



**KENYAN SECTION OF THE INTERNATIONAL COMMISSION
OF JURISTS**

**MEMORANDUM OF VIEWS ON THE DRAFT FREEDOM OF
INFORMATION ACT 2005**

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

James Mill, 1825

"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

FOREWORD

ICJ-Kenya applauds the Government for preparing the Draft Freedom of Information Act 2005 posted on the Ministry of Information and Communication website (www.information.go.ke). While the draft Bill in its current form contains some useful provisions, it still requires considerable further work if it is to set up a well-functioning access to information regime

ICJ-Kenya and the Freedom of Information Network have had occasion to consider and discuss the draft bill annexed to this publication. Following is our analysis and critique of the bill. We call upon the Government to incorporate our views before publication of the Bill so that we can have a comprehensive and progressive Freedom of Information Act in Kenya that will stand the test of time. A bill that will propel and promote transparency and openness in governance of our country Kenya.

Even as we critique the Bill we are guided by the following quote,

Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of cases that may arise; and that, even if it were, it is not possible to provide for them in terms of free from all ambiguity.

V. R. Krishna Iyer (2002)

ICJ-Kenya opines that we should be as diligent as we can in drafting this legislation and take care of as many eventualities as we can though some reforms maybe found necessary as the law is implemented and as time passes. Owing to the fact that law should always be alive, the legislation should allow for periodic reviews.

Noting also that we are drafting the law after many other jurisdictions including those of the commonwealth whom we share a legal heritage it is only fair that we draw lessons and best practices and provisions from them. As we borrow best provisions we must be guided to borrow from the most progressive of jurisdictions, South Africa easily comes to mind.

We hope our publication will be useful in this process of developing a freedom of information legislation, ushering in an era of transparency and openness and promoting public political participation.

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BACKGROUND

Freedom of information refers to the right to know; citizens' right to official information held by the government. It entails an obligation on the part of the public authorities to facilitate public access to information.

President James Madison once observed thus:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.

Having been popularly elected the NARC Government should enact a Freedom of Information Act as speedily as possible in view of the truism in the words of the late Madison.

Democracy thrives best in an atmosphere of trust, openness and accountability. The right of citizens to access information held by government and local authorities makes government more accountable for its decisions and actions. Clear legislation is necessary to enforce this right. In Kenya, this right is not adequately provided for and can only be inferred from a general reading of section 79 of the constitution which unfortunately has a number of clawback clauses. This is exacerbated by the Official Secrets Act, a colonial relic that criminalizes disclosure of information by public officials. In a study conducted by ICJ Kenya in 1999, it was concluded that Kenyan legislation does not secure freedom of information.

The right to information underpins all other human rights. The United Nations' General Assembly in its inaugural session in 1946 adopted resolution 59(1) which stated that freedom of information is fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated.

The right to access information is codified in Article 19 of The Universal Declaration of Human Rights adopted and proclaimed by United Nations General Assembly resolution on 10 December 1948. Similarly Article 19 of the International Covenant on Civil and Political Rights which entered into force on 23 March 1976, to which Kenya is a party, provides as follows:-

*Everyone shall have the right to hold opinions without interference
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, in writing or in print, in the form of art, or through any other media of his choice*

The African Charter on Human and Peoples' Rights adopted by the Organization of African Unity and which entered into force on 21 October 1986 also enshrines the right in Article9:

*Every individual shall have the right to receive information
Every individual shall have the right to express and disseminate his opinions within the law*

The Republic of Kenya has also acceded to the International Covenant on Civil and Political Rights (ICCPR). The Government by virtue of having ratified the ICCPR and the African Charter is bound to implement its provisions

Section 79 of the current Constitution of Kenya guarantees the freedom of expression, which includes: “freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)”.

By acceding to the African Charter, ratifying the ICCPR and including a similar provision in its Constitution, the Republic of Kenya has agreed to take on the responsibility for the protection and promotion of the right to information.

There is need to domesticate the provisions in the International instrument and legislate for the right to information. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform in government and across public bodies. Legislating for Freedom of Information will create the balance needed between access to information and national security as it provides for exemptions.

The right to access information is enshrined in the Draft Constitution of Kenya 2004 as follows:

Access to information

- 51 (1) Every citizen has the right of access to
- (a) information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any right or freedom
- (2) Every person has the right to demand the correction or deletion of untrue or misleading information that affects that person
- (3) The state shall publish and publicize any important information affecting the nation
- (4) Parliament shall enact legislation to provide for access to information

Even if constitutional protection *is* specifically extended to the right under the new Constitution, legislation is still needed to effectively operationalise the right.

The value of the right to information

At the outset, it is worth reiterating the benefits of an effective right to information regime:

- *It strengthens democracy:* The foundation of democracy is an informed constituency that is able to thoughtfully choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.
- *It supports participatory development:* Much of the failure of development strategies to date is attributable to the fact that, for years, they were designed and implemented in a closed environment - between governments and donors and without the involvement of *people*. If governments are obligated to provide information, people can be empowered to more meaningfully determine their own development destinies. They can assess why development strategies have gone askew and press for changes to put development back on track.
- *It is a proven anti-corruption tool:* In 2003, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. In contrast, of the ten countries perceived to be the worst in terms of corruption, not even one had a functioning access to information regime. The right to information increases transparency by opening up public and private decision-making processes to scrutiny.
- *It supports economic development:* The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.
- *It helps to reduce conflict:* Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and information-sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion or unfair advantage of one group over another.

In a nutshell access to information in the country is potentially beneficial to the citizens and the government. The fight against corruption can be won if there is access to information. The actions of the government and its agents can be accounted for if the society is well informed of what the Government is doing, that is what participatory governance is all about. This will enhance public trust in the government by its citizens. A government that is accountable receives less resistance from its citizenry. The right to information supports economic development. Free information is crucial to the development of a modern economy capable of engaging in the globalised international marketplace while fostering pro-poor economic growth. In this context, transparency is key and the right to information is vital. Free flow of information is necessary to make rational and informed decisions in the market.

Minimum Principles of FOI Legislation

Maximum disclosure

A good right to information law should conform to the international principles. One such principle is that of maximum disclosure. There should be a strong presumption in favour of access to information. The law should cover all public bodies as well as private bodies that carry out public functions or where their activities affect people's rights. Access to information is a fundamental right where withholding information is the exception rather than the rule. It should be extended to apply to any person within the republic and not just citizens.

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Everyone present in the territory of the country should benefit from this right. The law should also establish minimum standards regarding maintenance and preservation of records by public bodies. The law should provide that obstruction of access to, or the wilful destruction of records is a criminal offence.

Obligation to Publish

Information should be published and disseminated widely subject to reasonable limits based on resources and capacity. The information to be published will depend on the public body concerned. The law should establish both general obligations to publish and key categories of information that must be published.

Promotion of Open Government

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. Indeed, experience in various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. The law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information, which is available, and the manner in which such rights may be exercised.

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish.

Limited Scope of Exceptions

Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” test. There should be no blanket exemptions. Exemptions should be based on the content rather than on the type. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

- ✓ The information must relate to a legitimate aim listed in the law;
- ✓ Disclosure must threaten to cause substantial harm to that aim; and
- ✓ The harm to the aim must be greater than the public interest in having the information

No public bodies should be completely excluded from the ambit of the law. Similarly the Act should have the right to independent appeal on decisions made to deny information. Strong penalties should be put in place for frustrating the spirit of the Act; for example concealment of records

Simple, easy and inexpensive access

Law should be simple and easy to access. A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. Where necessary, provision should be made to ensure full access to information for certain groups, for example those who cannot read and write. The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants.

Disclosure takes precedence

Laws that are inconsistent with principle of maximum disclosure should be amended or repealed. The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other, legislation dealing with publicly held information should be subject to the principles underlying the freedom of information legislation.

