealed. That other laws relating to the maintenance, publication or dissemination of public information should be construed in a manner consistent with the FOI law. Where inapplicable, such information should be dealt with subject to the principles espoused by the freedom of information legislation.

#### Whistleblower protection

An effective freedom of information law should make provision for the protection of whistleblowers. Whistle blowers as the name suggest refers to government employees or third parties privy to government functions who disclose information of wrong doing by government officials, information which is the subject of exemption. This people perform the function of early warning and complement investigators roles. Such people should be properly protected from reprisals from government officials or penalisation, as a result of their actions, so long as they act reasonably and in good faith.

#### Conclusion

The FOI Bill 2007, when enacted into law, promises to usher Kenya into an era of openness, transparency and accountability. Access to information is the key pillar of democracy. It will facilitate public participation in public affairs, as noted by President Mwai Kibaki in 2005:

‘...more importantly, the free flow of news and information is one of the hall marks of a functioning democracy. An informed society is able to better participate in design and execution of public policies. It is also more resourceful and creative in addressing social challenges. Such a society is therefore, better placed to increase productivity and prosperity...my Government is, together with media and other stakeholders, drafting a Freedom of Information Act, to bring the legal framework in line with current realities. These and other initiatives are meant to enhance the ability of the people of Kenya to exchange ideas, question the Government, contribute to national development and be part of a truly democratic state.’

The above is a reflection of the promises we are asking all our leaders to keep in bringing Kenya in line with the current realities. Kenya should join the other 70 countries in the world that have enacted freedom of information laws.

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\* This is an edited version of a longer paper which is available at the Pambazuka News website (<http://www.pambazuka.org/en/category/comment/41846>)

\* Please send comments to editor@pambazuka.org or comment online at  
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MOVING TOWARDS OPEN DEMOCRACY IN KENYA:  
THE FREEDOM OF INFORMATION BILL 2007

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## FOREWORD

The Kenyan Section of the International Commission of Jurists and the entire Freedom of Information Network celebrates the dawn of an era in Kenya marked by the introduction of the Freedom of Information Bill, 2007 in Parliament Yesterday 17th May 2007 by Hon. Gideon Moi on behalf of Hon. Prof. Anyang' Nyong'o.

The painstaking efforts of the Freedom of Information Network of drafting and publicizing the Freedom of Information Bill have finally come to fruition through the tabling of the Bill. This has been an on-going campaign since the year 2000 spearheaded by ICJ-Kenya in consultation with various stakeholders, members of the Freedom of Information Network and supported by many Kenyans countrywide. This Ninth Parliament has brought us to the peak of the Right to Know Campaign by embarking on the legislative process.

We are happy to note that even the Government is keenly committed to this cause as evidenced by the publication of the recent Draft Kenya Freedom of Information Bill 2007. Indeed all stakeholders are reading from the same script, the Government, the Media, the Civil Society, the Members of Parliament and all Kenyans of good will. We therefore envisage a smooth passage of the Bill long before elections.

The Published Bill has very progressive provisions and promises to usher in an era of openness, transparency and accountability in Kenya. Enactment of the Freedom of Information of Act will confirm Kenya a leading democracy in Africa, being among the top five countries to have an FOI Law. Only South Africa, Angola and Uganda have access to information regimes.

We are now on the finishing line towards having a Freedom of Information Act in Kenya. The clock is ticking and we urge all members of the Ninth Parliament both in Opposition and Government to rise to the occasion and put the interests of this Great Nation forward by enacting the Freedom of Information Bill, 2007 in its entirety.

## WHY AN FOI LAW

In a nutshell among the many reasons for having a freedom of information legislation include:-

- It makes Government more accountable
- It increases public participation
- It promotes the involvement of all in public life including those currently marginalized like the women
- It makes private companies more accountable
- It is a tool to monitor and expose corruption
- It leads to better decision making
- It protects privacy
- It exposes human rights violations
- It promotes workers rights
- It improves health
- It strengthens the economy
- It protects the environment
- It makes the country more secure
- Access to Information is instrumental to Parliament in its oversight role.

