



**The Kenyan Section of the
International Commission of Jurists
(ICJ - Kenya)**

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Freedom of Information Bill, 2006

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THE FREEDOM OF INFORMATION BILL, 2006

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A Bill for

An Act of Parliament to enable the public to access information in the possession of the Government and public authorities, to establish systems and processes to promote proactive publication and dissemination of information; and for connected purposes

WHEREAS:

Article 19 of the Universal Declaration of Human Rights provides that everyone has the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers;

AND WHEREAS

Article 19 of the International Covenant on Civil and Political Rights provides that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, or in print, in the form of art, or through any other media of his choice;

AND WHEREAS

Article 9 of the African Charter on Human and Peoples' Rights provides that every individual shall have the right to receive information and to express and disseminate opinions within the law;

AND WHEREAS

Kenya is a State Party to both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights;

AND IN ORDER

to foster a culture of transparency and accountability and actively promote a society in which the people have effective access to information to enable them to more fully exercise their rights and participate in the governance of the country, make informed democratic choices and hold public bodies and officials to account and to curb corruption;

NOW THEREFORE, IT IS ENACTED by the Parliament of Kenya as follows -

PART I—PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Freedom of Information Act, 2006.

Interpretation.

2. In this Act unless the context otherwise requires;

“access” includes the right to examine, to look at, peruse, inspect, obtain, copy or procure any information;

“appellate authority” means the head of a public authority from which information is requested under this Act, or the delegate of such head, or any other person to whom under the administrative arrangements of that authority an appeal from the decision of a public information officer is to be referred;

“information” includes any material regardless of its physical form or characteristics, and any sample, work, model or copy thereof, any record, correspondence, memorandum, book, plan, map, drawing, film, microfiche, diagram, pictorial or graphic work, data, photograph, recording, audio or video-tape, machine readable material and any other information held in electronic form whether on computer disk or tape or in the memory of a computer or other device, anything that contains information, letters, reports, studies, records, minutes, statistics, directives, instructions, circulars, memoranda, practice notes, opinions, decisions in writing whether in form of sound, visual recordings or computerized data, any material recorded or stored by any means including tape, computer, or other device and any material subsequently derived from information so recorded or stored whether manually, mechanically or electronically and anything that is part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing;

“Minister” means Minister for the time being responsible for matters relating to information;

“private body” means any entity that is not a public authority;

“public authority” includes -

- (a) the President and the staff of the President;
- (b) the National Assembly, including members of Parliament and staff of the National Assembly;
- (c) the Judiciary;

- (d) all Government ministries, departments or agencies at all levels of Government;
- (e) any body which -
 - (i) is established by virtue of the President's powers or by or under an Act of Parliament or an Order made under an Act of Parliament or which is established in any other way by a Minister of the government or by a government department or public authority;
 - (ii) receives any part of its revenues directly from money provided by Parliament or from a levy authorized by an enactment or fee or charge of any other description so authorized;
- (f) any body or authority subject to examination by the Controller and Auditor General;
- (g) a statutory corporation;
- (h) a commission of inquiry
- (i) all local authorities established under the Local Government Act;
- (j) any body carrying out a statutory or public function, provided that the body is a public authority only to the extent of its statutory or public function; or
- (k) any other body or authority designated by the Minister as a public authority for purposes of this Act.

Cap 265

“public officer” includes a person in the employment of a public authority;

PART II — RIGHT TO INFORMATION

Objectives of the Act.

- 3. The objects of this Act are -
 - (a) to promote open government through maximum disclosure of information;
 - (b) to facilitate the right of all persons to have access to information held by public authorities and to require that public authorities proactively publish and disseminate information to the public in a useful form and manner in order to further the public interest generally, including in particular to promote -
 - (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;
 - (c) to ensure that persons are given reasons for decisions taken by public authorities which affect them;
 - (d) to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost; and

- (e) to enable individuals to see information held by public authorities about their affairs and to ensure that it is accurate.

Right to
information.

