

**THE COMMISSION ON
ADMINISTRATIVE JUSTICE**



**Handbook on
Best Practices on Implementation
of Access to Information
in Kenya**

Commission on Administrative Justice
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Foreword

The Commission on Administrative Justice (CAJ) is the oversight agency of the right to access to information as provided for by the Access to Information Act, 2016. The Act requires all public entities and relevant private bodies to disclose information upon public request in line with Article 35 of the Constitution of Kenya. This is not only good for the promotion of democracy and good governance but the socio-economic development of our country.

CAJ in partnership with USAID's AHADI program developed this handbook on Best Practices on the Implementation of the Access to Information Act as a sourcebook for the Commission, public institutions, county governments and the general public.

This handbook enables access to information held by the state and promotes routine and systematic information disclosure.

It has incorporated views from key stakeholders in both the public and private sector. It was also informed by international best practices and standards on the right to information to guide its application in the Kenyan context.

The Commission is confident it will provide operational guidance to the users, and serve as a valuable resource for illustrations on best practices in the implementation of the access to information law.

Signed this 27th day of August 2018



HON. FLORENCE KAJUJU, MBS
CHAIRPERSON OF THE COMMISSION

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Executive Summary

This handbook provides an overview of the legal framework on access to information in Kenya and the Access to Information Act, 2016. Importantly, documents illustrations of best practices in the implementation of access to information legislation from different countries.

The handbook is designed as a ‘how-to’ guide for public officers, access to information practitioners as well as those working for public entities and private bodies implementing the Kenya Access to Information Act, 2016. It is the first point of reference on both the legal framework on access to information in Kenya and global best practices on implementation of access to information laws.

The handbook was developed through research studying the implementation of access to information laws in five countries, in different regions and through interviews with key stakeholders in Kenya. The best practices from the eight countries have been captured in the handbook and are nuanced with Kenyan perspectives from the interviews with key stakeholders. The best practices are not prescriptive but rather provide operational guidance to public entities implementing the Access to Information Act, 2016.

The handbook is organized in six sections. Section one outlines the legal framework on the right to access to information in at the global, regional and national level. Section two provides an overview of the access to information terminology, how information is to be accessed, enforcement of the right of access to information, sanctions for violation of the right and the obligations of public entities. Section three documents best practices in the implementation of access to implementation laws. The practical illustrations are provided in text boxes on a pink background. The section also documents best practices from Mexico on implementation of the access to information law in devolved settings. Section four documents the sequence of implementation activities undertaken in three countries. It seeks to offer guidance on the question ‘how do we start?’ Section five contains relevant tools for the implementation of the Act. Finally, section six contains case law from Kenya and other jurisdictions relating to access to information.

We hope the handbook provides operational guidance and serves as a resource in the implementation of the Kenya Access to Information Act, 2016.

1.0 Legal framework on the right of access to information

1.1 Global and regional framework on the right of access to information Key points

- International Covenant on Civil and Political Rights, at Article 19 encompasses the right of access to information held by public bodies.
- Convention on the Rights of the Child guarantees the right of access to information for children in Articles 12 and 13.
- Convention on the Rights of Persons with Disabilities at Article 21 requires States to specifically guarantee the right of access to information to persons with disabilities.
- Convention on Elimination of All Forms of Racial Discrimination Article 5 requires the States to eliminate racial discrimination in freedom of expression including the right of access to information.
- African Charter on Human and Peoples' Rights at Article 9 guarantees the right of every individual to receive information.
- UN Convention Against Corruption underscores the role of information in fighting corruption and requires States to ensure the public has effective access to information.
- African Convention on Combating and Preventing Corruption requires States to ensure the realization of the right of access to information for the eradication of corruption.

The Universal Declaration of Human Rights (UDHR) was the first international instrument to guarantee the right of access to information. Article 19 provides for the right to seek and receive information and ideas.¹ While Article 19 does not explicitly mention the right of access to information, the right to seek and receive information and ideas is understood to encompass the right to information, that is the right to request and be given information held by public bodies.²

Article 19 of the UDHR laid the foundation for the development of the right of access to information in legally binding treaties at the global and regional level.

1.1.1 International Covenant on Civil and Political Rights

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right of everyone to freedom of expression, which includes freedom to seek, receive and impart ideas of all kinds regardless of frontiers, in writing or print or the form of art or through any media of his choice.³ Although the right of access to information is not expressly mentioned, there is general acceptance that freedom of expression includes the right of access to information.⁴

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 (III) A.

² T McGonagle 'The development of freedom of expression and information within the UN: leaps and bounds or fits or starts?' in T McGonagle & Y Donders *The United Nations and freedom of expression and information: critical perspectives* (2015) 41.

³ *International Covenant on Civil and Political Rights*, 16 December 1966, entered into force 23 March 1976, UNTS, 172, Art. 19(2).