Whistleblower protection

The Law should provide for the protection of whistleblowers. Whistleblowers perform a function of early warning and complement the work of regulators. Whistleblowers should benefit from protection as long as they acted in good faith and in reasonable belief that the

information was substantially true and disclosed evidence of wrongdoing. FOI law should be subject to effective monitoring and evaluation.

The current Government Draft Freedom of Information Act 2005 provides a good working draft for the legislation of the right to information. The following is an outline of suggestions on how to improve the Bill.

ANALYSIS AND CRITIQUE OF THE GOVERNMENT DRAFT FREEDOM OF INFORMATION ACT 2005

GENERAL COMMENTS

Having outlined above the minimum standards of a good Freedom of Information Legislation the cardinal rule is that the bill should be as faithful to the principles as possible.

Kenya is drafting this freedom of information law after many other countries including those of the commonwealth with whom we share many similar laws it is only fair that we learn the lessons of many other countries and borrow the best provisions. That said, it is disappointing to note that the Government's draft seems to have borrowed heavily the United Kingdom's and Australian Acts. The Government should borrow from more progressive and less restrictive Acts like South Africa's or Indian.

In this context, it appears that large tracts in the Bill have been modelled on the Australian *Freedom of Information Act 1982* and the UK *Freedom of Information Act 2000*. Both of those Acts are notorious for being very technically drafted. Both Acts also operate in contexts which are highly conservative legal jurisdictions. They do not provide good FOI models for countries which are genuinely committed to enabling the right to information to become more than just an administrative right exercised by Opposition MPs and journalists, and instead to be used by ordinary people to simply and cheaply access valuable information. The supreme value of the right to information is that it can be a tool for the empowerment of the public, but the more complicated a law is drafted, the harder it becomes for people to use it to easily and effectively engage with the Government. The new Indian *Right to Information Act 2004*, the South African *Access to Information Act 2000* and the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide better models.

Regrettably the draft Bill is overly legalistic, such that it may be very difficult not only for the public to understand the law, but also for public officials to know how to implement it. The right to information is primarily about trying to open up government to the participation of the common person. As such, it is crucial that right to information laws are drafted in a user-friendly way, the terms of the law need to be clear and precise, plain English should be used as much as possible.

The unnecessary legalism evidenced in the two model Acts has been compounded by the fact that the Acts have not been replicated in their entirety. Most notably, the definitions clauses in the Australian and UK Acts have not been replicated, as a result of which the

meaning of many clauses are problematically ambiguous. The copying of random individual clauses has also now caused certain internal inconsistencies between various provisions in the Bill which need to be sorted out as a priority.

All the provisions of the Bill should be simplified to ensure that it is easily understood by the public and public officers alike. Internal consistency should be checked so that all provisions interact appropriately.

If not amended some provisions are likely to create serious obstacles to implementation of the law and to the full enjoyment of the right to information in practice as we lack administrative openness having been under the Official Secrets Act since independence.

Following is an article by article critique of the draft bill.

PREAMBLE

The right to access information is only given with regard to information in the possession of the government or public bodies. It is necessary to include a right of access to information held by private bodies undertaking public functions or any information held by another person required for the exercise or protection of any right or freedom. The preamble does not cover or provide for the duty of maximum disclosure on the government. It is important that the intent of the Bill establishes clearly the principle of maximum disclosure, transparency and accountability.

Although the Draft Constitution has not been enacted the Bill should state that the right will emanate from the Constitutional provision on the right to access information in the Bill of Rights if the Draft Constitution is passed.

The preamble should provide as follows: -

An Act of Parliament to promote the constitutional right to information by entrenching the principle in law of maximum disclosure of information in the public interest. The Act will, guarantee the right of everyone to access information, and provide for effective mechanisms to secure that right.

This should be an enabling legislation for exercise of the right to access information; it should thus not be restrictive in language and objective.

PART I – PRELIMINARY

Section 1: Short Title and Commencement

This Act is cited as the “Freedom of Information Act, 2005”, but should be renamed the Right to Information Act 2005 this is because when you term it as a “right”, the Government is obliged to take positive measures to fulfil it. A right is an entitlement for all citizens placing duty on the state to take measures to respect, protect, promote and fulfil

The Act currently shall come into operation on such date as the Minister may, by notice in the Gazette, appoint and in this regard the Minister may appoint different dates for different provisions. *A specific date from the date of passage should be give for operationalising the Act, up to a maximum of one year. Experiences in other countries, such as India have shown that such a vague formulation can allow a law to sit on the books for years without ever coming into force. Different timelines and commencement dates may be set for different categories of documents if necessary especially where administrative measures to organize and collate records are required.*

Section 2: Definitions [*This should come after the Short title and Commencement for consistency with common practise in legislative drafting*]

Too many different definitions are used in the draft Act in respect of who and what will be covered. For example, the words “Government”, “government departments, agencies and local authorities” are all used, sometimes the “Minister” is also mentioned.

A single definition “public authority” should be used to refer to those bodies covered by the law. The definition in the Indian Freedom of Information Act would be a suitable definition. *“Public authority means any authority or body established or constituted; by or under the constitution and by any law made by the appropriate Government and includes any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate government.”* The entire draft should be amended so that the term “public authority” is used.

“Minister” should only be used where it is referring to the Minister of Information and Technology.

The terms ‘access to information’, ‘access to documentary information’, and ‘access to official information’ have been used interchangeably. This can be confusing and potentially limits the scope of information that may be sought. Instead, a single standard of ‘right to information’ should replace these various terms.

- ‘information’ should be broadly defined to include *“any material in any form, including records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, works, models, data, material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.”*
- “Right to information” should be include: *the right to information accessible under this Act which is held by or under the control of any Public Authority and includes the right to-*
 - (i) *inspection of work, documents, records;*
 - (ii) *taking notes, extracts, or certified copies of documents or records;*
 - (iii) *taking certified samples of material;*

- (iv) *obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.*

Section 3: Objects (Currently Section 2 of the Draft Act)

The Bill clearly provides access only to information held by the government departments, agencies and bodies. In accordance with international best practises however, disclosure of information should be the duty of all private bodies, at least where it is necessary to exercise or protect one's rights. Many private bodies, in the same way as public bodies are institutions of social and political power, which have a huge influence on people's rights, security and health. FOI law brings private bodies within the ambit of its information regime by including "information held by or under control of a private body where access to that information is necessary for the exercise or protection of any right."

The Bill provides that its object is to extend as far as possible the right of the Kenyan citizens to access information in the possession of the Government. The right to information should not be restricted to citizens only. In a country like Kenya where many people are poor and disadvantaged they may not have the necessary documents to prove their citizenship. The Section should be reworked to provide that the object of the Bill is to extend as far as possible the right of "all persons" to access information.

It is important also that the intent of the Bill establishes clearly the principle of maximum disclosure, transparency and accountability. The draft Bill should be reviewed to ensure that its provisions are drafted in language which makes it clear that the public have the (immediate) right to access information and the government a duty to ensure they can obtain such access.

Paragraph (b) of the Act provides that the Bill will create a general right of access to information in documentary form. This should be deleted as it restricts access to information that is not documented.

Paragraph (a) and (c) should be deleted. Paragraph (c) gives room for amendment of records. Records should never be amended for historical purposes.

PART II: PUBLICATION OF DOCUMENTS AND INFORMATION

It is important to establish the basis of the right to information. This should stem from the heading of the Part, we suggest that it should read; RIGHT TO INFORMATION AND OBLIGATIONS OF PUBLIC AUTHORITIES.

Section 4: Publication of information maintained by the government

The Bill proposes that the Minister should cause to be published in the Kenya Gazette 'information'. Experience has shown that the Kenya Gazette is not a suitable

medium of dissemination of information because it is not very accessible to the ordinary person. To be useful, information should be available in the offices of the public authority where it can be easily inspected. It should also compulsorily be published on the internet, and using other media and local methods as appropriate. Public information must be published.