Access to information makes the Government more sensitive and responsive to the needs and demands of the ordinary people. A freedom of information law increases public participation, because it is a tool which the public can use to regularly engage with government officials and parliamentary representatives

Freedom of information entails the right of citizens of a country to access official information held or in the custody of their government. It invokes an obligation on the government to facilitate easy access to information under its docket and quite significantly publish important information proactively to the general public regularly.

Good governance an essential component of any thriving democratic state is premised on a system of openness, trust and accountability of the government. This can only be achieved if the public is involved in the process of governance. If the general public knows the functions, policies and decisions made by government they can question the government on the basis of the information obtained and most importantly the reasons for the government's actions. It is thus necessary that the government develop a clear policy on the freedom of information in a bid to ensuring that subsequent legislation-Freedom of Information (FOI) laws are implemented effectively and based on accepted international principles and best practices.

The right to information underpins all other human rights; it is the cornerstone to which other rights are effectively enjoyed. This right is encapsulated in the Universal Declaration of Human Rights (UDHR) of 1948 under Article 19. It is similarly enshrined in the International Convention of Civil and Political Rights (ICCPR) to which Kenya is a party and reads as follows:

Every one shall have the right to hold opinions without interference  
Every one shall have the right to freedom of expression, this right shall includes freedom to seek, receive and impart ideas and information of all kinds regardless of the frontiers, either orally, in writing or in print, in form of art, or through any other media of his choice.

Though the Kenyan Constitution does not expressly provide for the freedom of information, section 79 of the Constitution makes provision for the freedom of expression which includes inter alia "freedom to receive ideas and information without interference, freedom to

communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of person)".

The right to information is enshrined in the Constitution Section 79 which provides for freedom of expression. The right is however derogated from through various legislations chief among them the Official Secrets Act. This position was sought to be corrected in the Draft Constitution whose Article 51 expressly provided for the right of access to information and required an enabling law be enacted within six months of the coming into force of the New Constitution

As it can be reasonably inferred from the Constitution that the right to receive ideas and information without interference affords the citizens of Kenya a right to access information including government information. Similarly Kenya having ratified and adopted the UDHR and the ICCPR, the government of Kenya is under an obligation to promote and preserve the right to information. One end of achieving such means is by putting in place the necessary policies to promote the right and the enactment of a Freedom of Information law to guarantee the said right to its citizenry.

The implementation and operationalization of both a policy and Freedom of Information law will be the essential building blocks towards creating an open, free and accountable culture in Kenya the foundation of a successful democratic state.

#### INTERNATIONAL PRINCIPLES AND BEST PRACTICES OF THE FOI LAW

For the proposed freedom of information policy 2007 developed by the Ministry of Information and Communications and the FOI Bill 2007 to be effective in implementation of an FOI regime, they must be premised on International principles and best practices. These are principles and practices, which have been developed over the years by countries that have adopted FOI laws, borne out of their experiences in respect to operationalising the enjoyment of the right to know. As we are getting into the Freedom of Information jurisprudence after many other countries let us learn from them and adopt best practices.

In borrowing international practice for the FOI regime let us be minded to borrow from the most progressive jurisdictions in application of the FOI Law. Australia and United Kingdom are known to be more conservative regimes. South Africa and India provide more progressive models. Let us at look at drawing lessons from closer home in South Africa.

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In addition this principle places an obligation on the government to provide training to their officers on the freedom of information, the scope of the right, procedures for allowing access of information to the public, maintenance and preservation of public documents, information that should be proactively disclosed and the scope of whistle blower protection.

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## SALIENT FEATURES OF THE FREEDOM OF INFORMATION BILL 2007

This Bill promises to usher in an era of openness, transparency and accountability in Kenya. It was drafted in a widely consultative manner and Kenyans of all walks of life were able to give their views before the Draft Bill was finalized and published.