⁴ UN Human Rights Committee, *General Comment 34, CCPR/C/GC/34, paras 18 & 19, Office of the High Commissioner for Human Rights, Special Procedures*, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (20 November 2017).

1.1.2 Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) guarantees the right of access to information for children and requires States to ensure that children capable of forming views have a right to express those views in matters affecting the child, taking into account the child's age and maturity.

Children are also guaranteed the right to seek, receive and impart information and ideas regardless of frontiers, in writing or print and the form of art or through any media of their choice.⁵

1.1.3 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities at Article 21 requires States to ensure that persons with disabilities can exercise their right of access to information by providing information intended for the public in accessible formats and technologies appropriate to different kinds of disabilities without additional costs. It also requires States to accept and facilitate the use of sign language, Braille, augmentative and alternative communication to ensure access to information for persons with disabilities.⁶

1.1.4 Convention on Elimination of All Forms of Racial Discrimination

Similarly, the Convention on Elimination of All Forms of Racial Discrimination (CERD) in Article 5 requires state parties to eliminate racial discrimination in the enjoyment of among other rights, the right to freedom of expression and opinion.⁷ The CERD general recommendation 35 further elaborates on the right of access to information.⁸

1.1.5 United Nations Convention Against Corruption

The United Nations Convention against Corruption underscores the role of information to society in the prevention of and fight against corruption. To this end, the Convention requires State Parties to take appropriate measures to secure the participation of individuals and groups outside the public sector such as community-based organizations, civil society organizations and non-governmental organizations in the prevention of and fight against corruption by ensuring the public has effective access to information.⁹

1.1.6 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) at Article 9(1) guarantees the right of every individual to receive information.¹⁰ While the right of access to information is not expressly provided for, the 2002 Declaration of Principles on Freedom of Expression in Africa elaborates on the right of freedom of expression and provide that States must guarantee access to information held by public bodies and that held by private entities where it is necessary for the exercise of a right.¹¹

5 *Convention on the Rights of the Child*, 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3 Art. 12 & 13.

6 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, entered into force 3 May 2008 Art. 21. 7 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, entered into force 4 January 1969, 660, UNTS, 195, Art. 5.

7 *UN Committee on the Elimination of Racial Discrimination (CERD)*, General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/G^{C/35}.

8 *UN Convention Against Corruption* 31 October 2003, A/58/422, available at <http://www.refworld.org/docid/4374b9524>.

9 HTML [accessed 03 April 2018]

10 *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Art. 9 (1).

11 *African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October 2002: Banjul, The Gambia.

1.1.7 African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption at Article 9 requires States to adopt legislation and other measures for the realization of the right of access to information required in the eradication of corruption and related offences.¹²

This international and regional legal framework on the right of access to information forms part of Kenyan law under the Constitution, 2010.

1.1.8 Global Instruments on the Right of Access to Information

The global and regional framework is supplemented by several soft law references.

The Tshwane Principles on the Right to Information and National Security seek to shield the right to information and ensure that the public has access to information held by governments while not endangering legitimate government interests to protect people from national security threats. Under the Principles, while governments may legitimately withhold information to protect narrowly defined national security interests, information relating to violations of human rights, humanitarian war, perpetrators of torture, crimes against humanity and locations of secret prisons must never be withheld.¹³

The Commonwealth Freedom of Information Principles recognizes the importance of public access to official information in promoting transparency and accountable governance and to encourage citizens' full participation in governance.¹⁴ The Commonwealth also has model draft law to guide member States, which draws from the Freedom of Information Principles and existing laws in member States.¹⁵ Significantly, Sustainable Development Goal 16 on peace, justice and strong institutions embraces the right to press freedom and information as important to its achievement.¹⁶

1.2 Right of access to information in Kenya

1.2.1 Constitution of Kenya, 2010

Key points

- Right of access to information is guaranteed to citizens only.
- The right places on the State two sets of obligations – active and passive transparency.
- The right is not absolute and law may limit access to information.
- The right has horizontal application in that it places obligations on private persons and entities
- The right of access to information is specifically guaranteed for persons with disabilities

Article 35 of the Constitution guarantees the right of access to information as a self-standing right independent of freedom of expression.

Article 35 provides:

- (1) Every citizen has the right of access to-
 - (a) Information held by the State; and
 - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.'

- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicize any important information affecting the nation.

First, the right to access to information is guaranteed only for citizens. The Constitution of Kenya, 2010 does not define ‘citizen’ and construes citizenship as only applying to natural persons.¹⁷ Notably, there is developing jurisprudence from the High Court in, which some instances the courts broadened the concept of citizenship to encompass juristic persons, while in other instances the Courts have adopted the express textual formulation in the Constitution that only includes natural persons.

Second, the right of access to information is a general right that encompasses the overall volume of information held by the State, except information exempted from access by statutory law in line with the general limitations clause based on human dignity, equality and freedom.

