



CENTRE FOR LAW  
AND DEMOCRACY

## *Kenya*

# **Comments on the Freedom of Information Bill**

**January 2012**

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## ***Introduction***

These Comments contain an analysis by the Centre for Law and Democracy (CLD) of the Kenyan Freedom of Information Bill (draft Bill). A process of popular consultation is currently being held around the draft Bill. The ICT Ministry prepared a draft which was the subject of a stakeholder workshop on 4 November 2011, hosted by the thematic group on Human Rights of the Commission on Implementation of the Constitution (CIC). Another draft, prepared by the International Commission of Jurists-Kenya (ICJ) was also discussed at that meeting. It was agreed that a Technical Working Group (TWG), led by two consultants engaged by the CIC and ICJ, would draft a harmonised version, which led to the preparation of the draft Bill analysed in these Comments.

The 2010 Constitution of Kenya contains a strong guarantee for the right to information (Article 35), and the draft Bill aims to implement that guarantee through legislation. There has been a long-standing campaign for a right to information law in Kenya.

The Africa Centre for Open Governance (AfriCOG), a Kenyan organisation focusing on governance issues which has been participating in the consultations around the draft Bill, asked CLD to prepare these Comments. They aim to provide interested stakeholders with an assessment of the extent to which the draft Bill conforms, and does not conform, to international standards and better comparative practice regarding the right to information. They provide recommendations for reform, as relevant, with a view to helping to ensure that a law can be developed which gives effect, as fully as possible, to this fundamental right.

Overall, the draft Bill is very strong in terms of giving effect to international standards relating to the right to information. Particular strengths include its wide scope, the narrow regime of exceptions and the establishment of an independent and powerful oversight body.

At the same time, there are a number of ways in which the draft Bill could still be improved. These include better integration into the law of the rules on access to information held by private bodies, granting the right of access to everyone, instead of just citizens, extending the scope of the proactive publication obligations, strengthening the procedural rules and adding a rule on severability (partial release of records), further limiting some of the exceptions, making it clear that public authorities bear the burden of proof where complaints are lodged against their decisions, extending the scope of punishment for obstruction of access, putting in place a full system for improving record management standards and requiring public authorities to provide training to their staff.

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These Comments are based on international standards regarding the right to information, as reflected in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe (CLD/AIE Rating).<sup>1</sup> They also reflect better legislative practice from other democracies around the world.<sup>2</sup> We have prepared an assessment of the draft Act based on the RTI Methodology and the relevant sections of this assessment are pasted into the text of these Comments at the appropriate places. The overall score of the draft Act, based on the RTI Methodology, is as follows:

<b>Section</b>	<b>Max Points</b>	<b>Score</b>
1. Right of Access	6	4
2. Scope	30	26
3. Requesting Procedures	30	20
4. Exceptions and Refusals	30	25
5. Appeals	30	22
6. Sanctions and Protections	8	5
7. Promotional Measures	16	12
<b>Total Score</b>	<b>150</b>	<b>114</b>

This score would place Kenya in a tie position for 10<sup>th</sup> place globally, along with Ethiopia, and behind Liberia, the top African country at 126 points.

## **1. General Comments**

Overall, the draft Bill is very well written and, as the scoring above clearly demonstrates, it provides a strong set of guarantees for the right to information. There are a few cases of overlap and/or repetition in the draft. To give just one example, section 26(14) states that the right of access applies to private entities which receive public resources or benefits, or deliver public functions or services. However, the main definition of public authorities, in section 2, already includes bodies which receive part of their revenues from Parliament, as well as bodies carrying out public functions. It is problematical to have overlapping but different definitions, as this may cause confusion and differential application of the law.

<sup>1</sup> This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other mechanisms in Europe, Africa and Latin America. It is available at: [http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final\\_.pdf](http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final_.pdf).

<sup>2</sup> See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2<sup>nd</sup> Edition (2008, Paris, UNESCO), available in English and several other languages at: [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=26159&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html).

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There are a few instances where internal references need to be reviewed. For example, section 29(2), on oral applications, takes effect subject to section 25, but the latter refers to the seal of the Commission. Section 32(2) similarly contains a cross-reference to “section 32” (i.e. instead of “this section”). It is assumed that these are mistakes.

At a more substantive level, although the draft Bill provides for access to information held by private bodies in certain cases, it remains unclear which provisions of the law apply to both public and private bodies, and which are applicable only to public bodies. Thus, sections 29-32, setting out the procedures for making and processing requests for information, consistently refer to public officers. A public officer is defined, via Article 260 of the Constitution, as a person holding a State or a public office. This does not include individuals working for private bodies, thus leaving it unclear as to how private bodies are to process requests.

Section 35 of the draft Bill contains a basic rule on correction of information. This issue is, however, normally addressed through a data protection law and, in practice, the Data Protection Law Bill that is being prepared alongside the Freedom of Information Bill does extend a right to individuals to correct information (see section 10 of the January 2012 draft).