The FOI Bill respects and complies with the international standards set out above and is truly a modern piece of legislation. It is easy to read and follow and is not unnecessarily technical or legalese.

The Bill if enacted promises to usher in transparency and accountability especially accountability in use of public resources and funds – The budget process, Constituency Development Fund, Local Authorities Transfer Fund etc, Accountability of historical injustices e.g. Wagalla Massacre. Accountability can only begin from a point of information of the people.

## Paradigm Shift

Simply the Bill starts from a premise of openness – that all information held by Government should be accessible because it is public information collected on tax payers money and kept by the Government for the public good of the people. It is a public resource just as much as clean air etc. The Bill acknowledges that every person has a right to information, right to know and the Government under the Bill has an obligation legally enforceable to make information accessible. Govt has a duty to avail information to the Kenyans.

The Preamble and Objects of the Bill sections are very clear on the intentions of the proposed law. The Right to Information is clearly captured in Section 4 in a very explicit way.

What we have now, is a situation where all information with the Government is secret until released to you. All information is secret and confidential unless otherwise declared. Prof. Nyong'o (The one championing the FOI Bill in Parliament) said in one of our FOI forums that when he was a Minister, his Newspapers would be stamped confidential. At the ICJ some letters from Government come stamped confidential. There is a misuse of confidentiality.

Infact in our view the Official Secrets Act (OSA) has been bastardized. The black letter of the law allows for keeping of secrets but Government has gone overboard in application of Official Secrets. This is a historical problem as OSA is a colonial relic. In Kiswahili 'Serikali ni siri kali' – Government is a place of fierce or top secrets. The FOI Bill takes us away from this mindset.

It is instructive to note that, the FOI regime cannot coexist with the OSA thus its repeal in Section 31 – The two regimes are quite opposite in intents.

In the FOI Bill all information held by the Government should be accessible save for a small core of information that may harm other state interests. This small core of information is exempt information in Section 5. The exemptions however must be specified in the law for them to be very narrow and they are subject to the harm test and overriding public interest.

It is to be noted that regime security or embarrassment of government officials are not instances of national security. National security is territorial integrity and sovereignty of the state Kenya. In a democracy threatening the party in power is allowed, what is sought to be protected is the Kenyan state and its people.

Section 5 (2) Introduces narrowing down and interpretation of national security in accordance with international standards. Remember in Kenya every wrongdoing by Government has been excused as national security. There are international standards on construing national security referred to as Johannesburg rules. We would wish to have this used in determining what is national security. Suffice to note that the FOI Bill 2007 goes some way in domesticating international standards that Kenya is a state party to.

Section 6 provides for maximum disclosure. We urgently need maximum disclosure in Kenya, where Govt departments are bound to proactively release information to the Kenyans without anybody requesting for it. Most of the Kenyans are illiterate and poor but we need the information. We need information that affects us to be proactively released and updated. The list of information that needs to be proactively released is long and as close to exhaustive as we could make it.

Other Salient features of the Bill include

- The Right of access to information is defined in Section 4 of the Bill. Access to Information is also defined in the interpretative section. This makes it clear how Kenyans are to access information from Government.
- The Right to information in Section 4 also means that now one needs no reasons to require access to information from Government, you do not need to be from a particular organization, you do not need to be a friend of a public officer – the syndrome of do you know somebody ends – so does trade in information – If information is in the hands of a few people as has been the case it is traded.
- The Bill defines information widely so that all aspects are covered and information in whichever form, there is no need to classify as public records etc – the Bill speaks to all information in Government offices.
- The definition for public authorities is wide enough to cover all Govt departments and all bodies funded by tax money including Commissions of Inquiry most of whose reports we have never been able to access despite the process of compiling them being a public affair.
- Section 7 – Introduces the important process of how we access the information – All public authorities must designate Public Information Officers (PIOs) – This counters the old problem of passing the buck – The Officer who keeps that information is not around; We need PS's approval – The many excuses we hear when trying to get info from Government will be done away with by the FOI Law.
- The Bill takes into cognisance of our local circumstances of language thus both English and Kiswahili can be used in filing requests for information and PIOs have a duty to help. District Officers and District Commissioners will serve as PIOs although all Government departments

to the lowest branch must designate PIOs so that those in rural areas are also served and can access information.