Third, the Constitution articulates two sets of obligations of the State concerning the right. The obligation of active transparency contained in Article 35(3) of the Constitution which imposes on the State a mandatory duty to proactively publish and publicize information affecting the nation. The passive transparency obligation is contained in sub-article (1), which imposes an obligation on the State to ensure access to sources of information including information held by private persons, where such information is necessary for the protection of rights.

Fourth, every person is entitled to a right to have information about him or her corrected or deleted if it is untrue or misleading and affects the person.

Fifth, the right has horizontal application as it places obligations on relevant private persons and entities.

Additionally, the Constitution guarantees the right of access to information to persons with disabilities.¹⁸ The Constitution also guarantees the right to privacy, right to a fair hearing, political rights and economic, social and cultural rights, which draw from the right of access to information.¹⁹

The above provisions of Article 35 of the Constitution are further concretized in the Access to Information Act, 2016, highlighted below. The County Government Act, 2012 sets out obligations of county governments regarding access to information. Several other national laws also relate to access to information.

1.2.2 Access to Information Act, 2016

The Access to Information Act 2016 is the primary legislation on access to information in Kenya.

The Act lists the objectives as to achieve openness and transparency in the activities of public bodies and private bodies through proactive disclosure of information and information requests; to protect of persons who disclose information of public interest in good faith and to provide a framework to facilitate public education of the right of access to information. A detailed discussion on the Act is carried out in Section two of this handbook.

¹⁷ See, Chapter Three, Constitution, 2010 on citizenship.

¹⁸ 18 Article 54(c) Constitution, 2010.

¹⁹ Article 31, Article 50, Article 38 & Article 43 Constitution, 2010.

1.2.3 County Government Act, 2012

As pointed out above, while the Access to Information Act, 2016 applies to both the national and county government, the County Government Act, 2012 places specific obligations on county governments regarding the right of access to information. Section 96 exclusively addresses itself to access to information held by county governments, unit or department of the county and requires county governments to designate an office to enhance access to information. The Section further obligates county governments to pass legislation to guarantee access to information.²⁰

Several other provisions in the Act invoke the right of access to information. These include the county government principle of public participation which is the bedrock of devolved governance and is preconditioned on access to information, data, documents and other information related to policy formulation and implementation.²¹ Additionally, the county media is obliged to observe access to information,²² while the county communication framework is required to facilitate public communication and access to information.²³

1.2.4 Kenya Information and Communication Act

The Kenya Information and Communication Act allows for access to information held by the Communication Authority of Kenya for purposes of performing its statutory functions.²⁴

1.2.5 Public Finance Management Act

The Public Finance and Management Act, which provides for effective oversight of public finances both in the national and county governments, makes specific reference to Article 35 of the Constitution and mandates publishing and publication of all reports of the parliamentary budget office 14 days after their production.²⁵

1.2.6 Ethics and Anti-Corruption Commission Act

The Ethics and Anti-Corruption Commission Act at Section 29 also echoes Article 35 of the Constitution and provides access to information for citizens outlining the procedure for requests for information. The Act requires the Commission to publish and publicize information within its mandate affecting the nation under the right of access to information in the Constitution.²⁶ The Act nonetheless introduces a requirement that every member and employee of the Commission must sign a confidentiality agreement.²⁷

1.2.7 Public Archives and Documentation Service Act

The Public Archives and Documentation Service Act which regulates the preservation of public archives and public records provides for public access to public archives which were accessible to the public before their transfer to the National Archives.²⁸

20 County Government Act, Section 96: (1)Every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other State organ in accordance with Article 35 of the Constitution. (2) Every county government and its agencies shall designate an office for purposes of ensuring access to information required in subsection (1). (3) Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information.

21 Section 87, County Government Act.

22 Section 93, County Government Act

23 Section 95, County Government Act

24 Section 93, Kenya Information and Communication Act.

25 Section 10 (f) Public Finance Management Act.

26

27 Section 29(5) Ethics and Anti-Corruption Act.

28 Section 6(4) Public Archives and Documentation Service Act.

2.0 Access to Information in Kenya

2.1 Access to information terminology

2.1.1 Citizen

Key point

- Citizen includes both natural and juristic persons.

The Act defines a citizen as any individual holding Kenyan citizenship and any private entity that is controlled by one or more Kenyan citizens.²⁹ The Act thus broadens the concept of citizenship to include firms and corporate entities.

2.1.2 Edited copy

Key point

- A document may be accessible subject to exempt information being deleted.

The Act allows for access to documents from which exempt information has been deleted.³⁰ This should be viewed in light of the need to balance the right to access to information against other rights such as privacy and human dignity.

2.1.3 Records

Key point

- Records refer all sources of information including those generated in digital form.