Since it is necessary to have a body to oversee proactive publication, this task should be given to a public official such as the Commissioner of Information. Kenyans desire a publication scheme that will facilitate maximum disclosure.

Additionally the Bill should broaden the scope of proactive disclosure. The list of topics which public bodies are required to proactively publish is extremely limited. The Bill currently focuses only on providing very basic information about public authorities. The Bill has not exploited the opportunity to use proactive disclosure as a means of increasing transparency in public bodies and thereby reducing corruption and increasing accountability of officials. The Act should impose a comprehensive disclosure regime on public authorities.

The Bill should provide for an obligation for proper records management. There should be an obligation on a public authority to ensure that records in its custody are maintained in good order and condition. This requirement should be included in the Bill providing 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.”*

We recommend that Section.4 (1) of the Bill be replaced with more comprehensive proactive disclosure provisions, and the remaining provisions in ss.4 and 5 be simplified to facilitate easier implementation by public officials. The following list of provisions could be inserted at Section4(1):

- (1) Every public body shall*
- (a) publish before the commencement of this Act:*
 - (i) the particulars of its organisation, 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) 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 statement of the categories of documents that are held by it or under its control;*
 - (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 its advise, and 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 for 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 agency, 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 authorisations 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 and other particulars of the Public Information Officers;*
 - (xvii) such other information as may be prescribed;*
- and thereafter update these 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.*

Section 5: Documents to be available for inspection and purchase

Section 5(1)(a) to (d) should be moved to Section 4 on Publications so that all of the proactive disclosure provisions are together. Under sub-paragraph [(c) *documents containing statements of the manner, or intended manner, of administration or enforcement of such an enactment or scheme; or*] the words ‘other business’ should be include after the words “enforcement of such enactment or scheme” to widen the scope.

Where subsection 5(2)(a) reads: “Cause copies of all documents.....made available for inspection and FOR PURCHASE by members of the public”; the words ‘for purchase’ should be replaced with the word ‘access’. This should also be reflected in Subsection 5(2)(c) [*cause to be prepared within 3 months, if practicable, and in any case not later than 12 months, after the preparation of the last preceding statement prepared in accordance with paragraph (b) or this paragraph, and as soon as practicable after preparation to be made available, for inspection and FOR PURCHASE by members of the public, at each Information Access Office, a statement bringing up to date the information contained in that last preceding statement*].

Reference to a “principal officer of an agency” at the beginning of the section will be confusing as there it could be a Minister, a Permanent Secretary. The ideal is to have the Chief Legal Officer of every public authority as the Freedom of information champion in every public authority. The reason for this is that a lot of the questions to be determined internally will be on interpretation of the Act rather than the technicalities of interpretation thus its better to have the legal officers be the Freedom of information champions.

PART III ACCESS TO DOCUMENTS

Section 6: Right of access

This section is unduly restrictive as it provides for access to “an official document of a government department,” or “a document of an agency.” A government department might refuse access on the grounds that a document is not an “official document”. This section should be amended in accordance with the recommendations above in relation to Section 2 to grant a comprehensive right to information.

Section 7: Part not to apply to certain documents

Sub-section (2) severely limits the scope of the Act by limiting access only to documents that became documents after the Act comes into force. This will operate to keep away a large amount of information in government hands, which is of interest to the public. The public have a right to access historical documents. It contrary to international best practise to impose such a severe limit on the right to access government information. The clause should be deleted.

Section 9: Access to documents apart from Act

[Nothing in this Act is intended to prevent or discourage ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so].

This section should be moved to sit with Section 4 on obligations of public authorities. The section should also be amended as follows by including the words: “

Nothing in this Act is intended to prevent or discourage, *limit or otherwise restrict* ministers and agencies from publishing.....”

Section 10: Request for access [reword to “Request for obtaining information”]

This section is crucial as it sets out the actual process for the public to request access to a document. The provision needs to be reworked to make its implementation capable. Section 10(1) does not properly identify who will be responsible within each public authority for receiving and processing applications. The current formulation

appears to envisage that “a responsible officer of an agency” (a term which is not explained) or the Minister will be responsible for accepting and responding to applications. This could be difficult to implement; is a Minister really expected to accept applications? Consideration should be given to requiring that a specific officer or officers be designated within public bodies to be responsible for receiving requests and ensuring access to information.

The provision currently still needs considerable reworking to make it capable of implementation in practice, in particular:

Section 10(2)(a) the word send should be deleted the paragraph should read; “be in writing or in electronic form; and [add that the request can either be in English or Kiswahili]. The Act should also accommodate the diverse capacities of information seekers by ensuring that illiterate or disabled people can make requests orally and require that officials must provide reasonable assistance to such requesters to help them formulate and/or submit their requests.

Section 10(2)(b) the section places too heavy a burden on requesters to identify the information needed. The section seems to assume that the requesters will always know exactly what document(s) they want. The requester should only be required to provide as much information as possible to assist the Public Information Officer to find all relevant documents. Section 10(2) should be made explicitly subject to Section 10(3) that requires assistance from Public Information Officers to fix non-conforming applications.

Section 10(2)(d) the request must be sent by post or email to the agency’s public information officer as designated under this Act.

Section 10(2)(e) provides that a fee shall accompany the request. Ideally, no application fee should be charged because it is a disincentive to poor people. Under any FOI Act, fees are paid after confirmation of availability of information. Such fees should not be so excessive as to deter potential applicants. A waiver of fees should be granted where the request is of public interest or would cause financial hardship to the applicant.

Payment of a fee should not be required for requests for personal information. The Minister should make regulations for the manner in which fees are to be calculated, that no fee is to be charged in prescribed cases and that any fee cannot exceed a certain maximum. He should consult with the Commissioner of Information before making the regulations.

Section 10(3) should be made clear that applications cannot be rejected UNLESS AND UNTIL such assistance has been offered and rejected.

Section.10 (4) places a burden on requesters to resubmit if the inadvertently submit to the wrong agency – even though this will incur additional time and expense. This provision also overlooks the transfer requirement at Section 12. Considering that

public authorities have more resources and a better understanding of the bureaucracy, Public Authorities should be under a duty to transfer requests. Also, if a public authority MAY transfer a request; it will most likely exercise this discretion not to transfer the request. Transfers should be made within a set time; and the time taken to forward the request to the other agency will not count when computing the time a request was responded to.

We recommend that the Section be reworked as follows;

When a request is made to a public authority:

(a) which is held by another public authority; or

(b) the subject of the document is more closely connected with the functions of another public authority than with those of the agency to which the request is made;

the public authority to which the request is made shall transfer the application or such part of it as may be appropriate to the other public authority within... days and inform the applicant within ...days about such transfer. ALTERNATIVE WORDING: the public authority to which the request is made shall transfer the application or such part of it as may be appropriate.

Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.

The rationale for the amendment is that if a public authority MAY transfer a request, it will most likely exercise this discretion not to transfer the request. The provision also entrenches the principle of originator control which is always inimical to access to information.

Section.10 (5): should include an additional provision that information must be provided within 48 hours where it relates to the life or liberty of a person. The provision should also be amended to provide that the public information officer who grants or refuses to grant a request is absolutely required to give notice of his decision within 30 days. As long as the requester provided his/her contact details (which is required by the Act) notice of a decision should not be difficult. The content of the decision notice should be specified in the Act. In particular, where an application is rejected, the notice must include the details of the decision-maker, provide detailed reasons for the rejection, and advise the requestor of how, when and to whom they can appeal the decision.

Section 11: Request for access to personnel records.

Section 11(2)(b)(ii) has not been notified of the outcome [change to read: has not been provided with the records] within 30days after the request was made.

Section 15: E-mail and other computer-based requests [reword to “Forms of access”]

Section 15(1)(a) should be reworked to permit inspection of documents, records, work, taking notes, extracts or certified copies of documents or records.