- 4.(1) Every person has the right to access information held or under the control of a public authority.
- (2) Every person has the right to access information held or under the control of a private body where that information is necessary for the enforcement or protection of any right.
- (3) Nothing in this Act limits or otherwise restricts the disclosure of, or the right to access information pursuant to any other law, policy or practice.
- (4) The right to access information includes the right to-
 - (a) inspect works, documents or records;
 - (b) take notes, extracts or certified copies of documents or records;
 - (c) take certified samples of material; or
 - (d) obtain information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through print-outs where such information is stored in a computer or in any other device

Exempt
information

- 5. (1) Despite section 4, information, hereinafter in this Act referred to as “exempt information” may be withheld by a public authority where the public authority concerned is satisfied that disclosure of such information is reasonably likely -
 - (a) to cause serious prejudice to the national security of Kenya;
 - (b) to impede the due process of law or to endanger the safety or life of any person or the safety of a rare or endangered species;
 - (c) to involve the unwarranted invasion of the privacy of an individual other than the applicant or the person on whose behalf an application has with proper authority been made;
 - (d) by disclosing commercially confidential information relating to a public authority; or supplied to or obtained by the public authority from a third party, to cause serious prejudice to the legitimate commercial or financial interests of that authority or party;
 - (e) to cause serious prejudice to the ability of the Government to manage the economy of Kenya;
 - (f) to significantly undermine a public authority’s ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; or
 - (g) to damage a public authority’s position in any actual or

contemplated legal proceedings by revealing the legal advice which it received in anticipation of or connection with such proceedings;

- (2) For the purposes of paragraph 1(a)-
 - (a) “national security” shall be reckoned in accordance with applicable international standards; and
 - (b) the Minister in consultation with the Information Commissioner may, having regard to applicable international standards, develop guidelines for determining when information is reasonably likely to cause serious prejudice to the national security of Kenya.
- (3) Sub-sections (d) and (e) do not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.
- (4) Notwithstanding anything in sub-section (1), a public authority shall disclose information where the public interest in disclosure outweighs the harm to protected interests.
- (5) For the purposes of sub-section (4), in considering the public and democratic interest, particular regard shall be had to the need to -
 - (a) promote accountability of public authorities to the public;
 - (b) ensure that the expenditure of public funds is subject to effective oversight;
 - (c) promote informed public debate;
 - (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
 - (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.
- (6) Unless the contrary is proved by the public authority, information is presumed not to be exempt if the information is more than thirty years old.

Proactive disclosure.

6. (1) A public authority shall –
 - (a) publish and update –
 - (i) the particulars of its organization, functions and duties;
 - (ii) the powers and duties of its officers and employees;
 - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
 - (iv) the norms set by it for the discharge of its functions;
 - (v) any guidance used by the authority in relation to its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals

- and records, held by it or under its control or used by its employees for discharging its functions;
- (vi) a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be consulted by any person;
 - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
 - (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of advising it with information as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible to the public;
 - (ix) a directory of its officers and employees;
 - (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations
 - (xi) the budget allocated to each of its agencies, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
 - (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
 - (xiii) particulars of concessions, permits or authorizations granted by it;
 - (xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
 - (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
 - (xvi) the names, designations, contact details and other particulars of its public information officers, appellate authorities and the particulars and contract details of the Information Commissioner;
 - (xvii) a list of all applications under this Act received by the public authority, including an indexed register containing copies of records released in response to requests under this Act other than records relating to the personal affairs of the applicant;
 - (xviii) such other information as may be prescribed by the Minister;

- (b) publish all relevant facts while formulating important policies or announcing the decisions which affect the public;
 - (c) provide to any person the reasons for any decision taken by it in relation to that person;
 - (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 interests of natural justice and promotion of democratic principles.
 - (e) unless there are good reasons to the contrary, allow members of the public to attend its meetings at which decisions affecting them are made and shall give adequate notice of such meetings;
 - (f) upon signing, public authorities shall 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 terms of reference;
 - (ii) the contract sum;
 - (iii) the name of the provider, contractor or individual to whom the contract has been granted;
 - (iv) the periods within which the contract shall be completed.
- (2) It is the duty of every public authority to take steps in accordance with the requirements of sub-section (1) to provide information proactively to the public at regular intervals through various media of communication.
- (3) All materials shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language and the most effective method of communication in that local area and the information should be easily accessible, and be available free or at cost, taking into account the medium used.
- (4) At a minimum, the material referred to in sub-section (1) shall be made available -
- (a) for inspection by any person without charge;
 - (b) by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made, and
 - (c) on the Internet, provided that the materials are held by the authority in electronic form.

PART III - APPLICATIONS AND ACCESSING INFORMATION

Public information officers.