Records mean documents or other sources of information compiled, recorded or stored in written form including those generated by, transmitted within and stored in an information system.³¹

2.1.4 Exempt information

Key Point

- The right of access to information is not absolute and certain information may be lawfully withheld.

The Act recognizes that certain information may be lawfully withheld by a public entity or private body, although such information must be contemplated in Section 6.³²

2.1.5 National security

Key point

- National security is a ground for limiting access to information.

National security refers to protection against internal and external threats to Kenya's territory and sovereignty, its people, their rights and freedoms, property, peace, stability and prosperity and other national interests.³³

²⁹ Section 2, *Access to Information Act, 2016*.

³⁰ *As above*.

³¹ Section 2 and 17, *Access to Information Act, 2016*.

³² Section 2, *Access to Information Act, 2016*.

³³ Article 238(1) *Constitution, 2010*.

2.1.6 Personal information

Key point

- Personal information refers to information about an identifiable individual.

The Act defines personal information broadly to include information relating to race, gender, marital status, pregnancy status, age, social origin, mental health, language, birth, religion, culture as well as information on education, medical or criminal or employment history. It also includes information relating to financial transactions an individual has been involved in, a person's views or opinion over another person, correspondence sent by the individual that is explicitly or implicitly confidential and contact details of an individual.³⁴

2.1.7 Private body

Key points

- Private bodies are non-state actors.
- Private bodies are required to disclose the information if it is necessary for the protection of any right or freedom.

The Act distinguishes two classes of private bodies: (i) those that receive public funds or carry out public functions or services or those bodies that have exclusive contracts to exploit natural resources; and (ii) those that possess certain information which of significant public interest even if they do not receive public funds or carry out public functions or services.³⁵

The qualification that private bodies are only obliged to give information necessary for the exercise or protection of a fundamental right is important.

2.1.8 Public entity

Key point

- Public entity means offices in the national and county governments or the public service.

Public entity refers to offices in the national and county governments including entities performing a function within a commission, agency of any other body established by the Constitution.³⁶

2.1.9 State

Key point

- State means organs and entities comprising the government of the Republic of Kenya.

State refers to the organs of government; the Executive, Parliament and the Judiciary and other entities comprising the government.³⁷ These organs should disclose information held.

³⁴ Section 2, Access to Information Act, 2016

³⁵ As above.

³⁶ Section 2, Access to Information Act, 2016 & Article 260 Constitution, 2010

³⁷ Article 260, Constitution, 2010.

2.1.10 Information

Key Point

- Information means all records.

Information means all records held by a public entity or private body regardless of the manner of storage, source or the date the record was produced. This essentially means that all records even those produced before the promulgation of the Constitution, 2010 and the coming into effect of the Access to Information Act, 2016 are subject to the right of access to information.

2.2 Accessing information

2.2.1 Who is entitled to access information?

Key points

- Citizens both natural and corporate are entitled to access information.
- No justification is required to access information.

The Act acknowledges the right of access to information to citizens. Citizen is defined as persons holding Kenyan citizenship and any private entity that is controlled by one or more Kenyan citizens. In this regard, the right of access to information extends to both natural and juristic persons. The exercise of the right does not depend on the nature of the interest the applicant may or may not have in obtaining the information requested.

Example: Katiba Institute v President Delivery Unit and 3 others [2017] eKLR [Right to information extends to juristic persons]

Katiba Institute deponed that the President Delivery Unit on diverse dates in 2017 published advertisements in the media, through billboards and in business messaging or tags. Katiba Institute then wrote to the President Delivery Unit seeking information on how many advertisements had been published, the total cost incurred as well as the government agency that met the cost. Katiba Institute argued that the respondents refused and failed to supply the information sought under Article 35(1) and violated the values and principles enshrined under Article 10 of the Constitution especially the rule of law, good governance, transparency and accountability. The determination of the case made a great variation from the earlier cases. The learned judge considered that the Access to Information Act under Section 2 considers a citizen to include a juristic person whose director(s) is a citizen. The court further stated that under Section 21 of the Act it was not a condition precedent for the petitioner to first file a complaint with the Commission of Administrative (CAJ). The court ordered that the information be availed to the petitioner.

As stated above, this case made a great variation from earlier cases in which the Courts has interpreted the right of access to information as only restricted to natural (human) persons.³⁸

³⁸ See *Famy Care Limited v Public Procurement Administrative Review Board and Another [2012] eKLR* where the High Court restricted the concept of citizenship for purposes of access to information to only natural persons. Similarly in *Nairobi Law Monthly Limited v Kenya Electricity Generating Company and 2 others [2013] eKLR*, the High Court upheld the restrictive interpretation. See also *Nelson O Kadison v Advocates Complaints Commission and another [2013] eKLR* and *Friends of Lake Turkana Trust v Attorney General and 2 others [2014] eKLR*

2.2.2 Entities required to disclose information upon request

Key points

- All public entities should disclose the information except in instances in which information is exempt.
- Private persons and bodies should disclose information for exercise and protection of rights and freedoms

The obligation to grant information extends to the three branches of the State, that is, Executive, Judiciary and Parliament. This also includes both the national and county governments and independent and constitutional commissions.