Section 15(3) allows the Minister to withhold information where providing it would interfere unreasonably with the operations of his or her functions. This is a carte blanche that could allow the minister to withhold any and every kind of information, considering that ministers are very busy people. It should be reworded to remove reference to the Minister and to read: “would interfere substantially and unreasonably with the operations of the public authority.”

As noted above in relation to Section 10 (5) add 3(d) to Section 15(3) *The applicant should be informed of his or her right with respect to review the decision as to the form of access including particulars of the appellate authority, time limit, process and any other forms.*

Section 16: Deferment of access

Deferrals should be made subject to a maximum time limit after which the information will be considered for release otherwise it could be deferred indefinitely to the detriment of the requester.

Section 17: Deletion of exempt matter or irrelevant material

Officials who may arbitrarily decide that information requested is irrelevant could easily abuse this provision. For clarity and simplicity, the Section could also be reworked to provide that; *“where a request for access to information is rejected on the ground that it contains information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information”*

A new subsection should also be added providing for the applicant to be informed of his or her right to appeal decisions made pursuant to this section with full particulars of the authority to whom the appeal can be made and the timelines for the review of the decision.

Section 18: Decisions to be made by authorised persons

There should be a clear chain of command which makes it clear which officer within each public authority is ultimately responsible for implementation of the Act and processing of individual applications. The Chief Legal Officer of every public authority should be the FOI champion. He or she should ultimately be responsible for the implementation of the Act.

Section 19: Requests may be refused in certain cases

Subsection (1) of this section is absurd:

- Is against the principle of maximum disclosure

- There should be a positive duty on public authorities to maintain documents in line with access to information principles and their envisaged obligations under the Part of the Bill addressing Public authorities' obligations.
- All public authorities should have an obligation to process requests

As already noted, ministers are very busy people and almost any request is likely to interfere with their functions. Therefore, reference to the minister should be excluded and replaced with reference to a public authority.

This entire provision is unjustifiably broad and could too easily be abused. It completely undermines the principle of maximum disclosure. Section 19(2)(a) for example, it is unfair on requesters because it means that even where a public authority has not maintained its records properly, it could still rely on this provision to argue that it would take them too long to find a piece of information. This is not within the spirit of openness. This provision should be deleted in its entirety. At the very least, the reference to the minister should be replaced with reference to a public authority because ministers are very busy people and almost any request is likely to interfere with their functions

Section 19(5) allows the agency or minister to refuse to grant access to the documents requested without even having identified any or all of the documents to which the request relates and without giving reasons. According to the Principles on Freedom of Information Legislation drafted by ARTICLE 19, no public bodies should be completely excluded from the ambit of an FOI law and nor should whole classes of documents. International best practise requires that all documents should be examined at the time of a request to verify that they are exempted from disclosure under the Act

Section 20: Information Access Offices. [Add appointment of Information Officers]

The provision provides for the setting up of information access offices. Such offices should be spread out through out the Republic. Information officers should also be appointed to man all of these offices.

Section 20(1) should be amended to read as follows: The Minister responsible for implementation, by public authorities, of this Act shall cause to be published, as soon as practicable after the date of commencement of this Part, but not later than to 3 months after that date, a statement setting out the addresses of such: Information Access Offices and Public Information officers, throughout Kenya, as are to be set up and appointed for the purposes of this Act.

PART IV EXEMPT DOCUMENTS

The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with 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. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old because at that point they should be deemed to be no longer sensitive and thus declassified.

ALL exemptions should be subject to a blanket “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. The Act currently already makes some exemptions specifically subject to a public interest test – for example, in Sections 22, 24, 27 and 33. However, this is not enough – all exemptions should be considered through the lens of the public interest.

Every test for exemptions (articulated by Article 19) should therefore 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?

Section 21: Documents affecting national security, defence or international relations

Section 21 of the Bill provides that any document that may constitute damage to security, defence or international relations of the republic in the opinion of the minister, and in consultation with no one, may be deemed to be an exempt document. This section vests wide discretionary powers upon the Minister particularly considering that the exemption is very broadly drafted. It is recommended that sub-sections 21(1)(a)(iii), Section 21(1)(b) and Section 22(1)(b) be deleted. Section 22(1)(a) provides adequate protection against disclosures that would harm international relations.

A public interest override provision should be included before section 21, in the following terms:

“A public authority may, notwithstanding the exemptions specified in section [X], allow access to information if public interest in disclosure of the information outweighs the harm to the public authority.”

Sections 21(1)(a)(iii) and (b) overlap with Section 22(1)(a) and (b) because both protect international relations/ relations with foreign governments. As such, one set of provisions should be deleted to prevent duplication. In any case, Section 21(1)(b) and 22(1)(b) should both be deleted because the key issue for any exemption should be whether harm will be caused by disclosure, whereas, Section 21(1)(b) and 22(1)(b) focus instead on the confidential nature of the information. Just because information was given to the Kenyan Government 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. Why should disclosure be prevented in such cases? As long as the more general protections in Section 21(1)(a) and 22(1)(a) which guard against disclosures that would cause harm to international relations are 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?

Section 22: Documents affecting relations with other Governments.

The use of Ministerial certificates in Section 21, 22, 24 and 25 is entirely contrary to international best, such that it is disappointing that this device has been replicated from the Australian *Freedom of Information Act 2002*. Even in Australia, Ministerial certificates have often been attacked by parliamentarians and civil society alike, as being contrary to good governance because they allow the Minister to remain unaccountable. In 1978, the Parliamentary Committee which considered the Australian Bill concluded:

“There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy”.

More recently, in 1994 two officials from the Attorney General’s department concluded that:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.”

In a law which is specifically designed to make Government more transparency and accountable, the use of Ministerial certificates cannot be defended. Within access to information regimes, the only use that Ministerial certificates have is to give Ministers the power to make decisions about disclosure, which cannot be questioned by any court or tribunal. Sections 44(3) and (4) of the Government Freedom of Information Bill 2005 put Ministerial certificates beyond the scrutiny of the Information Tribunal. This completely undermines the principles upon which the Westminster separation powers is based – oversight bodies are supposed to provide the “checks and balances” on the executive and legislature. But in this instance, the Minister is able to be his/her own judge and jury.

We strongly recommend that all of the exemptions in the Bill, which permit a Minister to issue a conclusive Ministerial certificate, be deleted. If this

recommendation is not implemented, at the very minimum, all of the provisions permitting the use of Ministerial certificates should:

- Require the same criteria to justify the use of a certificate in all the provisions, namely that “the disclosure of the document would be contrary to the public interest”. The tests in Section 21 and 22(4A) are more general and could be more easily abused.
- Amend the sub-clause which permits the use of a Ministerial certificate where “information as to the existence or non-existence of a document...would, if contained in a document of an agency, cause the last-mentioned document to be an exempt document” to require that in such cases, the relevant exempt information can be severed and that portion made the subject of the Ministerial certificate, while the remainder of the document can still be released.
- Delete the sub-clause, which permits the delegation of the power to issue Ministerial certificates. Ministerial certificates are very significant documents and should ONLY be issued by a Minister if at all. If this power is delegated, it could easily be abused by officials who have less to lose politically if it is later found out that the Ministerial certificate was incorrectly issued.
- Add an additional clause requiring any Ministerial Certificate issued be tabled in Parliament along with an explanation.

Section 23: Cabinet documents

Although it has historically been very common to include 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.

In this context, it is recommended that the Cabinet exemption be deleted and Cabinet documents protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. For example, Section 23(1)(a) protects documents “submitted to the Cabinet for its consideration”. However, it is notable that in some other jurisdictions, this type of provision has been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption. While it is positive that the exemption requires that the document must have only come into existence for the purpose of submission to Cabinet, in this day and age of “cut and paste” report writing, it would not be very hard for an official to “create” a new document for Cabinet out of old information that he/she wishes to make exempt.