7. (1) Subject to sub-sections (3) and (4), a public authority shall appoint as many public information officers in all offices or units as they have at the local, district, provincial and national levels as necessary to enable it to provide information to persons requesting information under this Act.
- (2) Where for any reason, a public authority has not appointed a public information officer, the head of the public authority shall for purposes of this Act be deemed to be the public information officer of that public authority.
- (3) A public information officer shall be the principal contact person within a public authority to deal with requests from persons seeking information from the public authority and shall take all reasonable steps to assist any person seeking to exercise any right under this Act.
- (4) A public information officer shall be of sufficient rank within the public authority to be empowered to make binding decisions in relation to information disclosure under this Act.
- (5) Notwithstanding sub-section (3), it is the duty of every public officer to assist a person seeking information under this Act and no public officer may refuse to receive a request for information on the ground only that the public officer is not a public information officer.
- (6) A public officer other than a public information officer to whom a request for information is made under sub-section (5), shall refer the person seeking information to a public information officer, and if no such officer is immediately available, shall receive the request and issue a receipt therefor, indicating thereon the public officer's name and designation and that the request is to be forwarded to the appropriate public information officer.
- (7) Notwithstanding any other provision in this Act the administrative officer responsible for –
- (a) a location;
 - (b) a division;
 - (c) a district; and

(d) a province
as existing or as established under any law shall be a public information officer for purposes of this Act.

Submission of applications.

8. (1) An application to access information shall be made in English or Kiswahili by email, fax, post, telephone or by any other medium provided that the applicant provides -
- (a) contact details; and
 - (b) sufficient particulars for the public information officer or any other official to understand what information is being requested.
- (2) A public information officer who receives an oral request shall, subject to section 10, reduce the request to writing, including the public information officer's name and designation, and shall give a copy thereof to the applicant.
- (3) Notwithstanding sub-section (1), an application may, if the applicant is unable to communicate in English or Kiswahili, be made in any other local language in use in Kenya, and in such event the public information officer to whom the application is made shall arrange for a translation of the application to English or Kiswahili.
- (4) Where a request for information does not comply with sub-section (1), the public information officer who receives the request shall, subject to section 10, render such reasonable assistance, free of charge, as may be necessary to enable the request to comply with that sub-section.
- (5) A request referred to in sub-section (4), shall not be deemed to have been rejected while assistance is being rendered.
- (6) A public authority may not inquire into a person's identity on account of a request for access to any information, or inquire as to the purpose of the person's request.
- (7) A public authority may prescribe a form for requests for information, but any such form must not be such as to unreasonably delay requests or place an undue burden upon applicants, and no application may be rejected on the ground only that the applicant has not used the prescribed form.
- (8) A public authority which receives a request for information shall provide the applicant with a receipt documenting the request.

Processing of applications.

9. (1) Subject to section 10, a public information officer shall make a decision on an application as soon as possible, but in any event, within fifteen working days of receipt of the application -

Provided that where the information sought concerns the life or liberty of a person, the information shall be provided within forty-eight hours of receipt of the request:

Provided further that where an application is especially complex or relates to a large volume of information, the public information officer may request the Information Commissioner for an extension of time of no more than fifteen working days.

- (2) The public information officer may seek the assistance of any other public officer as the public information officer considers necessary for the proper discharge of the public information officer's duties and such other officer shall render the required assistance.

Transfer of applications.

10. (1) A public information officer may, not later than five days from the date of receipt of an application, transfer the application, or any relevant part of it, to another public authority, if the information requested is held by that other public authority.

- (2) Where an application is transferred under sub-section (1), a public information officer shall inform the applicant immediately but in any event no later than five days from the date of receipt of the application, about such transfer.

- (3) A public authority to which an application is referred by a public information officer under sub-section (1), shall make a decision on the application within fifteen days from the date that the application was first made, failing which the request shall be deemed to have been rejected.

Providing access to information

11. (1) Where a decision is taken to provide the information requested, a public information officer shall send the applicant a written notice within fifteen working days of receipt of the application, advising -

- (a) that the application has been granted;
- (b) the details of any fees or further fees to be paid for access, together with the calculations made to arrive at the amount of the fee;
- (c) the method of payment of such fees;
- (d) the proposed process for accessing the information once the payment is made; and
- (e) that an appeal may be made to the Information Commissioner in respect of the amount of fees required or the form of access proposed to be provided.