#### **Recommendations:**

- The draft Bill should be reviewed to identify and eliminate any areas of repetition and overlap.
- The internal references in the draft Bill should be reviewed to make sure that they are correct.
- It should be clear from the way the law is drafted which provisions apply to all obliged bodies – public and private – and which apply only to public authorities.
- Consideration should be given to removing section 35 on data protection from the draft Bill, leaving this to be addressed in a more structural fashion in the data protection law that is currently being developed.

## **2. Right of Access and Scope**

Article 35 of the Constitution of Kenya provides a clear guarantee of the right to information held by both the State and non-State actors, the latter only where this is necessary “for the exercise or protection of any right or fundamental freedom”. It also places a positive obligation on the State to publicise important information affecting the nation. This is supported by section 26 of the draft Bill, which states that every citizen has a “legally enforceable right to access information held by, or under the control of, a public authority”.

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The draft Bill is rather weak in terms of underlying principles and interpretive guidance. Section 3 sets out the objects of the law, including to give effect to Article 35 of the Constitution. Otherwise, however, this section simply describes what the law does, instead of describing the wider objectives of the law. This may be contrasted with section 7 of the draft Bill, which describes the guiding objects and principles of the oversight body (the Commission), which include such things as accommodating diversity, securing democratic values and principles, and promoting constitutionalism. Similar objects could be adduced for the law as a whole, which might include promoting democracy, accountability and participation, and combating corruption. The draft Bill does not include any specific instructions as to the principles to be employed in interpretation. It could, for example, privilege interpretations which best give effect to the underlying objects of the law.

The right of access only applies to citizens. This is contrary to better national practice, as well as international guarantees, which protect the right of everyone to access information. Experience in other countries shows that widening the scope of application to everyone does not impose significant cost or other barriers. National security is sometimes posited as a reason for not extending the right of access to everyone, but it is clear that this is a false premise for several reasons: security threats do not emanate exclusively from non-citizens; such a rule does little in practice to limit determined non-citizens from accessing information; and such a rule misunderstands the whole thrust of the right to information, which allows for protection of genuinely sensitive security information while allowing for wide publication of other information.

The scope of information covered by the draft Bill is extensive, and the definition of 'information' in section 2 is lengthy. At the same time, it is perhaps excessively complex, and even a bit confusing and repetitive. It might be better to replace it with a simpler definition that makes it clear that anything which imparts meaning and is available in recorded form is included within the definition of information.

Section 3(b) provides for a strong right to access information held by public authorities, covering information held by or on behalf of these authorities, and also information to which they are entitled, by law, to have access. Slightly different language is used in section 26(1), which refers to information held by, or under the control of, a public authority.

The draft Bill also defines the public authorities covered by its obligations widely. These include the National Assembly (including MPs and staff), the judiciary, government departments, bodies established by law, by the President, by a minister or by another public authority, any body subject to audit by the Controller and Auditor-General, a corporation as defined by the State Corporations Act (i.e. public

companies), commissions of inquiry, local authorities, bodies carrying out statutory or public functions, bodies funded from public resources and other bodies so designated by the responsible minister.

The draft Bill follows the constitutional rules inasmuch as it provides for a right to access information held by private bodies where this is necessary for the “enforcement of protection of any right”. It may be noted that this language is slightly different from that of the Constitution, referring to ‘enforcement’ instead of ‘exercise’, and it would be preferable to align the two. Furthermore, unlike in South Africa, the other country which has extended the right of access to private bodies *per se*, the Kenyan rules do not define a private body, which may be interpreted even to include private individuals. Given that it is already quite cutting edge to cover private bodies (except where they are assimilated to public authorities, which is done in many laws), it might be appropriate to limit the scope of the law here to legal entities and other entities which carry on business activities, as is done in South Africa.

There are two areas where the rules on public authorities could be clarified. The first is in relation to other constitutional bodies. The draft Bill does refer to all government agencies, but this could be interpreted as excluding constitutionally independent bodies. The second is in relation to county assemblies and governors. The draft Bill refers to local authorities under the Local Government Act, but it would appear that the latter does not refer specifically to county assemblies and governors.

#### **Recommendations:**

- A set of underlying principles – referring to the wider social values that the law seeks to promote – should be added, along with a statement to the effect that it should be interpreted so as best to give effect to those values.
- The right of access should apply to everyone, not just to citizens.
- Consideration should be given to simplifying the definition of information to make it clear that any recorded matter that imparts meaning is covered.
- A consistent definition of the scope of the right of access, in terms of whether public authorities have to control information or simply have a right to access it, should be used, preferably based on the latter notion.
- The scope of application vis-à-vis purely private bodies should be defined in the same way in the law as in the Constitution, and consideration should be given to limiting the scope to (private) legal entities and other entities that carry on business activities.
- The law should make it perfectly clear that it covers all constitutional bodies, including county assemblies and governors.