Private persons and entities are also required to disclose information when the information is required for the exercise and protection of fundamental rights and freedoms.

Example: John Harun Mwau v Linus Gitahi and 13 others [2016] eKLR [Private persons and entities required to disclose information for exercise and protection of fundamental rights]

Harun Mwau has been accused in a report published by the Nation Media Group of owning a container full of 1.1 tonnes of cocaine impounded in Malindi. Subsequently, the US imposed sanctions against Mwau. Mwau moved to Court seeking information from those who had implicated him. He argued that the information he sought was necessary to protect his rights to human dignity, privacy and life. The Court was invited to determine if Mwau was entitled to information on the location of the depot where the container was being held, the actual person who impounded it, the serial number and shipping line and the consignee under Article 35. The Court ruled that all the information held had to be disclosed as it was needed to protect another right.

2.2.3 Information subject to disclosure upon request

Key points

- The Act makes a general presumption in favour of disclosure
- A public entity or private body is deemed to hold information based on possession and competence

All records held by a public entity or a public body regardless of the form in which the information is stored, its source or date of production. This implies both documentary and non-documentary information. Records include plans, maps, drawing, diagram, painting or graphics, photography, microfilm, sound recording, video cassette and any other item conveying information.

The concept of 'information held' by the State or another person, implies 'held' based on possession of the information or competence of the body.

2.2.4 Information subject to disclosure without request [Proactive disclosure]

Key points

- Public entities must disclose certain information proactively.
- This information should be updated annually.

Public entities are required to actively disclose certain information and update that information annually. The information includes information about a public entity, its services, mandate and powers, information on its decision-making processes, salary grades of its employees its policies and procedures, how it deals with the public and other entities and information on public procurement upon signing a contract for goods or services.

2.2.5 Information which is not subject to disclosure/ limitations of access to information

Key points

- Categories of information may lawfully be exempt from disclosure.
- All exemptions are subject to the public interest.
- Information held for more than 30 years cannot be exempted from disclosure.

The Act creates a general presumption in favour of access to information. It does not extend limitation to the overall volume of information held by any given public entity or private body as a whole, but limits access to categories of information protecting various interests. The protected interests are national security, personal privacy, commercial interests, court proceedings, the national economy and professional confidentiality.³⁹

Even then, public interest trumps the protected interests. The Act recognizes the need for balance between the protected interests and public interest by providing that information exempted from access may be disclosed when public interest outweighs the protected interests and defers such determination to the courts.⁴⁰ The Act links public interest to the promotion of accountability of public entities to the public and debate over public issues, ensuring effective oversight of public funds expenditure; public information on public health or safety to the environment, and ensuring that a statutory authority with regulatory responsibilities is adequately discharging its responsibilities.⁴¹

The limitations do not apply to information that has been held for over 30 years.⁴²

2.2.6 Exercising the right of access to information

Key points

- Information must be requested for from the public entity or relevant private body.
- Information already published will not be given following an information request.
- Application must be in writing.
- The Act imposes strict timelines for processing information requests.
- Reasons must be given for refusal to grant access to information.
- Transfer of requests must not delay the grant of the information requested.
- Fees payable must only relate to reproduction and supplying the information.
- The right of access to information includes the right to correction or deletion of inaccurate personal information

The right of access to information is not a self-propelling right, hence a citizen must request for the information from a public entity or the relevant private body.

First, the requestor of the information should find out whether the information needed has already been published by the public entity, if it has, there is no need to make an information request.

³⁹ Section 6 (1) (2), Access to Information Act, 2016.

⁴⁰ Section 6 (4), Access to Information Act, 2016.

⁴¹ Section 6(6), Access to Information Act, 2016.

⁴² Section 6(7), Access to Information Act, 2016.

Public entities are not obliged to give supply information to a requestor if the information is reasonably accessible by other means.⁴³

Example: Kahindi Lekhalile and 4 others v Inspector General National Police Service and 3 others [2013] eKLR [Information must first be requested from the public entity holding it]

Kahindi Lekhaile and others sought to have an audit of the ivory stock in the country that is that held by the Kenya Wildlife Service and other private establishments pursuant to reports that such ivory may have found its way to the illegal market. Kahindi and others moved to Court requesting for this information. The issue for determination by the Court was whether the Court was the appropriate place of the first instance to seek the information and whether the petitioners were entitled to the information. While ruling that a person seeking information must first do so to the public entity holding the information and be denied, the Court noted that the right of access to information was not self-propelling and a person must request for information to exercise the right.