- (2) Subject to section 14, upon receipt of the requisite fee, a public information officer shall provide the information to the applicant or permit the relevant inspection immediately but in any event no later than two working days from the date of receipt of such payment.
- (3) Any information which may be made accessible to an applicant shall be produced forthwith, at the place where it is kept, for inspection, to any person who desires to have access to it in such a manner that it can be read, listened to, or otherwise comprehended, or in the form in which it is held unless the applicant requests that it be made available in another form and it is practicable to do so, and such information may also be copied, reproduced, or used for conversion to a sound transmission.
- (4) Where information is to be provided under this section, and the applicant requests that access be given in either English or Kiswahili, the information shall be given to the applicant in that language –
 - (a) forthwith, if the information already exists in that language; or
 - (b) within a reasonable time if the information does not exist in the language in which access has been requested.

Partial disclosure. **12.** Where a request for information relates to exempt information, access to any information which is not exempt shall, to the extent it may reasonably be severed from the rest of the information, be provided to the applicant.

Rejection of application. **13.** (1) Where a request is rejected or partially rejected on the basis of section 5, the public information officer concerned shall send the applicant a written notice within fifteen working days of receipt of the application, specifying-

- (a) the name and designation of the person making the decision;
- (b) the reasons for the decision, including the relevant provisions of the Act relied upon, findings on any material questions of fact and the material on which those findings were based;
- (c) the applicant's rights with respect to review of the decision, including the particulars of the appellate authority, time limits and the procedure.

(2) Where any requested information has not been provided within the specified period under this Act, the request shall be deemed to have been refused.

Fees.

- 14. (1)** No fee may be charged in relation to the submission of an application.
- (2) A public authority from which an application for information has been made, shall make no charge to the applicant for the provision of the information other than a reasonable charge for access which shall not exceed the actual costs of making any copies of such information and if applicable, supplying them to the applicant.
- (3) Any fees imposed should not be so high as to defeat the objectives of this Act.
- (4) A public information officer may waive any fee where payment of the fee may cause financial hardship to the applicant or where the disclosure of the information is in the public interest.
- (5) Notwithstanding anything in this section, the person making the request for information shall be provided with the information free of charge where a public authority fails to comply with the time limits in this Part.
- (6) The fee regime for all public authorities shall be prescribed in Regulations made by the Minister.

Correction of information.

- 15. (1)** At the request of the applicant a public authority shall, at its own expense correct any personal information held by it relating to the applicant which is inaccurate, incomplete or irrelevant.
- (2) A request under this section shall be made in writing to the public authority responsible for the maintenance of the record system containing the inaccurate, incomplete or irrelevant information and shall –
- (a) state that it is a request to amend certain personal information relating to the applicant;
- (b) specify the personal information that is to be amended indicating how such information is inaccurate, incomplete or irrelevant, and how it is adverse to the applicant's interests; and
- (c) specify the remedy sought by the applicant.

PART IV - THE INFORMATION COMMISSIONER

Appointment of
Information
Commissioner.

- 16.** (1) The Information Commissioner shall be nominated by the National Assembly and appointed by the President.
- (2) The person appointed to the office of Information Commissioner shall be a person who -
- (a) is a citizen of Kenya;
 - (b) is a person of high moral character and proven integrity and has knowledge and experience in matters relating to freedom of information;
 - (c) does not have any criminal conviction or any pending criminal charges;
 - (d) is not an undischarged bankrupt;
 - (e) is not a serving public officer or a Member of Parliament, or an office bearer in a political party; and
 - (f) does not hold any other public office unless otherwise provided for in this Act.
- (3) The Minister shall, within fourteen days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, invite persons qualified under this Act to apply for nomination for the position of Information Commissioner.
- (4) An application under sub-section (3), shall be forwarded to the Clerk of the National Assembly within twenty-one days of the advertisement and may be made -
- (a) by any qualified person; or
 - (b) by any person, organization or group of persons proposing the nomination of any qualified person.
- (5) The Clerk of the National Assembly shall, within seven days of the period prescribed under sub-section (4), forward to the relevant departmental Committee all applications received under sub-section (4).
- (6) The departmental Committee shall, within twenty-one days, consider all applications received under sub-section (5) and shall nominate and forward therefrom to the President, the names of three persons.

- (7) The President shall, within seven days of receipt of names under sub-section (6), by notice in the Gazette, appoint a person to be the Information Commissioner.
- (8) The Information Commissioner may serve a maximum of two three-year terms and shall not during the term of office hold any other public office.

Office of the
Information
Commissioner

- 17.** (1) The Information Commissioner shall be independent of the control, direction or interference of any other person or authority, other than the courts.
- (2) The Information Commissioner shall 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.
- (3) The Information Commissioner shall have budget autonomy in that the Office of the Information Commissioner shall be treated under an adequate and separate line item in the preparation of the national Budget.
- (4) The Information Commissioner shall recruit staff in accordance with open and fair recruitment processes and may for the better discharge of the functions of the office establish provincial or district offices.