It is also not clear why Section 23(1)(b) protects “official records of the Cabinet”. These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of discussions then why should they be worried about their release? So long as they capture Cabinet discussion accurately, they should be open to public scrutiny (unless some other exemption applies). The same argument applies to the exemption in Section 23(1)(c) – which protects documents containing extracts from official Cabinet records. Section 23(1)(d) should also be deleted on the basis that Cabinet decision-making processes and debates should be able to stand up to public scrutiny – unless openness would harm another legitimate interest, such as international relations or law enforcement. However, if Section 23(1)(b) is deleted and official records of Cabinet are at least released, this may go some way to mending the harm done by Section 23(1)(d). Section 23 should be deleted entirely. At the very least Sections 23(1) (a), (b) and (c) should be deleted.

Section 24: International Working Documents.

Section 24(1) which protects internal working documents is also far too broad. It is positive that the provision is made subject to a public interest test. Although as discussed in under Section 23 above in relation to the Cabinet exemption, the fact remains that the advice and decision documents being exempted under this provision are exactly the kind of documents that most need to be exposed to public scrutiny, in the interests of good governance and accountability. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, where the discussions relate to sensitive information, it must be remembered that such information will be protected under other exemptions clauses.

The exemption is currently too focused on the types of internal working documents, not their purpose. The exemption though, should be drafted more tightly to ensure that it is not so broad that it can be used to remove all the most interesting documents from public view. It should only protect internal documents where disclosure would genuinely harm the decision-making process. The simple fact is that good governance requires not only that the public knows what the government does – but also WHY!

Section 24(1) be replaced with the following provision:

“A public authority may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to:

(a) cause serious prejudice to the effective formulation or development of government policy;

(b) seriously frustrate the success of a policy, by premature disclosure of that policy;

and disclosure would be contrary to the public interest”

Section 25: Periods for which certain certificates remain in force

As discussed earlier, Ministerial Certificates should be deleted from the Act entirely – as should this provision.

Section 28: Documents concerning certain operations of agencies

The protections contained in Section 28 are all much too broad, apart from Section 28(1)(a). Section 28(1)(d) is the worst of the sub-clauses. Allowing an exemption for information the release of which would “have a substantial adverse effect on the proper and efficient conduct of the operations of an agency” is the equivalent to giving officials a carte blanche to withhold any document they do not wish to make public. What is intended to be legitimately covered by this provision? Ideally, this provision should be deleted, but at the very least the drafters should include criteria to guide the application of this exemption. It can too easily be abused – or even just genuinely misunderstood.

Section 28(1)(c) which protects information related to “the management or assessment of personnel” is also a provision which is ripe for abuse. Could this clause be used to cover up cases of nepotism or favouritism in promotions, or instances of transfers being used as punishment? Could this clause be used to hide bad staff management practices? Section 28(1)(b) is simply redundant – the relevant interests are already protected by Section 28(1)(a). Sections 28(1)(b), (c) and (d) should be deleted.

Section 29: Documents affecting personal privacy

A subsection should be included to provide that the exemption of private documents does not apply if:-

- (a) the third party has effectively consented to the disclosure of the information
- (b) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party
- (c) the third party has been deceased for more than 20 years; or

Section 31: Documents relating to business affairs etc.

It is legitimate to include exemptions to protect sensitive commercial information, but to make absolutely sure that the exemption is not abused, it is absolutely imperative that Section 31 is made subject to a public interest override. 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. It is an indisputable fact that most of the corruption that occurs in Government happens at the public/private interface – most commonly a private body contracting with a public authority makes an agreement for both sides to divert public money. It is in recognition of this fact that the strong push for greater “corporate responsibility” is occurring internationally. Allowing access to key business information from private bodies is one way of supporting this agenda.

In this context, Section 31(1) (c) provides an unjustifiably broad protection for private business information because it does not contain a harm test but merely tries to protect the “business, commercial or financial affairs of an organization or

undertaking where disclosure could unreasonably affect that person adversely in respect of his or her lawful business”. This is much too broad – what does “unreasonably affect” and “adversely” cover? These are very low standard of harms. What if the disclosure relates to environmental or social hazards – these could affect the private body adversely but should still be disclosed to the public!

Section should be made expressly subject to a public interest override whereby information will still be released even if covered by an exemption, if the public interest in disclosure outweighs the public interest in withholding the information.

Section 31(1)(c) should be reviewed to ensure that the level of harm required to justify non-disclosure is sufficiently high to warrant protection, taking note of the need to promote greater corporate social responsibility and accountability of the private sector. At the very least, information should still be disclosed where the disclosure of the record would reveal evidence of;

- (i) a substantial contravention of, or failure to comply with the law; or
- (ii) an imminent or serious public safety, public health or environmental risk

Section 32: Documents relating to research

The exemption in Section 32 for research information is much too broad. If the research has any commercial value it will be protected by Section 31(1)(b). In all other circumstances there is little justification for protecting against premature publication of research. Conversely, there is ample scope for abuse via such a provision – key government statistics (on health care, education, crime) could be withheld on the basis that they constitute part of a bigger research activity. At the very least, the harm test is too low – “substantial damage” or “serious prejudice” should be required to justify non-disclosure.

Section 34: Electoral rolls and related documents

The exemption in Section 34 against disclosure of electoral rolls is entirely unjustified. There is little harm that can be envisaged from the release of such rolls, but huge benefits in terms of electoral transparency. In India for example, it is very common practice for NGOs to access copies of electoral roll and then undertake research to check that the people listed on the electoral roll actually exist. At the last election, NGOs uncovered thousands of false names on the electoral rolls. Their work has contributed to cleaning up voter fraud. This kind of work should be encouraged rather than stifled. The section should be deleted.

PART V- AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

Section 37: Amendments of records.

There should be added a subsection to the effect that an applicant should be informed of all the changes made and be provided with (certified) copies of the same.

PART VI- REVIEW OF DECISIONS

Section 38: Internal review

The provision is confusingly drafted. It is not clear whose decision is being appealed to whom. It provides that a decision made otherwise than by the minister or principle officer of the agency may result in an appeal, but does not specify what happens if the decision is made by one of the two officials. The provision also specifically states that an appeal may only be made if the decision was NOT made by “the responsible minister or principal officer”, but then does not explain what happens if the decision WAS made by those parties. Will an applicant in such cases be able to apply directly to the information Tribunal?

It is very worrying that the Section is drafted in such general terms, leaving the details of the internal appeals process to be set out in regulations. This is not appropriate. An effective and internally consistent appeals framework is essential to a proper functioning of the entire access regime. The primary legislation should set out such important details. 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. The provision should be reworked to make it clear:

- Who exactly within each public authority will be responsible for receiving complaints under the Act (the Appellate authority)
- What investigation and decision-making powers the Appellate Authority has;
- The time limits for making decisions’
- The process for notifying applicants of decisions; and
- Any appeal rights following the internal appeal.

Subsection 1 provides that the applicant may, by application in writing to the agency accompanied by any application fee in respect of the application, request a review of the decision [a fee should not be charged for the review the applicant had already paid a fee for the application]

PART VII- MISCELLANEOUS [This part should be retitled Information Tribunal and the provisions tailored accordingly.

Section 39: Establishment of Public Information Directorate

Section 39(2)(a) provides that the directorate should determine what information it is expedient to give the public concerning the operations of this Act. This Provision should be rephrased to require the PID to discharge its functions in accordance with the principle of maximum disclosure.

Section 39(2)(b) provides that the directorate shall give advice to any person as to any matters covered by this Act including approving publications schemes of government departments and agencies. The Information Tribunal should also undertake this function and also the Ministry of Justice and Constitutional affairs should be tasked with the duty of advising persons on the implementation of the Bill.

The Act should also provide for the salary of the Information Commissioner for example that his salary should be equal to that of a judge of the Supreme Court.