**Right of Access**

Indicator		Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	2	Const. 35
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	3(b), 26(1)
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law.	1	0	
	The legal framework emphasises the benefits of the right to information?	1	0	
<b>TOTAL</b>		<b>6</b>	<b>4</b>	

**Scope**

Indicator		Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	0	26(1)
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	4	2
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents).	2	2	2, 3(b)
7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	8	8	2
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	3	2
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	2
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	2	2
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	1	2
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive	2	2	2

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	significant public funding.			
<b>TOTAL</b>		<b>30</b>	<b>26</b>	

### **3. Duty to Publish**

The main provision in the draft Bill on the duty to publish is section 28. That section requires public authorities to publish a wide range of types of information, as soon as possible and in any case within one year. This includes information about the authority and how it works, relevant facts about policies and decisions which affect the public, or persons likely to be affected, and detailed information about public contracts. This is a good start but could be further extended to include far more detailed financial information about the public authority itself, as well as funds provided to the public. Furthermore, in addition to a guide to enable a person wishing to make a request to identify the classes of information it holds, public authorities should be required to provide information about the manner of making requests.

Section 28(1)(b) places an obligation on public authorities to publish a ‘statement’ updating their information at least annually. This is a useful idea but it does not fully take into account modern information technologies. For the most part, and with exceptions to ensure that information reaches the people who need to access it, information will be published online. This should be updated more-or-less continuously, and not via a ‘statement’ but by simply updating the information. For example, every new contract should go online immediately.

It is useful to have strong proactive publication rules in a right to information law, among other things to signal that this is an important area for improvement. Kenya has been making important progress in this area, including in relation to open government data, and these rules should help standardise and encourage that progress.

At the same time, in many countries, public authorities have struggled to meet more stringent proactive publication obligations. One way of addressing this is to set strong rules in the law, but to give public authorities some time to bring themselves fully into compliance with these standards. It is also useful to put in place a system for pushing proactive publication beyond the minimum standards set out in the law over time, after these have been achieved.

It seems that some thought has been given to this, in a reference in section 6(1)(g), on the role of the Commission, to publication schemes. The adoption of such schemes could provide a vehicle to achieve both of the objectives noted above.

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However, the idea has not been substantively developed in the main body of the draft Bill.

Section 28(1)(e) provides for openness for meetings where decisions affecting the public are made. This is very much to be welcomed and signals a cutting edge approach in the draft Bill. At the same time, it is not clear why, if meetings are to be included, access is only provided to meetings where decisions affecting the public are to be taken. Just as with information, all meetings should in principle be open. To provide for a proper regime of access to meetings, it would be necessary to develop these provisions further, for example, specifying which types of meetings are covered (for example, meetings of oversight bodies but not necessarily low level meetings) and at least some procedural issues regarding closure of meetings (for example, that the decision to close should normally be made in public).

#### **Recommendations:**

- The scope of proactive publication obligations should be extended to cover far more financial information, as well as more detailed information about making requests.
- The rule on updating should require public authorities to update their information continuously online, not just annually via statements.
- The idea of publication schemes, as referred to briefly in the draft Bill – or some other system for giving public authorities some time to meet the minimum proactive publication obligations set out in the law and then to push past these over time – should be further developed.
- The rules on open meeting should also be further developed, and should apply to all meetings of relevant bodies, not just meetings where decisions affecting the public are to be taken.

**Note:** The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

#### **4. Requesting Procedures**

It is abundantly clear from section 26(3) that requesters are not required to give reasons for their requests and that public authorities may not be influenced in the way they process requests by their belief as to the reasons for those requests. This is supported by section 29(6), which precludes officials from enquiring into a requester's identity or reasons for making a request. However, since the right of access to information held by private bodies is conditional upon the information being needed for the enforcement or protection of a right, it would normally be necessary for the requester to establish this.

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Pursuant to section 29(1), requests may be made by email, fax, post, telephone or any other medium, and are required to contain only the applicant's contact details and sufficient particulars to enable officials to identify the information being sought. It is clear from section 29(2) that oral requests are also admissible, and in this case the receiving official must reduce the application to writing, sign it and give the requester a copy. Forms may be prescribed, but may not either delay requests or burden requesters, and applications may not be refused simply because the requester has not used the form (section 29(7)).

These are very positive provisions. At the same time, they may be somewhat ambitious. A number of countries have made provision for telephone requests. However, these have normally been added after the system is largely up and running, and the other request systems have become operational. This could be considered in Kenya, rather than trying to do everything at once. Section 29(1) refers to the use of "any other medium" for making a request. This is simply too open to be realistic; if someone tried to make a request by Morse code would the public authority be expected to obtain the necessary equipment to receive it?

Requests may be submitted in English or Kiswahili, but where the requester is unable to do this, they may be submitted in any other local language, and the receiving official shall have them translated into English or Kiswahili (sections 29(1) and (3)).