Removal of
Information
Commissioner.

- 18.** (1) A person holding the Office of Information Commissioner may be removed from office before expiry of term only for inability to exercise the functions of the office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour.
- (2) The Information Commissioner shall be removed from the office by the President if the question of the Information Commissioner's removal has been referred to a Tribunal appointed under this section and the Tribunal has so recommended.
- (3) The President shall appoint the Tribunal consisting of a chairman and four other members from among persons -
 - (i) who hold or have held the office of judge of the High Court or Court of Appeal; or
 - (ii) who are qualified to be appointed as judges of the High Court.

PART V - APPEALS, OFFENCES AND PENALTIES

First appeal.

- 19.** (1) Any person who does not receive a decision within the time limits specified in this Part or who is aggrieved by a decision of the public information officer may lodge an appeal to the appellate authority.
- (2) The appellate authority shall dispose of complaints within no more than ten working days.
- (3) Where no decision is received within the time limits set by this Act, the complaint shall be deemed to have been rejected and an appeal may be lodged with the Information Commissioner.
- (4) Where the public information officer and the appellate authority are in reality the same person, an appeal may be made directly to the Information Commissioner.

Appeal to the
Information
Commissioner.

- 20.** (1) Subject to sub-section (2), an appeal may be made to the Information Commissioner by any person –
- (a) who has been unable to submit an application to a public information officer or a complaint to an appellate authority, either because none has yet been appointed or because they refused to accept the person's application or complaint;
 - (b) who has been refused access to any information requested under this Act;
 - (c) who has not been given a response to a request for information or given access to information within the time limits set out in this Act;
 - (d) who has been required to pay a fee which the person considers to be unreasonable;
 - (e) who believes that the information that the person has been given is incomplete, misleading or false; or
 - (f) in respect of any other matter relating to requesting or obtaining access to information under this Act.
- (2) The Information Commissioner shall decline to hear an appeal in relation to any matter in which an appeal may be lodged under section 19 unless before lodging the appeal the complainant has complied with that section.

- (3) The Information Commissioner shall dispose of appeals within no more than twenty working days.
- (4) For the purpose of disposing of an appeal under this Act the Information Commissioner –
 - (a) shall have the same powers as the High Court in respect of attendance and examination of witnesses;
 - (b) may require any Minister, officer or employee of the public authority concerned or any other person who in the Commissioner's opinion is able to provide information or produce records relevant to the appeal to do so;
 - (c) may examine any record to which this Part applies, including any record containing information which is or may be exempt;
 - (d) shall take all reasonable precautions to avoid the disclosure of information which is or may be exempt but may disclose to the appropriate authority any information, including exempt information, which in the Commissioner's opinion indicates the commission of an offence or significant misconduct on the part of any person;
 - (e) may receive and consider any record or information, whether or not it would be admissible in a court of law; and
 - (f) may enter any premises occupied by a public authority and examine or remove any record or material relevant to the appeal.
- (5) No obligation to maintain secrecy or other restriction upon the disclosure of information, whether imposed by an enactment or by any rule of law or otherwise, shall preclude a person from supplying information to the Commissioner for the purpose of an investigation under this section.
- (6) A public authority shall not be entitled, in relation to any investigation by the Commissioner, to any privilege in respect of the production of records or the giving of evidence except as is allowed by law; and anything said or any records produced by a person in the course of such an investigation shall be privileged in the same manner as if it were said or supplied in proceedings in court.
- (7) The Commissioner has the power to make any order -
 - (a) requiring a public authority to take such steps as the Commissioner 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) appointing a public information officer or appellate authority;

- (iii) publishing or disseminating certain information or categories of information;
 - (iv) making necessary changes to its practices in relation to the maintenance, management and destruction of records;
 - (v) enhancing the provision of training on the right to information for its officials;
 - (vi) providing the Commissioner with an annual report in compliance with section 27;
- (b) compensating the complainant for any loss or other detriment suffered;
 - (c) imposing any of the penalties provided for in this Act; or
 - (d) rejecting an appeal.

(8) Decisions of the Information Commissioner are binding on all parties.

(9) The Information Commissioner shall serve notice of the decision, including any rights of appeal, on both the complainant and the public authority.

(10) The Information Commissioner shall operate with as little formality as possible.

(11) Hearings before the Commissioner shall be conducted in the manner prescribed under Rules which shall be developed by the Commissioner in consultation with, and published by, the Minister.