A Section should be included for the protection of the Information Commissioner against prosecution. The provision should provide as follows;

No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf of or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise of any power or duty under this Act.

For purposes of the law of libel or slander, anything said or any information supplied pursuant to an investigation under this Act is privileged, unless that information is shown to have been said or supplied with malice.

Section 40: Publication Schemes

The task of approving Publication Schemes should be tasked on the Information Commissioner. It is highly unlikely that a Minister would authorise the publication of schemes that disclose information to the maximum.

Section 41: Establishment and constitution of Appeals Tribunal [The should fall under Part VI on Review of Decisions] the Tribunal should be renamed “Information Tribunal” or “Information Commission”

It should be clarified in **Section 41(1)** that the Tribunal is not just a body for arbitration, but is an appeals body with the power to make binding decisions and enforce them. Without these powers, the bureaucrats could easily ignore the Tribunal.

The appeals tribunal should be independent in appointment and operation. As currently envisaged, it cannot be independent as the minister in consultation with the Attorney General appoints its members. The provision should be reworked to

provide that the President shall nominate a candidate or candidates for the post of Information Commissioner from persons qualified under the provisions of the Act and parliament shall by a special majority vote, confirm the said nomination. Additionally also provides an eight-point criteria for qualification of an information commissioner. Members of the tribunal should be insulated from removal at a whim contrary to what is currently provided for in the Bill.

We recommend the criteria to be as follows. The person appointed to the office of Information Commissioner shall -

- (a) be a person qualified to be appointed as a judge of the High Court of Kenya;
- (b) be publicly regarded as a person who can make impartial judgements;
- (c) have sufficient knowledge of the workings of Government;
- (d) not have had any criminal conviction and not have been a bankrupt;
- (e) be otherwise competent and capable of performing the duties of his or her office;
- (f) not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and
- (g) not hold any other public office unless otherwise provided for in this Act.

It appears that Sections 41-44 are designed to establish an Information Tribunal which will act as an appeal body for applicants who are dissatisfied with the response they receive from a public authority and/or the appellate authority under Section 38. This is a positive step in theory because best practice international standards require that access regimes include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, the availability of another independent body as the first point of appeal is a positive step. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Australia, has shown that such independent bodies have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness.

It should be recognised at the outset, that the creation of a new Information Tribunal will require the allocation of financial resources from the Government if it is to be effective. It is important that the Government is genuinely committed to ensuring the new Information Tribunal can discharge their mandate effectively and does not indirectly exert influence via the (none) allocation of funding.

The Tribunal should be independent, autonomous and properly resourced.

The procedure for appointing members of the Information Tribunal must be impartial and independent of government interference, to ensure that the

Information Tribunal is seen as non-partisan and can act as an independent body. The current provisions for appointment in Section 41 of the Bill do not fulfil these criteria. Appointment of members by the Minister in consultation with the Attorney General means that Tribunal members will effectively be government appointees. This severely undermines the notion of the Tribunal comprising an *independent* appeal body. It is additionally problematic that the Minister can amend the schedule setting out membership, procedures and sittings of the Tribunal at will and without oversight by simply putting a notice in the Gazette. This power is too broad and far-reaching to be vested in a single Government officer, particularly considering the centrality of an independent oversight body to an access regime.

The process of appointment of Commissioners should be applied to the appointment of Tribunal members to ensure that the Tribunal is – and is seen to be – impartial and independent. More generally, it is worth noting that the appointment process for most Information Commissioners and/or administrative tribunals responsible for handling freedom of information appeals throughout the world are designed to maximise independence of appointees – usually by requiring a committee comprising representatives of Government, the Opposition and the Chief Justice to nominate candidates, and often requiring those candidates to subsequently be endorsed by Parliament.

We recommend that the following provisions replace Section .41:

The President shall nominate a candidate or candidates to the Information Tribunal from persons qualified under the provisions of this Act and parliament by a special majority vote, shall confirm the said nomination.

- (2) The persons appointed to the Information Tribunal shall –*
 - (a) be a person qualified to be appointed as a judge of the High Court of Kenya;*
 - (b) be publicly regarded as a person who can make impartial judgments*
 - (c) have sufficient knowledge of the workings of Government;*
 - (d) not have had any criminal conviction and not have been a bankrupt;*
 - (e) be otherwise competent and capable of performing the duties of his or her office;*
 - (f) not be the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament; and*
 - (g) not hold any other public office unless otherwise provided for in this Act.*
- (3) Members of the Information Tribunal shall have budgetary, operational and decision-making autonomy and should be completely independent of the interference or direction of any other person or authority, other than the Courts.*
- (4)(a) A person who is a member of the Information Tribunal may be removed from office before expiry of his or her term only for inability to exercise the functions of the office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.*
 - (b) A person who is a member of the Information Tribunal shall be removed from the office by the President if the question of his removal has been referred to a Tribunal appointed under this section and the Tribunal has so recommended.*
 - (c) The President shall appoint the Tribunal consisting of a chairman and four other members from among persons:-*
 - (i) who hold or have held the office of judge of the High Court or Court of Appeal;*

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

Clarify the investigative powers of the Information Tribunal and other process issues in order to ensure that the Information Tribunal can perform its appeal functions effectively, it is imperative that the Tribunal is explicitly granted the powers necessary to undertake a complete investigation and ensure enforcement of their orders. Section 8 of the Schedule does this to some extent but it is not comprehensive.

An additional provision should be included to allow the tribunal to initiate its own investigations. In practice, this will be useful in allowing the Information Tribunal to investigate delays in providing information, because these cases will often not reach the Tribunal as a complaint if the information is finally handed over, but may still be worthy of review and the imposition of a penalty, particularly if the Tribunal uncovers a pattern of non-compliant behaviour.

Section 42: Applications to the Information Tribunal

Explains what cases the Tribunal can adjudicate on, but they are unduly complicated. There is need to simplify the provision by clarifying a core set of areas over which the tribunal shall have jurisdiction. Notably, an additional catch-all provision should also be included which allows the Information Tribunal to hear an appeal on “any issue related to disclosure”. This will ensure that the Information Tribunal’s jurisdiction is not inadvertently limited, while at the same time simplifying the law. It is recommended that Sections 43 and 44 be replaced with the following:

“Subject to this Act, the Information Tribunal shall receive and investigate complaints from persons:

- (a) who have been unable to submit a request to a Public Information Officer, either because none has been appointed as required under the Act or because the PIO has refused to accept their application;*
- (b) who have been refused access to information within the time limits required under this Act;*
- (c) who have not been given access to information within the time limits required under this Act;*
- (d) who have been required to pay an amount under the fees provisions that they consider unreasonable, including a person who wishes to appeal a decision in relation to their application for a fee reduction or waiver;*
- (e) who believe that they have been given incomplete, misleading or false information under this Act;*
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.”*

Section 44: Powers of the Tribunal

The tribunal should be explicitly given powers to investigate and to enforce their orders. It should be able to initiate its own investigations even in the absence of a complaint. The tribunal should be given powers to make interim orders and generally powers to hear matters pertaining to access to information. The Bill should also provide for the funding of the tribunal.

Firstly, clarification of the investigative powers of the Information Tribunal is needed in order to ensure that the Information Tribunal can perform its appeal functions effectively. Section 8 of the Schedule does this to some extent but it is not comprehensive. The following provision should therefore be inserted before s.44:

The following provision should be inserted before Section 44:

- (1) *The Information Tribunal has, in relation to the carrying out of the investigation of any complaint under this Act, power:*
 - (a) *to summon and enforce the appearance of persons and compel them to give oral or written evidence on oath and to produce such documents and things as the Information Tribunal deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*
 - (b) *to administer oaths;*
 - (c) *to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Tribunal sees fit, whether or not the evidence or information is or would be admissible in a court of law;*
 - (d) *to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;*
 - (e) *to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Tribunal under this Act as the Information Tribunal sees fit; and*
 - (f) *to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*
- (2) *Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Tribunal may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from any the Information Tribunal on any grounds.*

Where the Information Tribunal is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Tribunal may initiate its own complaint in respect thereof.