Where a request does not comply with the minimum requirements, officials are required to render such reasonable assistance as may be required, free of charge, to bring it into compliance (section 29(4)). As noted, officials are also required to help with oral and other language requests. What does not appear to be provided for is an obligation to provide assistance to those who may need it because of disability (for example, so as to receive requests in Braille).

Pursuant to section 29(8), requesters are to be provided with a receipt upon lodging a request. No timeline is, however, stipulated for the provision of this receipt, so that in theory at least these could be given after the deadline for processing requests.

Section 31 provides for the transfer of requests to another public authority where the information is held by that other public authority. Clear timelines and other procedures (for example to inform the requester) are detailed for such transfers. This is useful but the standard for transfer does not best serve the right to information. Ideally, the law should allow for transfers only when the original public authority does not hold the information requested. If it does hold the information, but this is more closely related to the work of another public authority, the original authority can always consult with the second authority. At a minimum, transfers

should be possible only where the information is more closely related to the work of another public authority. Otherwise, requests could be transferred even though the document was produced by the original public authority, simply because it had been shared with another authority.

The rules on form of access are somewhat unclear. Section 32(3) provides that information shall be made available at the place where it is kept, in such a manner that it may be read, listened to and so on, unless the requester asks that it be made available in another form, and it is practicable to do so. Section 32(4) provides that information shall be provided forthwith in either of English or Kiswahili, as stipulated by the requester, if it is available in that language or within a reasonable time if it needed to be translated.

It would be preferable to have clearer rules on form of access. The law should stipulate that a requester may state a preference for form of access – such as inspection, an electronic copy, a physical copy and so on – and have a right to obtain the information in that form, unless to do so would be detrimental to the record or breach a copyright held by a third party. Consideration should also be given to whether or not it is practical to require public authorities to translate every document between English and Kiswahili to respond to a request. This could be quite expensive and time-consuming.

Pursuant to section 30, public authorities are required to respond to requests as soon as possible and in any case within 15 working days. Where a request is “especially complex or relates to a large volume of information”, the public officer may request an extension of up to another 15 working days from the Commission. Where the information concerns the life or liberty of a person, the response must be provided within 48 hours.

These are positive provisions. To score the full two points for timelines on the CLD/AIE Rating, the maximum original timeline must be ten working days or less, but we recognise that this is very much best practice. The system for extending the timeline includes a commendable procedural requirement, namely that the Commission must approve the extension. At the same time, the grounds for applying for an extension are somewhat vague. It will often be possible to provide a large volume of information quickly, for example if it is in clearly identifiable, electronic files. It would, therefore, be preferable to include a requirement that the complexity or volume of a request renders it impractical to fulfil it within the original timelines. Also, where this happens, there should be a requirement to notify requesters of the extension. Finally, the provision for urgent requests relating to life or liberty is commendable. However, a period of 48 hours may fall entirely outside of working hours. It might be more practical to provide for a timeline of two working days.

It is free to make requests and only reasonable fees, which shall be only for reproduction and sending the information, if applicable, may be charged for satisfying requests. These fees shall be prescribed by regulation. A public information officer may waive the fee where payment may cause financial hardship or where disclosure is in the public interest. Significantly, where a request is not responded to in time, no fee may be charged.

These are strong fee rules. They could be enhanced by providing for a certain number of pages of photocopying – say twenty pages – to be provided for free. It would also be preferable to require public information officers to waive fees in the cases stipulated, as opposed to leaving this to their discretion, and to elaborate more specifically when these conditions apply. For example, the waiver could apply whenever individuals fall below a certain income, to be set by the minister, and the types of public interest grounds for waiver could be elaborated.

#### **Recommendations:**

- Section 26(3) on reasons should to be amended to recognise the fact that for requests to private bodies, it may be necessary for the requester to provide reasons.
- Consideration should be give to narrowing the means in which requests may be submitted to eliminate the reference to “any other means” and to leave the possibility of telephone requests for later.
- The law should require assistance to be provided to requesters where necessary because of disability.
- A timeline should be established within which a receipt acknowledging the lodging of a request must be provided.
- The rules on transfer of requests should be amended to allow this only where the original authority does not hold the information or, at least, where another authority is more closely connected to the information.
- The rules on form of access should be clarified to make it quite clear that requesters have a right to access information in the form they prefer, subject only to clear overriding interests, such as preservation of the record.
- Consideration should be given to whether or not it is realistic to provide for translation of all records between English and Swahili at the request of a requester.
- Consideration should be given to reducing the time limit for responding to requests to ten working days, while the time limit for responding to urgent requests could be translated into two working days.
- Consideration should be given to adding a requirement that the original time limit may only be extended where to comply within the original time limit would unreasonably interfere with the activities of the authority and that, where such an extension is granted, the requester must be notified.
- Consideration should be given to providing a certain number of photocopies for