- The Bill allows for partial disclosure of information as in the case of Security contracts subject of corruption sagas, tendering, suppliers and such information can be partially disclosed even if the nature of the security equipment remains a secret.
- Rejection of a request for information must be communicated within a specific number of days and an appellate process is established. Firstly there will be an internal review of the decision to deny the applicant information and if the applicant is still dissatisfied they can appeal to the Information Commissioner.
- As Information sought to accessed is collected on tax payers money no fees should be charged. The only cost that can be charged would be the one of say saving the information on CD or photocopies. There should be no charges for the information.
- We appreciate we are coming from an Official Secrets Regime thus the need for the information commissioners office as an ombudsman for the access to info regime. This is the enforcement mechanism. His independence is assured and protected in the Bill.
- Penalties are also created to enhance enforcement of the right to information for Kenyans. Without penalties obedience and compliance would be low.
- The Bill protects whistleblowers appropriately
- Importantly, the Bill requires management of records in Section 26. We need proper information retrieval systems so that we can access information. Information and records need to kept in a proper system in Government offices. A good example here are the Wealth Declarations Forms.
- In the Bill the Burden of proof is on the person denying to give information – Government.

This Bill will also help Parliament and oversight bodies. Parliament now relies on question time to get even basic information from Ministers. When the Bill is enacted, the Mps can just file requests and leave question time for analysis and save time for other parliamentary procedures like discussion on Bills and Motions.

#### NECESSARY REFORMS IN THE BILL

A few areas of concern have been noted as relates to the Bill for discussion during the Committee Stage.

- The Freedom of Information Bill 2007 makes provision for establishment of the Office of Information Commissioner however though the process of appointment and independence is well catered for it is preferable to have an Information Commission with 7 Commissioners. The practice of regulation in Kenya has been to appoint Commissions not single regulators. The Commission should be required to have provincial offices as well and not just be present in Nairobi.
- The Bill needs to allow in the part on applications for groups of people to request for information even if the groups are not incorporated legally as in the case of resident associations or self help groups.

- The Minister should not have wide unchecked powers to designate private bodies that will be covered by the Freedom of Information Bill. This power can be abused and should be checked or qualified for instance that the nature of information that can be sought should be related to a right.
- It will be preferable to allow for the Government to prepare for implementation thus need to note that some parts will be full operational say after 12 months like maximum disclosure and 3 years for computerization in management of records.
- The Bill should allow for establishment of internal review committees to review and discuss decisions of the Public Information Officers. Asking that these decisions be reviewed by the head of the authority now defined as the appellate authority will not be of much help in relation to how Governmental functions are now organized.

## CONCLUSION

The Freedom of Information Bill 2007 when enacted into law promises to usher Kenya into an era of openness, transparency and accountability. Access to information is key pillar of democracy and will facilitate public participation in public affairs as noted by His Excellency, President Mwai Kibaki in 2005.

...More importantly, the free flow of news and information is one of the hall marks of a functioning democracy. An informed society is able to better participate in design and execution of public policies. It is also more resourceful and creative in addressing social challenges. Such a society is therefore, better placed to increase productivity and prosperity.

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President Mwai Kibaki, 2005

The above is a reflection of the promises we are asking all our leaders to keep in bringing Kenya in line with the current realities. Kenya should join the over 70 countries in the World that have enacted Freedom of Information Laws.

Source: <http://www.pambazuka.org/en/category/comment/41846>