(12) Where on an appeal to the Information Commissioner, no decision is received within the time limits set by this Act, the complaint shall be deemed to have been rejected and an appeal may be lodged with High Court.

Appeal to the High Court.

21. (1) An appeal on the decision of the Information Commissioner lies to the High Court and the decision of the High Court shall be final.

(2) On an appeal on the decision of the Information Commissioner, the High Court may –

- (a) confirm, set aside or vary the decision or order in question;
- (b) exercise any of the powers which could have been exercised by the Information Commissioner in the matter in connection with which the appeal is brought; or
- (c) make such other order as it may consider just.

Burden of proof.

22. In any appeal proceedings under this Act, the onus of proving that a denial of a request is justified shall be on the person or body that denied the request.

Offences and penalties.

23. (1) A public information officer or other public officer who has duties under this Act and who -
- (a) without reasonable cause, refuses to receive an application for information;
 - (b) in bad faith denies a request for information;
 - (c) unreasonably delays the provision of access to information; **or**
 - (d) knowingly gives incorrect, incomplete or misleading information; commits an offence and is liable –
 - (i) if before an appellate authority or the Information Commissioner, to a fine not exceeding one hundred thousand shillings; and
 - (ii) if before a court, to a fine not exceeding one hundred thousand shillings and imprisonment for a term not exceeding six months or to both.
- (2) A public officer whose assistance has been sought by a public information officer or other public officer referred to under sub-section (1) for the performance of the duties of that public information officer or other public officer, may be liable for penalty as prescribed in sub-section (1) jointly with the public information officer or other public officer or severally as may be decided by the appellate authority, the Information Commissioner, or a court.
- (3) Any person who destroys information, whether or not the information was, at the time it was destroyed, the subject of a request, or of a complaint under this Act; and does so intending to prevent its disclosure of such information in accordance with the requirements of this Act or in circumstances in which it was foreseeable that such disclosure would thereby be prevented, commits an offence and is liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both.
- (4) A person who –
- (a) obstructs the Information Commissioner in the performance of the Information Commissioner's functions; or
 - (b) commits any act in relation to an investigation by the Information Commissioner which, if that investigation were a proceeding in court, would constitute contempt of court; or
 - (c) fails to comply with an order of the Information Commissioner, commits an offence, and the Information Commissioner may certify the facts constituting the offence to a court which may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and

after hearing any statement that may be offered in defence, deal with the person in any manner in which a court could deal with the person if the person had committed the same offence in relation to the court.

- (5) A person who obstructs any public officer or other authority in the performance of the public officer's or the authority's functions under this Act otherwise than as provided under sub-section (5), commits an offence and is liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

PART VI- MISCELLANEOUS

Whistleblower
protection.

24. (1) No person shall be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of any office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity if the disclosure is one which is in the public interest.
- (2) Subject to sub-section (3), the provisions of sub-section (1) shall only apply where the person believes on reasonable grounds that the information is accurate
- (3) For the purposes of sub-section (2), a disclosure which is made to the police or to an appropriate public authority shall be deemed to be made in the public interest.
- (4) For the purpose of this section a person is penalized if the person is dismissed, discriminated against, made the subject of any reprisal or other form of adverse treatment or is denied any appointment, promotion or advantage that otherwise would have been provided; and the imposition of any such penalty in contravention of this section shall be actionable as a tort.
- (5) Any term of any settlement arising from a claim under this section, insofar as it purports to impose an obligation of confidentiality on any party to the settlement in respect of information which is not inaccurate and which was or was proposed to be disclosed, shall be unenforceable.
- (6) In any proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information it shall be a defence to show that in the circumstances the disclosure was in the public interest, and where the offence is alleged to have been committed by a public servant or Government contractor and involves the disclosure of information obtained by the person in the person's position as such, that the defendant had before making the disclosure complied with the provisions of sub-section (2).