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<p>free.</p> <p>➤ Fee waivers should be made mandatory and clearer criteria for when they are engaged should be stipulated in the law.</p>
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Indicator	Max	Points	Article
13 Requesters are not required to provide reasons for their requests.	2	2	26(3), 29(6)
14 Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	2	29(1)
15 There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	2	29(1), (2), (7)
16 Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.	2	2	29(4)
17 Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	2	1	29(2)
18 Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	1	29(8)
19 Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	1	31(1)
20 Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	1	32(3), (4)
21 Public authorities are required to respond to requests as soon as possible.	2	2	30
22 There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	1	30
23 There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	1	30
24 It is free to file requests.	2	2	34(1)

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25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	1	34
26	There are fee waivers for impecunious requesters	2	1	34(4)
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	0	
<b>TOTAL</b>		<b>30</b>	<b>20</b>	

### **5. Exceptions and Refusals**

Section 26(11) of the draft Bill provides simply that it applies to the exclusion of any other law that prohibits the disclosure of information. This is an important provision in terms of ensuring that the new law will be able to effect real change in terms of openness.

The exceptions to the right of access are set out in section 27(1). This protects the following interests: national security, due process of law, life and safety of persons and rare species, privacy, legitimate commercial or financial interests, the ability of the government to manage the economy, the ability of a public authority to give adequate consideration to a matter prior to a final decision, and a public authority's position in actual or contemplated legal proceedings. The exceptions in favour of commercial interests and ability to manage the economy do not apply to environmental or product testing, where this reveals a serious public safety or environmental risk.

This is, in general, a very narrow and well drawn set of exceptions. A list of examples of what is included in the definition of national security is provided at section 27(2), and again in the definitions in section 2. While the items on these lists are often considered as national security interests there are a few problems with the list. First, foreign relations are considered to be part of national security, whereas in fact most foreign relations in a country like Kenya address other concerns, such as economic, developmental, cultural and environmental issues. It is, therefore, better practice to separate out protection for international relations from national security. Second, there is a risk that the list will be treated as being equivalent to the exception. Thus, officials may treat all information about weapons systems as confidential, even if disclosure of the information would not in fact cause serious harm to national security, as required by the primary exception. Third, the two lists

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are overlapping and yet different, which may lead to some confusion. Fourth, the second list is non-exclusive (i.e. other items may also be included within the definition of national security), so that it does not serve to narrow the scope of national security. It would be preferable not to provide for a list of items relating to national security, and instead leave this to be decided on a case-by-case basis.

Privacy is similarly defined in section 2, through a long non-exclusive list of examples. It is not clear how this will help define the concept more clearly, as most of the items on this list are fairly clear. Otherwise, similar problems arise for this list as for the national security list.

Section 27(1)(b) provides protection for “due process of law”. It might also be useful to provide protection for law enforcement, which is often considered to be different and yet which does require confidentiality protection in some cases.

The exception at section 27(1)(f), which protects a public authority’s ability to give “adequate and judicious consideration to a matter”, represents a unique way of addressing what is often referred to as the internal deliberations exception. The result, however, could be overbroad in nature, or at least interpreted in an overbroad manner, as it refers to the ability of a public authority to give “adequate and judicious consideration to a matter”. This might, for example, be understood in terms of resources or ability to do research, whereas in more tightly drawn regimes of exceptions, the reference is limited to internal advice, with a view to protecting the free and frank flow of such advice.

These exceptions apply whenever disclosure of the information is reasonably likely to result in the stated harm. In several cases, the harm is of serious prejudice, which is a strong standard. At the same time, a requirement only of reasonable likelihood is rather weak; a better standard would be actual likelihood.

A clear public interest override is articulated in sections 27(4) and (5), which together combine the benefits of a general public interest override with those of indicating specific types of public interest considerations. The result is a strong form of public interest override.

Section 27(6) provides that exceptions are presumed to lapse after thirty years unless the ongoing need for the exception is proven. To gain the full two points on this issue in the CLD/AIE Rating, the period of time should only be twenty years. Experience in other countries has demonstrated that this is long enough and some countries have gone so far as to specifically reduce longer periods to twenty years or even less. Furthermore, public authorities always have to prove that an exception applies (see below, under Appeals). A higher standard of proof or a procedural barrier should apply where information is to be kept confidential beyond the

presumed maximum period. For example, this could require the permission of the Commission (as is done in Mexico) or a specific process to be undertaken by the public authority (for example, that the reasons for continued confidentiality need to be written down and attached to the file).

Section 52(1)(h) imposes an obligation on public authorities to consult with third parties before giving access to information supplied by them. No procedures are set out for the conduct of this consultation, and no reference is made to whether and, if so how, this might impact on the timelines established pursuant to section 30.

The draft Bill does not include a severability provision, so that where only part of the information is exempt, the rest of the record must still be disclosed. This may be partially inferred from section 33(2), which refers to the full or partial rejection of a request, but which does not actually impose an obligation on public authorities to provide partial access.

Pursuant to section 33(2), where a request is rejected, a notice must be provided to the requester stipulating the name and designation of the person making the decision, the reasons for the decision, including the specific provision in the law relied upon and any material findings of fact, and the requester's right to appeal the refusal. These are strong notice provisions.