An additional provision should be included to allow the Tribunal to initiate its own investigations. In practice, this will be useful in allowing the Information Tribunal to investigate delays in providing information, because these cases will often not reach the Tribunal as a complaint if the information is finally handed over, but may still be worthy of review and the imposition of a penalty. Also, this power can be important if the Tribunal uncovers a pattern of non-compliant behaviour within a public authority.

Section 44 (1) should be extended to clarify exactly what decision-making powers the Information Tribunal has. Because the Tribunal is a new body, it is useful to specify the extent of the Tribunal's powers in more detail to ensure that all parties – the public, public authorities and Tribunal members themselves – clearly understand what the Tribunal can do. This elaboration of the Tribunal's decision-making powers should be

included in the body of the Act rather than the Schedule, as the current draft of the Bill allows the Schedule to be modified by the Minister alone.

In this context, it is particularly worth noting that Section 44 (3) unnecessarily restricts the Tribunal's powers by disabling the Tribunal from releasing documents if they are found to be exempt even if an exemption is found to apply to certain information the Tribunal as an independent arbiter should have the power to look at whether the public interest in disclosing the information outweighs the public interest in withholding the information. This will ensure that an impartial judge is responsible for deciding what is in the public interest – which is preferable when one considers that officials can sometimes confuse the general national public interest with the Government's interests.

The Commission should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose sanctions as appropriate. Without strong powers, the Commission could easily be ignored and sidelined by a bureaucratic establishment, which is determined to remain closed. Specifically, the Tribunal's powers should be defined follows:

- (1) The Information Tribunal has the power to:*
 - (a) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;*
 - (i) providing access to information, including in a particular form;*
 - (ii) appointing an information officer;*
 - (iii) publishing certain information and/ or categories of information;*
 - (iv) making certain changes to its practices in relation to the keeping, management and destruction of records;*
 - (v) enhancing the provision of training on the right to information for its officials;*
 - (vi) providing him or her with an annual report, in compliance with section X;*
 - a. require the public body to compensate the complainant for any loss or other detriment suffered;*
 - b. impose any of the penalties available under this Act;*
 - c. reject the application.*
- (2) The Information Tribunal shall serve notice of his/ her decision, including any rights of appeal, on both the complainant and the public authority.*
- (3) Decisions of the Information Tribunal shall be notified within 30 days of the receipt of the appeal notice.*

Section 44(2) be amended to permit the Information Tribunal to “disclose document even where they are exempt, where the public interest in disclosure outweighs the public interest in withholding the information”.

As discussed previously Section 44(3) and (4) should be deleted – because Ministerial certificates have no place in an effective right to information regime.

Consideration should be given to including a provision making it explicit that the Court has the power to consider appeals de novo, and will not be restricted to considering only points of law.

It is important to clarify who carries the burden of proof in appeals; consideration should be given to including an additional provision in the Bill which sets out the burden of proof in 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.

An additional provision be inserted into Section 44 specifying that:

“In any appeal proceedings, the public authority to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.”

Clarify the decision-making powers of the Information Tribunal, the Tribunal is a new body, it is useful to specify the extent of the Tribunal’s powers in more detail to ensure that all parties – the public, public authorities and Tribunal members themselves – clearly understand what the Tribunal can do. This elaboration of the Tribunal’s decision-making powers should be included in the body of the Act rather than the Schedule, as the current draft of the Bill allows the Schedule to be modified by the Minister alone.

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Penalties for Non compliance

There is need for the Act to impose penalties for non-compliance with the law. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions, a shortcoming which should be rectified as a priority. Sanctions for non-compliance are particularly important incentives for timely disclosure where the bureaucracy is not used to hurrying at the request of public. Offences and penalty provisions can be combined.

In the first instance, it is important to clearly detail what activities will be considered offences under the Act. It is important that these provisions are comprehensive and identify

all possible offences committed at all stages of the request process, for example, unreasonable delay or withholding of information, knowingly providing incorrect information, concealment or falsification of records, wilful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders.

Once the offences are detailed, sanctions need to be available to punish the commission of offences. International best practice demonstrates that punishment for serious offences can include imprisonment, as well as substantial fines. Notably, fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption, the scourge that access laws assist to tackle, can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices.

When developing penalties provisions, they should be able to 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. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. 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 PIOs. If the PIO has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the PIO should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.

We recommend the inclusion of the following offences and penalties provisions to sanction non-compliance with the law:

Subject to sub-section (3), where any Public Information Officer has, without any reasonable cause, failed to supply the information sought, within the period specified under section 7(1), the appellate authority, Information Tribunal or the Courts shall, on appeal, impose a penalty of [Sh XXXX], which amount must be increased by regulation at least once every five years, for each day's delay in furnishing the information, after giving such Public Information Officer a reasonable opportunity of being heard.

Subject to sub-section (3), where it is found in appeal that any Public Information Officer has –

- *Refused to receive an application for information*
 - *Mala fide denied a request for information;*
 - *Knowingly given incorrect or misleading information,*
 - *Knowingly given wrong or incomplete information, or*
 - *Destroyed information subject to a request;*
 - *Obstructed the activities of a Public Information Officer, any appellate authority, the Information Tribunal or the Courts;*
- commits an offence and the appellate authority, Information Tribunal or the Courts shall impose a fine of not less than [Sh XXXX] and the courts can also impose a penalty of imprisonment of up to two years or both.*

- (3) *An officer whose assistance has been sought by the Public Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Public Information Officer or severally as may be decided by the appellate authority, Information Tribunal or the Courts.*
- (4) *Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Public Information Officer, or if no salary is drawn, as an arrears of land revenue.*

The Public Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him.

45. Repeal of Cap 187 and Savings

The provision provides for the repeal of the Official Secrets Act. This is applauded and the same should be applied to other laws that have provisions that are a hindrance to the right to information. These include the Evidence Act, the Penal Code, the Preservation of Public Security Act, the Kenya Broadcasting Act and the National Intelligence and Security Services Act, Criminal Procedure code and the Books and Newspapers Act.

The following are specific provisions in various acts that are identified as inhibiting access to information that should be repealed. *The Official Secrets Act chapter 187 laws of Kenya* is the most direct and significant legislative restriction on the right to access information in Kenya.

Section 3(1) provides that;

Any person who for any purpose prejudicial to the safety or interests of the Republic:

(c) Obtains, collects, records, publishes, or communicates in whatever manner to any other person any code, word, plan, article document or information which is calculated to be or is intended to be directly or indirectly useful to a foreign power or disaffected person shall be guilty of an offence.

Section 3(3) provides that;

Any person who has in his possession or under his control any code word, plan, article, document or information which-

- (a) relates to or is used in a prohibited place or anything in a prohibited place; or
- (b) has been made or obtained in contravention of this Act; or
- (c) has been entrusted in confidence to him by any person holding office under the Government; or
- (d) has been entrusted in confidence to him owing to his position as a person holds or has held a contract made on behalf of the Government or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract,

and who for any purpose or in any manner prejudicial to the safety or interests of the Republic-

- (i) uses the code word, plan, article, document or information; or
 - (ii) retains the plan, article or document in his possession or under his control when he has no right so to retain it or when it is contrary to his duty so to retain it, or fails to comply with all directions issued by lawful authority with regard to its return or disposal,
- shall be guilty of an offence.

Section 3(4) provides that;

Any person who, having in his possession or under his control any plan, article, document or information that relates to munitions of war, communicates it directly or indirectly to any foreign power, or to any other person for any purpose or in any manner prejudicial to the safety or interests of the Republic, shall be guilty of an offence.