An application for information request should be written in English or Kiswahili and should provide sufficient details and particulars to enable the public officer to understand the information requested.⁴⁴

Applicants who are unable to make written requests due to illiteracy or disability should be assisted, such requests reduced to writing and the applicant be furnished with a copy of the written request.⁴⁵

Public entities may prescribe a form for making requests but such a form should not occasion delay in exercising the right.⁴⁶

Information requests to be processed as soon as possible but within 21 days. Requests relating to life or liberty of the person are to be processed within 48 hours. The Act allows for an option to extend from 48 hours to no more than 14 days if large amounts of information are required and if the consultations are necessary which cannot be done within 48 hours.⁴⁷

Upon receipt of information request, an information access officer has two corresponding duties: (i) duty to inform if the public entity holds the information requested; and (ii) if it holds the information to communicate to the person requesting if the information request is approved.⁴⁸

If the request for information is declined, the reasons for the decision must be given including a justification for deciding the information is exempt unless the information is expressly categorized as such. The information requestor must also be notified of the appeal mechanisms to the office of the Ombudsman.⁴⁹

Example: Zebedeo John Oporo v The Independent Electoral and Boundaries Commission [2017] eKLR [Justification required for refusal to grant access to information]

The Petitioner requested from the 1st Respondent records and documents in their custody of the elections of the Bonchari Member of National Assembly seat held on 8th August 2017. The documents requested for by the petitioner included the number of voters identified by the electronic voter identification devices at every polling station; Copies of Forms 32A (Voter Identification & Verification Forms) at every polling station;

⁴³ Section 6(5), Access to Information Act, 2016.

⁴⁴ Section 8(1), Access to Information Act, 2016.

⁴⁵ Section 8(2) & (3), Access to Information Act, 2016

⁴⁶ Section 8(4), Access to Information Act, 2016.

⁴⁷ Section 9(1),(2) & (3), Access to Information Act, 2016

⁴⁸ Section 9(4), Access to Information Act, 2016

⁴⁹ As above.

Polling Station Diaries as prepared and submitted by the respective presiding officers at every polling station to file an election petition. The issue before the court was whether the Respondent had established that the refusal to grant access to information is justified under the exceptions under Section 6 of the Access to Information Act.

The court held that the refusal to grant access must be reasonable and justifiable. The court found that the respondent had violated the right of access to information and ordered that the petitioner be granted access into the requested forms.

The Act establishes a general presumption that any information request not responded to within 21 days is denied.⁵⁰

If a public entity does not have the information requested, an information access officer may transfer the application to another relevant entity that holds the information requested. The transfer is to be done within 5 days. The information access officer is required to inform the applicant of the transfer of the request within 7 days from the date the application was made.⁵¹

The public entity to which the information request is transferred is mandated to decide on the request within 21 days since the first application was made.⁵²

Once an information request is approved, the information access officer should within 15 days from the date application furnish the applicant with a written response advising that the information request was approved, where necessary that the information will be contained in an edited copy, fees to be paid and mode of payment proposed mode of accessing the information and that an appeal could be made to the office of the Ombudsman on the fees payable and proposed mode of access.⁵³

Once the fee is paid, the information access officer is required to provide the information to the office or permit relevant inspection of the information within 2 days of payment. Information is to be made accessible at the place it is kept and to be inspected in the form it held. The costs of any copying, reproduction or conversion to sound transmission are to be paid by the applicant.

Fees in the context of information requests are only to be levied to the actual cost of making copies of the information and supplying the information.⁵⁴

The right to access to information includes the right to correction or updating or annotation of inaccurate personal information. A request to correct information is to be made in writing to the public entity responsible for the maintenance of the record system stating it is a request to amend, identifying the personal information to be amended and the remedy sought by the applicant. No fee is to be charged for correction, updating or annotation of out of date or inaccurate personal information.⁵⁵

⁵⁰ Section 9(5), Access to Information Act, 2016.

⁵¹ Section 10(1) & (2), Access to Information Act, 2016.

⁵² Section 10(3), Access to Information Act, 2016.

⁵³ Section 11(1), Access to Information Act, 2016.

⁵⁴ Section 12(1) & (2), Access to Information Act, 2016.

⁵⁵ Section 13(1) & (2), Access to Information Act, 2016.

2.3 Enforcing the right of access to information

2.3.1 Reviews and Appeals

Key points

- An appeal on refusal to grant information can be made to the Commission on Administrative Justice.
- An appeal of the decision of the Commission on Administrative Justice can be made to the High Court.
- Decisions of the Commission on Administrative Justice are binding.