#### **Recommendations:**

- Foreign relations should not be included within national security but should instead be listed as a separate exception.
- Consideration should be given to doing away altogether with the list of items which are deemed to be included within national security. At a minimum, the two lists should be combined and made into an exclusive list.
- Similarly, consideration should be given to doing away with the list of items that are deemed to be personal in nature.
- An exception to protect law enforcement should be added.
- Consideration should be given to limiting the internal deliberation exception at section 27(1)(f) to cases where the disclosure would inhibit the free and frank provision of advice, and thereby undermine the ability of the public authority to give proper consideration to a matter.
- Consideration should be given to enhancing the required standard regarding the risk of harm, for example from a reasonable likelihood to actual likelihood of harm.
- Consideration should be given to reducing the presumed maximum period of confidentiality from thirty to twenty years. To extend confidentiality beyond this period, public authorities should have to go through a specific procedure.
- Clear procedures should be added for consultations with third parties, along with timelines.

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➤ A severability clause should be added to the law.

Indicator		Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	4	26(11)
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.	10	9	27(1)
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	4	27(1)
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	4	27(4), (5)
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	1	30(1), 27(6)
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	1	52(1)(h)
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	0	
35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	2	33(2)
<b>TOTAL</b>		<b>30</b>	<b>25</b>	

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## **6. Appeals**

The draft Bill devotes an enormous amount of attention to the question of appeals, allocating some 27 sections to the establishment of the Freedom of Information and Data Protection Commission (Commission) and complaints before it, running to some 22 of the drafts overall 44 pages.

Sections 36-39 address the question of internal reviews. Section 36 provides for broad grounds for applying to review decisions, within 30 days of their having been made. It is clearly intended to be an internal review, although this is not actually specified in the section. The grounds for review do not explicitly include breach of the timelines for responding to requests. Failure to respond to a request within the timelines is deemed to be a decision refusing the request (see sections 31(3) and 33(3)), but there may be other reasons to wish complain on the basis of timelines (for example against an extension of the timeline which the requester does not believe is warranted).

Various procedures are set out for the processing of internal reviews. Section 39 provides for internal review decisions to be communicated as soon as they have been made, but it does not set an overall time limit for making such decisions. This is crucially important, since otherwise public authorities might delay these reviews indefinitely. Furthermore, the draft Bill does not make it clear who is responsible for processing internal reviews. It is important that these not be simply a repeat of the original decision, but be made at a higher level within the same public authority.

Section 22 provides for a complaint to be lodged with the Commission. Hearing and determining complaints and appeals is one of the functions of the Commission, pursuant to section 6(1)(f). Section 22 does not describe the grounds upon which such complaints may be made, thereby leaving this completely open. These should be broad. However, they should not be completely open, but should, rather, be limited to breaches of the right to information law. Furthermore, section 22 does not set any procedural rules for the processing of such complaints. The Commission should have broad powers to set its own procedures, but at least a framework of rules – including as to timelines for both lodging and deciding complaints – should be set out in the law. The law should also make it clear that it is free to lodge complaints and that one does not need the services of a lawyer to pursue a complaint.

As noted, the draft Bill contains very detailed provisions on the establishment of the Commission. Guiding principles for the Commission are set out in section 7, including securing democratic values and promoting constitutionalism. Section 8 contains a clear statement to the effect that the Commission is an independent body. The system of appointments is described in sections 10 and 11. These include stringent positive eligibility rules for members – including meeting the

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requirements of Chapter Six of the Constitution, which sets out detailed rules on leadership and integrity – as well as strong prohibitions on membership – including not being a member of Parliament, a County Assembly, the governing body of a political party, or a local authority.

The process of making appointments involves a selection panel, comprised largely of officials, inviting applications from the public, which are to be published. It shall shortlist at least three candidates for the position of chairperson, and five candidates for the two other membership positions. These shall be forwarded to the President who, in consultation with the Prime Minister, shall nominate the exact number of candidates to the National Assembly. If the National Assembly rejects any candidate, the President and Prime Minister shall forward another nomination. If the National Assembly approves any candidate, the President shall formally appoint him or her. In making appointments, all of the relevant players shall ensure that at least one of the three appointees is from each gender, and shall otherwise observe the principles of regional and ethnic balance, and have due regard for the principle of equal opportunities for persons with disabilities. The salaries and allowances of members are set by the Salaries and Remuneration Commission. Similar protections are in place for the independence of the secretary of the Commission, who shall be its chief executive officer, although the members also serve on a full-time basis (see sections 18-19 and 13).

Pursuant to section 13, the tenure of members is six years and they are not eligible for reappointment. A position on the Commission becomes vacant if, among other things, the person is removed in accordance with the relevant provisions in the Constitution, or for a serious violation of the Constitution or any law, gross misconduct, physical or mental incapacity, incompetence or bankruptcy. Anyone may present a petition for removal to the National Assembly which, if it considers the petition to be well grounded, shall forward it to the President, who may suspend the member and appoint a tribunal, comprised mainly of judges, to consider the matter (sections 14-15).