Section 3(5) provides that;

Any person who receives any code word, plan, article, document or information, knowing or having reasonable grounds for believing at the time when he receives it, that the code word, plan, article, document or information is communicated to him in contravention of this Act, shall be guilty of an offence, unless he proves that the communication to him of the code word, plan, article, document or information was contrary to his wishes.

The Penal code is the substantive legislation that spells out criminal liability in Kenya. The Code places serious obstacles on the free flow of information as well as the right to freedom of expression more generally. Prior to 1997 the Penal Code presented the biggest obstacles to the right to freedom of expression. The Penal Code was amended as part of the IPPG reform package. Sections 52 gave power to the minister to prohibit any publications if he found it necessary in the interests of public order, health or morals, the security of Kenya and the administration of justice. The Section was amended together with Sections 56, 57 and 58. The minister is required to have reasonable grounds before he can exercise his powers. The exercise of powers would now be subject to the important limitation of being “reasonably justifiable in a democratic society”. There is still a lot of room for abuse and manipulation in the undefined parameters of ‘reasonable grounds’ and ‘reasonable justifiable in a democratic society’, by the minister in his decisions under these sections.

An in-depth reading of the *Criminal Procedure Code* identifies sections that indirectly inhibit the right to information. This is because these sections are so broadly provided that they are subject to abuse. For example there are no specific provisions on newsroom searches under Kenyan law. The requisite provisions are the general ones in respect of search warrants. [Section 118 of the Criminal Procedure Code]. This and other provisions should be repealed to ensure consistency with the provisions of the FOI law.

The Evidence Act chapter 80 laws of Kenya provides instances where information can be termed as privileged. It is patently clear, though a close reading of the Act that the media’s

confidential sources are not privileged. Press laws should be promulgated to allow journalists called as witnesses to refuse to answer questions concerning sources of confidential information. Alternatively, journalists should have a limited statutory right to protect sources, and judicial faith in the importance of protecting sources should be enhanced.

The Preservation of Public Security Act chapter 57 laws of Kenya is another controversial Act to the extent that it gives the President powers to derogate from the fundamental right to free expression even in peacetime without legislative or judicial oversight.

Section 4(1) provides:

Where an order under Section 85 of the constitution (which Relates to the bringing into operation of this part) has been made by the President, and so long as the order is in force, it shall be lawful for the President, to the extent to which this part is brought into operation and subject to the Constitution, to make regulations for the preservation of public security.

Section 4(2) provides:

Regulations for the preservation of public security may make provision for:
(d) ...The censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information including any publication or document, and the prevention of the dissemination of false reports.

Section 20 of the *National Intelligence Act* [Act 11 of 1998], titled 'prohibition of access to information provides that;

(1) An officer or employee of the National Security intelligence Service shall not disclose or use any information gained by him by virtue of his employment otherwise than in the strict course of his official duties, or with the authority of the Director-General.

(2) A person who, by a warrant, is authorised to obtain or seize any information, material, record, document or thing or any other source material or is requested to give any information, material, record, document or thing or any other source material or to make the services of other persons available to the service, shall not disclose the warrant, or disclose or use any information gained by or conveyed to him when acting pursuant to the warrant, otherwise than as authorised by the warrant or by the Director-General.

(3) A person who acquires knowledge of any information, knowing that it was gained as a result of any warrant or seizure, in accordance with such warrant shall not disclose that information otherwise than in the course of his duty.

(4) Any person who contravenes any of the provisions of this section commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.

Principles on National Security, Freedom of Expression and Access to Information

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information should be a primary consideration. Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and precision so as to enable individuals to foresee whether a particular action is unlawful. The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. National security and freedom of expression and information are often viewed as pulling in opposite directions. On the one hand, governments, particularly those that feel threatened by external or internal violence, maintain that disclosure of “secret” information or airing of critical opinions can undermine the very institutions that protect the security and well-being of law-abiding citizens. On the other hand, human rights defenders point to government suppression of speech on national security and related grounds as having paved way for human rights violations.

Although the right to freedom of expression is fundamental, it is not absolute. All of the main human rights treaties recognize that the right may be subject to restrictions, including in the interest of protecting national security. Yet, none of the international bodies charged with interpreting and applying these treaties has provided a definition of national security, and few have even offered meaningful guidance in limiting its scope. To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- The expression or information at issue poses a serious threat to a legitimate national security interest;
- The restriction imposed is the least restrictive means possible for protecting that interest; and
- The restriction is compatible with democratic principles.

A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing or to conceal information about the functioning of its public institutions.

Protect officials for liability for bona fide release of information

Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. Officials need to be reassured that they will not be penalised for releasing information. This can be done by specifically including a provision in the Act protecting officials from “*being criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act*”.

To encourage openness and guard a provision should be included to protect officials who act in good faith to discharge their duties under the law.

Protection of whistleblowers

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. 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. This is especially important in the fight against corruption.

We recommend that an additional article be included dealing with whistleblower protection.

(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

Access to information by persons with disabilities

As earlier discussed very Kenya should have the right to access information. International best standards require that marginalized groups be accorded special protection in legislation. Persons with disabilities should be protected under the FOI law to enhance their capabilities of accessing information. This protection includes availability of materials in Braille at all

information offices. The said offices should also have interpreters and persons well versed in sign language. As stated earlier it should be made possible under the Act to seek information orally. The Government should ensure easy access of information by persons with disabilities. The cost of this access should be borne by the Government to enable people with disabilities seek and access information.

SCHEDULES TO THE BILL

First Schedule of the Bill sets out provisions for the Appeals Tribunal established under Section 41. The schedule should provide a time limit within which a complaint brought to the tribunal is to be determined to guarantee timely disposal of complaints.

There should also be a provision in the Act for appeals to the Court from the decision of the tribunal within a given period of time. This will ensure that decisions of the tribunal are in compliance with the law.

The schedule should specifically provide that where the tribunal passes a decision as against a public authority in any given complaint, the public authority will be ordered to pay costs of the complainant incurred in prosecuting the complaint. No filing fees or lodging fees should be charged on the complainant however.

The Schedule should provide in addition to the powers of the Minister to make rules and regulations for the purpose of giving effect to the provisions of the Bill that the rules should be made in consultation with the implementing authorities under the Bill such as the tribunal and the Director of Information and should be approved by parliament before publication in the Kenya Gazette. This is necessary so as to implement the Bill effectively taking into account the changing circumstances.

The Schedule should also provide that members of the tribunal should make and subscribe to an oath or affirmation according to a form to be set out in the Bill. The form of oath is to be set out in the first schedule. Section 41 should provide that all members of the tribunal should subscribe to the oath.

In the Second Schedule, the Bill should provide the fees payable under the regulations in respect of the request. These fees must accompany a request for information. The Bill should provide for a maximum fee. It should not be so high as to deter potential applicants. It is also necessary that the regulations contain provisions exempting persons who cannot afford the fees from the requirements for fee payment. The regulation should also make provisions that promote obtaining information that is in the public interest by waiving the requirement for fee where it is established that the request is in the public interest.

The Bill provides for request for information in Part III. However provisions do not provide the form in which the request should be made. The schedule should provide for:

- The template form that can be used for requesting information from public bodies, although this should not be compulsory so long as sufficient information is provided by the requester;

- The time for making a request for review where the request is declined by the public body and the template form for applying for review of such decision, although this should not be compulsory so long as sufficient information is provided by the requester;
- Fee payable, if at all, for review application
- The officer(s) to sit over the application for review.
- A requirement of public bodies to give reasons for their decisions where access to information is denied.
- A provision for appeals of decisions of public authorities to the Appeals Tribunal.
- Provide a time limit on how long a request for information may be deferred by a public authority.
- Designate officers of public bodies who are primarily responsible for acting on requests.

(Attach already formatted Republic of Kenya Draft Freedom of Information Act 2005)