- Annual reporting.
- 29.** (1) The Information Commissioner shall annually lay before Parliament, on or before the first day of October, a report on the implementation of this Act during the previous year.
- (2) The relevant Committee of the National Assembly shall consider the report and submit any views, comments and recommendations on it to the National Assembly as soon as practicable following tabling of the report.
- (3) Each responsible Ministry or department of Government, in relation to the public authorities within its jurisdiction, shall collect and provide such information to the Information Commissioner as is required to prepare the report under this section, and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.
- (4) Each report shall, at a minimum, state in respect of the year to which it relates -
- (a) the number of requests made to each public authority;
 - (b) the number of decisions to the effect that an applicant was not entitled to access to information pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;
 - (c) the number of appeals received by the Information Commissioner, the nature of the complaints and the outcome of the appeals;
 - (d) particulars of any disciplinary action taken against any public officer in respect of the administration of this Act;
 - (e) the amount of charges collected by each public authority under this Act;
 - (f) any facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act;
 - (g) recommendations for reform, including recommendations in respect of particular amendments of this Act or other legislation; and
 - (h) any other matter relevant to operationalizing the right to access information, as appropriate.
- (5) The Information Commissioner may from time to time lay before Parliament such other reports on the operation of the Act as the Information Commissioner thinks fit.

Regulations.

- 30.** (1) The Minister may by Regulations make or make further provision for -
- (a) designating any private body or authority or class of bodies or authorities, to be a public authority or public authorities for the purposes of this Act;
 - (b) the manner in which applications under this Act are to be made;
 - (c) the form in which information requested under this Act is to be supplied;
 - (d) the making of applications for personal information by representatives of the individual to whom the information relates;
 - (e) the measures which public authorities shall take in order to assist persons in exercising their rights under this Act;
 - (f) the measures which public authorities shall take to ensure that adequate records are created and maintained by public authorities;
 - (g) the procedures that should be followed by a complainant in asking authority to review any decision or failure to act before a complaint may be made to the Information Commissioner;
 - (h) a public authority to consult with a third party before giving access to information obtained by it from that party;
 - (i) procedures requiring a public authority to ensure that personal information is accurate;
 - (j) compensation to be sought by an individual who has suffered damage as a result of the holding of inaccurate information about the individual's personal affairs by a public authority;
 - (k) the records that public authorities shall be required to keep; and
 - (l) the salary and expenses of the Information Commissioner which shall not be less favourable than those paid to a judge of the High Court.

Repeal of Cap 187.

31. The Official Secrets Act is repealed.

MEMORANDUM OF OBJECTS AND REASONS

The principal purpose of the Bill is to provide for access to information in the possession of the government and public authorities and certain private bodies that have a public character, to establish systems and processes to promote proactive publication, dissemination and access to information and to establish the Office of Information Commissioner which shall be an independent office which shall have powers directly and incidental to undertake the functions of the Act and to hear appeals under the Act.

This Bill is drafted in tandem with a motion in the National Assembly for its introduction for debate.

This Bill will give effect to the provisions of Section 79 of the Constitution on freedom of expression by giving effect to freedom of information.

Kenya is a signatory to the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights both of which provide for freedom of information and Kenya is bound to apply the provisions in its domestic laws. The Bill is drafted in accordance with international standards. This Bill needs to be passed to bring Kenya to conformity with international standards. International organizations offered their expertise in the process. 68 countries have passed this legislation in a new wave of democratisation and Kenya should join this wave. In Uganda the Freedom of Information Act is in operation as is the case with the United Kingdom from whom we adopted most of our laws.

The process of drafting the Bill was all inclusive and many stakeholders made their contribution. The Government and the President have promised that this law will be enacted in Kenya. Indeed all parties have committed to uphold participatory democracy and openness, transparency and accountability, this legislation when enacted seeks to bring in openness, transparency and accountability.

Information held by the Government is a public good and is held in trust for the citizens. Kenyans need to be able to access that information to promote good governance, promote economic growth and development, reduce human rights violations, curb corruption and herald a new culture of openness and transform the name and culture of Government from *serikali* drawn from *siri kali*. The Freedom of Information Law will transform the culture of government from one of secrecy to one of openness.

Part I (Clauses 1 – 2) of the Bill provides for preliminary matters, the short title of the Bill and interpretations. The term information is defined broadly to include any material regardless of its physical form or characteristics. The terms access, appellate authority, public authority, private body and public officer are also defined.

Part II (Clauses 2 – 6) of the Bill provides for the Right to Information

Clause 3 gives the objectives of the Bill, which are amongst others to promote open government, to facilitate right to access to information held by public authorities in order to promote public participation in democratic development, greater accountability and better informed decisions while Clause 4 provides for a general right to information.

Clause 5 provides for exempt information which may be withheld by a public authority where the public authority concerned is satisfied that the disclosure of such information is reasonably likely to cause serious prejudice to the national security of Kenya, impede due process of law or to endanger the safety or life of other persons, interfere with privacy, or cause serious prejudice to legitimate commercial or financial interests.