Various of these provisions are contradicted by the First Schedule, which appears to have been cut and pasted from another law. Among other things, the First Schedule provides for a term of five years, which may be renewed, for at least eight members and for different grounds for removal of members from the main body of the law.

Funding for the Commission is appropriated on an annual basis by Parliament, and it may also receive grants and donations, as long as these do not seek to influence its decision-making (section 40). The Commission is required to observe various formalities in terms of reporting on revenues and expenditures (sections 42-43).

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This is a very robust system for ensuring the independence of the Commission, involving public nominations (or applications), a selection panel, publicity of applicants, the President, the Prime Minister and the National Assembly. At the same time, it is extremely complex, with very detailed and often stringent timelines (sometimes of just seven days), leading to an overall system which seems almost guaranteed to be breached in at least some of its provisions. Furthermore, it is not clear how, within a total number of three persons, all of the required balancing – for gender, regions, ethnicity and disability – could be respected.

The system for removals is also very robust but complex. It may not be practical or advisable to allow anyone to present a petition to the National Assembly calling for the removal of a member, which system could be abused to harass members. In some countries, the power of removal may only be initiated by a majority of members of the oversight body. Given the relatively small number of members being proposed in Kenya, this might be impractical. An option could be to give this power to another body, such as the Kenya Human Rights Commission or the relevant oversight committee within Parliament. Clearly the contradictions in the First Schedule need to be resolved.

Where a complaint has been lodged with the Commission, it has the power to require the concerned public authority to provide it with a report and to initiate an inquiry (section 22). In doing so, it has the powers of a court to compel the production of witnesses and information (section 23(1)). It is not clear, however, where the burden of proof lies when the Commission is deciding a complaint. Section 27, establishing the exceptions, refers to the need for a public authority to be satisfied that there is a risk of harm from disclosure, but this is not the same as requiring it to bear the burden of proof before the Commission.

Pursuant to section 23(2), where it is satisfied that there has been a breach of the law, the Commission may order the release of information, the payment of compensation, or any other “lawful remedy or redress”. These are broad powers but it is not clear what is covered by the residual power of the Commission to order any other lawful remedy. It would be preferable for the law to specify that the Commission has the power to impose various structural remedies on public authorities, where appropriate, for example due to flagrant or repeated breaches of the law. These could include, for example, a requirement to publish information on a proactive basis, to conduct training or to put in place more robust request processing systems.

Orders of the Commission may be filed in the High Court. Any person who is dissatisfied with such an order may appeal the same to the High Court within 21 days (section 23(3)). Where the Commission’s orders are not subject to appeal, the Commission may apply for leave to enforce them as a decree, in which case they are

subject to execution in the same manner as orders of the High Court (i.e. they become legally binding) (sections 23(4) and (5)).

**Recommendations:**

- Section 36 should make it clear that it refers to an internal review.
- The grounds for internal reviews should be broadened to include breach of the timelines.
- The procedures for internal reviews should set an overall time limit for decisions to be reached, for example of twenty days, and should make it clear that these decisions are made at a higher level than the original decision.
- The law should stipulate the grounds for making a complaint to the Commission, along with some basic procedural rules for the processing of such complaints, including timelines, that it is free to lodge complaints and that one does not need a lawyer.
- Consideration should be given to simplifying the process of appointments to and removals from the Commission, while maintaining the independence of members.
- The contradictions between the main provisions in the law and those in the First Schedule should be resolved.
- The law should make it clear that the public authorities bear the burden of proof in complaints before the Commission.
- Consideration should be given to spelling out in more detail the exact remedial powers of the Commission, in particular vis-à-vis public authorities.

Indicator		Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	1	36-39
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	2	22
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	2	2	10-11
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	2	40-45
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	2	10
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	2	22-23

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42	The decisions of the independent oversight body are binding.	2	2	23(4), (5)
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	2	23(2)
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	23(3)
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	0	
46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	4	4	22
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	0	22
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	1	23(2)
<b>TOTAL</b>		<b>30</b>	<b>22</b>	

## 7. Sanctions and Protections

The draft Bill provides, at section 50, that where a request has been made and the requester would have had a right to access the information, it is an offence to alter, destroy or conceal a record with the intention of preventing disclosure. This is useful but it does not go nearly far enough. These sorts of sanctions should apply for intentional obstruction of access regardless of whether or not the information is the subject of a request and, where there is a request, whether or not the specific information is subject to disclosure.

Section 26(10) provides protection for any person against sanction for releasing information under the law in good faith. It is not clear what sort of sanctions this would protect against; employment-related sanctions or also legal (civil or criminal) sanctions. This is supplemented by section 51, which provides that where information provided to a public authority by a third party is disclosed pursuant to the law, the information shall be considered privileged for purposes of defamation law (so that liability may ensue only where publication is made with malice). The provision is awkwardly drafted, but the intention appears to be to provide protection against defamation suits for officials who release information.