The Act establishes a two-tier review/appeal system. In the first instance, an appeal may be made on a decision to refuse to grant access to information, or grant edited information, defer providing access to information, the decision relating to fees imposed, decision purporting to grant access but not granting access, granting information only to a specified person and decision refusing to correct, update or annotate information. The appeal to the Commission on Administrative Justice should be filed within 30 days from the day the decision was notified to the applicant. The commission may extend the period. The commission can also review decisions on proactive disclosure upon request or its motion. Upon review, the commission can order the release of information withheld unlawfully, recommend payment of compensation or any other lawful remedy.

The decisions of the office of the Ombudsman are binding on national and county governments and can be executed through the High Court, in a like manner as a High Court order.

The second tier appeal mechanism lies in the courts. A person not satisfied with the decision of the Commission can appeal the decision in the High Court within 21 days.

2.3.2 Oversight

Key points

- Commission on Administrative Justice is charged with overseeing and enforcing implementation of the Act.
- Public entities and private bodies should submit reports to the Commission on their implementation of the Act.

The implementing agency is the Commission on Administrative Justice has one Commissioner designated as the Information Commissioner.

The Commission is mandated to investigate complaints relating to access to information, receive reports from public institutions to monitor compliance with the Act, facilitate public awareness, work with public entities to promote the right to access to information, monitor state compliance with its international obligations in the context of the right of access to information, review decisions arising from violations of the right of access to information and promote data protection.

Public entities and relevant private bodies are also required to furnish the Commission with annual reports on the number of requests for information received and those processed, the number of declined requests and the reasons for declining, the average number of days taken to process requests, fees collected from information requests and number of full-time staff deployed to process information requests and total expenditure of the entity in processing requests.

2.4 Protection of whistleblowers

Key points

- The Act protects persons who disclose information in public interest from penalization.
- Any penalty imposed is actionable in tort.
- Confidentiality agreements with information subject to disclosure are unenforceable.

The Act insulates from penalty persons who make or propose to disclose information obtained in confidence in the course of employment, profession, voluntary work or by holding office if the disclosure is made in the public interest.

What are public interest disclosures? These are disclosures:

- i. To law enforcement agencies or an appropriate public entity.
- ii. On violations of law including human rights, mismanagement of funds, conflict of interest, corruption, abuse of public office.
- iii. On dangers of public health, safety and environment.

Penalization includes dismissal, discrimination, made the subject of reprisal or other forms of adverse treatment, denial of appointment, promotion or advantage that would otherwise have been provided.

The Act also deems unenforceable settlements to claims that arise out of obligations of confidentiality in respect of information which is accurate and which was proposed to or was disclosed.

Significantly, Kenya is in the process of enacting specific legislation for the protection of whistleblowers, the Kenya Whistleblower Protection Bill. The Bill has however not been submitted to the National Assembly as of April 2018.

2.5 Sanctions

The Act imposes sanctions as follows:

	Person/ entity	Offence	Sentence upon conviction	
			Fine (Kshs) (up to)	Term of imprisonment (not exceeding) or both
1.	Information access officer	Refuse to reduce oral applications into writing (Sec. 28(3))	50,000	3 months
		Refuse to accept an information request (Sec. 28(3))		
		Failure to respond to information request within the stipulated time (Sec. 28(3))		
		Failure to provide information that is capable of being read heard or viewed by an applicant with disability (Sec. 28(3))		
2.	Person	Charging a fee exceeding the actual cost of making copies (Sec. 28(4))	100,000	6 months
		Failing to respond to information required for the protection of a right (Sec. 28(4))		
		Failing to respond to a request to correct personal information or to correct, delete, destroy or annotate information within a reasonable time (Sec. 28(4))		
3.	Person	Knowingly disclose information under the exemption clause (unless in the public interest) (Sec. 28(1))	1,000,000	3 years
4.	Person	Altering, defacing, concealing or erasing records with intent to prevent disclosure of information (Sec. 18) & Sec 28(5)	500,000	2 years
5.	Private body	Failure to make publicly available the name and contact of the information access officer (Sec. 28(5))	500,000	-
6.	Person	Providing false information intended to injure another person	500,000	3 years
7.	Person	Fails to attend proceedings before the Commission in line with a summons issued (Sec. 28(8))	300,000	3 Months
		Fails to attend proceedings before the Commission in line with a summons issued (Sec. 28(8))		
		Causes obstruction or disturbance in the course of proceedings before the Commission (Sec. 28(8))		
8.	Person to whom information is disclosed	Conveying to others altered information conceals some information, misrepresents the information with the intent to deceive (Sec. 28(10))	200,000	1 Year

2.6 Reporting obligations for public entities

Key points

- Public entities are required to submit an annual report to the Office of the Ombudsman.
- The Act requires that the report be submitted on or before June 30 each year.
- The Act imposes specific requirements on the content of the report.