Clause 6 provides for proactive disclosure. The clause requires public authorities to publish and update certain categories of information; for certain information the bill requires publication at regular intervals. A public body is also required to publish certain information proactively to the public at regular intervals through various media of communication. The clause requires that at minimum, the information mentioned under that clause should be made available for inspection without charge.

Part III (Clause 7 -15) of the Bill provides for applications and accessing information. Clause 7 provides for the appointment/designation of Public information officers in all offices and at all levels, local, district and national levels to enable it to provide information to persons requesting information under the Act. Where an information officer has not been appointed, the head of the public authority shall be deemed to be the public information officer.

Clause 8 of the Bill provides for submission of applications which may be submitted in English or Swahili, by email, fax or any other mode, even orally. When an officer receives an oral application, the same shall be reduced into writing, the applicant is expected to leave a contact address and sufficient particulars for the public information officer to understand the information being requested. A public information officer may not inquire into the identity of the applicant or the purpose of the request.

Clause 9 provides for the processing of applications , these may be processed as soon as possible but within 15 working days of receipt, in cases where the information requested is a matter of life and death, the information shall be availed within 48 hours.

Clause 10 deals with transfers of applications to the relevant authorities in cases where the request for application is made to the wrong department in the first instance.

Clause 11 provides for access to information, procedure for notifying applicant of success of application to information, partial disclosure, rejection of applications and procedure for notifying the applicant together with reasons.

Clause 14 provides for fees, that no fees are charged in relation to submission of an application, but only a reasonable fee for making copies.

Clause 15 provides for correction of personal information

Part IV (Clauses 16 – 18) of the Bill provides for the Information Commissioner.

Clause 16 provides for the procedure for appointment of the Information Commissioner, his credentials, and terms of service.

Clause 17 provides for the office of the Information Commissioner, his powers, the budget autonomy of his office and staff recruitment for his office.

Clause 18 provides for the procedure for removing the Information Commissioner from office, which procedure involves the appointment of a tribunal by the president.

Part V (Sections 19 – 24) of the Bill provides for Appeals, Offences and Penalties. Clause 19 provides for the first appeal, any person who does not receive a decision within the time limits specified in the Act or feels aggrieved by the decision of the public information officer may make an appeal to the appellate authority.

Clause 20 provides for an appeal to the Information Commissioner. The clause provides for the circumstances under which a person may appeal to the Information Commissioner, period within which the Information Commissioner may dispose of appeals, powers of the Information Commissioner with regard to appeals, including the orders that he is empowered to make and the manner in which he conducts the hearings. In hearing appeals, the Information Commissioner shall have the same powers as a High Court judge.

Clause 21 provides for appeals from the Information Commissioner to the High Court, the clause provides that the decision of the High Court shall be final while Clause 22 provides that the onus of proving that the denial of the request is justified shall be on the person that denied the request.

Clause 23 provides for offences and penalties. Under the bill, some of the offences

include, refusal to receive an application, bad faith denials of a request, unreasonable delays and giving of false or misleading information. Destruction of information and obstruction of the commissioner from performing his function is an offence. The clause also provides for penalties for the offences.

Part VI (Clauses 24 – 31) provides for miscellaneous provisions.

Clause 24 of the bill makes provision for the protection of whistleblower, upon disclosure of wrong doing in public interest while Clause 25 provides that no legal proceedings shall lie against any person for anything done under the Act.

Clause 26 and Clause 27 provides for management of records in a manner that facilitates the right to information and the power of the Information Commissioner to act on his own motion even in the absence of a complaint respectively.

Clause 28 mandates the Information Commissioner to promote the Act, he is thus empowered to develop and conduct educational programmes for the public, and to train public officers on the Act.

Clause 29 requires the Information Commissioner to lay before Parliament, on or before the first day of October a report on the implementation of the Act during the previous year. The clause also gives the minimum requirements of the Report.

Clause 30 gives the Minister for the time being responsible for matters relating to information to make regulations to make further provision for designating a private body or other body as a public body, rules on applications, form in which information is to be supplied, record keeping and on such other matters as stated under that clause.

Clause 31 provides for the repeal of the Official Secrets Act, Chapter 187 of the Laws of Kenya.

The enactment of this Bill will occasion additional expenditure of public funds to be provided through the estimates. Largely this Bill will not occasion additional expenditure of public funds, but will involve re-organization of public officers to comply with the provisions of the Bill and re-focus of some of the on-going initiatives and projects within Government to comply with provisions of the Bill.