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Section 47 provides protection against any employment related sanction for whistleblowers (those who release information in the public interest) and also against legal sanctions for whistleblowing officials. The former applies whenever the person has a reasonable belief in the veracity of the information (section 47(3)). This is useful but this is a complex area and, in due course, a fully developed law on whistleblowers should be adopted.

**Recommendations:**

- The law should prohibit all forms of intentional obstruction of access, not just cases where the information is the subject of a request for information and is, pursuant to that request, supposed to be released.
- It should be clear that officials may not be subject to any sort of sanction – either employment-related or of a legal nature – for good faith disclosures pursuant to the law.
- Consideration should be given to redrafting section 51, so that its meaning is more precise and clear.

Indicator		Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	1	50
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	2	26(10), 51
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2	2	47
<b>TOTAL</b>		<b>8</b>	<b>5</b>	

**8. Promotional Measures**

Section 2 of the draft Bill defines an information officer as a dedicated official for purposes of the law and who in the first instance is the chief executive of the public authority and thereafter any delegated officer. There is, however, no independent requirement on public authorities to appoint information officers. It seems odd to

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put a substantive rule in the definitions. This may be enough to establish an obligation but it would be preferable to have a separate rule on this.

The functions of the Commission, as described in section 6, make it clear that this is the central body for promoting the right to information. Section 6(e), for example, refers to the Commission as the “chief agent of the Government” in this regard. Pursuant to section 6(c), the Commission is required to “inform and educate the public as to their rights under this Act” in various ways.

Section 48 establishes a system for ensuring minimum standards regarding the management of records. It requires all public authorities to maintain its records in a manner which facilitates the right of access and sets out various ways in which this should be done, including by computerising all records within three years. This is supported by section 49, which calls generally on all public authorities and private bodies to “operate and maintain digital records”.

This is useful, but it is not really a proper system for ensuring minimum record management systems, so much as a rather vague appeal to public authorities to do their bit in this area. What is needed here is to allocate responsibility to a central body for setting minimum record management standards, along with a requirement for all public authorities to bring themselves into compliance with these standards within a set period of time, say six months. The law could go further, and stipulate the areas that should be addressed by the standards, or leave this up to the designated central authority. This authority should have the power to revise these standards from time-to-time, triggering an obligation on all public authorities to implement the new standards.

The goal of computerising all records within three years is a commendable one, but almost certainly unrealistic. It might be more realistic to ask public authorities to ensure that, within three years, all new records are available in electronic format.

Pursuant to section 28(1)(a)(vi), public authorities are required to produce guides listing the classes of documents that they hold, their subjects and the location of any indexes which may be consulted. This is very useful to facilitate the right to information but it falls short of the better practice standard found in the CLD/AIE Rating, which requires public authorities to maintain lists of all documents in their possession.

The draft Bill fails to impose an obligation on public authorities to ensure that their staff receive appropriate training on implementation of the law.

Pursuant to section 46, all public authorities are required to provide annual reports to the Commission on implementation of the law over the previous year. These must



include information about the number of requests received, processed and refused, along with reasons, the number of applications for review and the reasons for each denial, the average number of days taken to process requests, the total amount of fees and the number of staff devoted to implementation. More detailed information about could be required to be provided, including about the efforts of the public authority in the areas of proactive publication, training and record management. It should also be clear that these reports are to be made available, including on the Internet.

The Commission, in turn, is required to provide an annual report on implementation of the law to the minister who shall then lay it before Parliament (section 45). It would be useful to provide a link between this report and the section 46 reports, as well as to provide at least a bit more detail regarding what these reports should contain.

**Recommendations:**

- The substantive body of the law should include a specific obligation for public authorities to appoint information officers.
- Section 48, on record management, should go beyond a general call on public authorities to keep their records in good condition and put in place a specific system for establishing and enforcing minimum record management standards.
- Consideration should be given to replacing the obligation to computerise all records with an obligation to computerise all new records.
- Consideration should be given to requiring public authorities to maintain full lists of the documents that they hold.
- A provision requiring public authorities to provide appropriate training for their staff on implementation should be added to the law.
- Consideration should be given to adding more detail to the law regarding what must be contained in the annual reports provided by public authorities to the Commission, and they should be required to be published.
- Consideration should be given to making it clear that the Commission’s annual report is to provide an overview of the information in the annual reports provided by public authorities, as well as to indicate at least in an overview manner what else should be contained in these reports.

Indicator	Max	Points	Article
54 Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	2	2
55 A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	2	6

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56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	2	6(c)
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	1	47, 48
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	1	28(1)(a)(vi)
59	Training programmes for officials are required to be put in place.	2	0	
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	2	46
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	2	45
<b>TOTAL</b>		<b>16</b>	<b>12</b>	

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