The Act requires public entities to submit to the Office of the Ombudsman annual reports on or before 30th June a report covering the preceding year which shall include: the number of requests received by the entity and the number processed; the number of determinations in which the public entity declined to release information and the main grounds for these determinations; average the number of days taken by the public entity to process different types of requests; the total amount of fees collected in processing requests; and the number of full-time staff in the public entity assigned to processing information requests and the total cost incurred by the entity for processing information requests.

2.7 Data Protection

Key points

- Data protection seeks to protect the right to personal privacy and autonomy of the individual.
- The Act confers on the Office of the Ombudsman powers to request for and receive reports on the protection of the right to data protection.

The concept of data protection is premised on the protection of the right to personal privacy and autonomy of the individual. As relates to personal privacy, the right to privacy is closely linked to the protection of one's identity. The autonomy of the individual ideally means that natural persons should have control of their own personal data.⁵⁶

The Act provides for correction of personal information held by public entities and private bodies in instances in which such information is out of date, inaccurate or incomplete. The Act also provides a procedure for the correction of personal information.⁵⁷

In the specific context of data protection, the Act makes express references to data protection in the functions of the Office of the Ombudsman. Section 21 confers on the Office of the Ombudsman the power to request and receive reports from public entities relating to the implementation of the Act on data protection and to assess those reports on the protection of personal data.⁵⁸ Section 21 requires the Office of the Ombudsman to work with other regulatory bodies on legislation for promotion and compliance with data protection measures.⁵⁹

As of May 2018, the Data Protection legislation is yet to be passed. A Data Protection Bill and policy are currently in the process of development.

⁵⁶ Y McDermott 'Conceptualising the right to data protection in the era of Big Data (2017) *Big Data and Society*

⁵⁷ Section 13, *Access to Information Act*.

⁵⁸ Section 21(1)(b), *Access to Information Act*.

⁵⁹ Section 21(1)(d), *Access to Information Act*.

3.0 Implementing access to information – Best practices

This section highlights best practices and lessons from India, Mexico, South Africa, the United Kingdom and Uganda which could be considered and adopted under the ‘good fit’ approach for public entities and relevant private bodies implementing the Kenya Access to Information Act.

3.1 Best Practices in processing information requests

The Access to Information Act, 2016 lays down an elaborate framework for processing information requests. First, the Act designates all chief executive officers as information access officers.

Second, it sets out the application process that requires that applications must be in writing in English or Kiswahili providing sufficient details for the information access officer to understand the information requested.

Third, it sets out strict timelines for processing information requests. Information requests must be processed within 21 days of the receipt of the application. In instances in which the information sought relates to the life or liberty of a person, the request must be processed within 48 hours, with an option to extend once for 14 days to allow for a search, if a large amount of information is required or where consultations are necessary before the request can be granted.

Fourth, it provides for the transfer of applications within 5 days of receipt of the application, if the information requested is held by another entity. The Act also requires that, where an information request has been transferred to another public entity, the applicant should be informed within seven days and that the public entity to which the request is transferred, shall make a decision on the application within 21 days.

3.1.1 Implementing structures

In terms of entity-specific processing of information requests, experiences from India reveal that entity-specific characteristics determine the infrastructure required to deal with access to information applications. Policy intensive entities tend to have less access to information requests, hence leaner access to information structures, while entities involved in day to day implementation of programmes have more information requests hence need more formalized systems and more designated access to information officers.⁶⁰

For entities involved in programme implementation, hence more information requests and the need for more formalized systems, Mexico’s implementing structures offer the best illustration comprising of a liaison unit and an information committee.⁶¹

(See box below).

The Kenyan Access to Information Act makes provision for information access officers to make consultations and seek assistance in the processing of information requests.⁶² This provides an avenue to consider adoption of information committees within public entities.

60 MD Surie & Y Aiyar ‘Implementing the right to information: A case study of India’ in SE Trapnell *Right to information: Case studies on implementation* (2014) 64, http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/RTI_Case_Studies_Implementation_WEBfinal.pdf (accessed 18 May 2018).

61 YMizrahi & M Mendiburu ‘Implementing the right to information: A case study of Mexico’ in SE Trapnell *Right to information: Case studies on implementation* (2014) 117-118, http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/RTI_Case_Studies_Implementation_WEBfinal.pdf (accessed 18 May 2018).

62 Section 9(3) & (5), *Access to Information Act, 2016*.

Viewed from the perspective of institutionalization and sustainability, the information committee is favourable particularly in entities with high staff turnover, for instance, county governments.

Mexico: Implementing structures: a liaison unit and an information committee

Mexico's Federal Transparency and Access to Public Government Information Law, 2002 and the Regulations developed under the Law require each agency to set up a liaison unit for processing information requests and uploading information on its website (proactive disclosure); and an information committee which acts as a collegial body to review exempt information in each agency and the agency's response to information requests. The information committee must have at least 3 officers who are: the head of the liaison unit; another officer appointed by the head of the agency and the officer responsible for overall coordination of services/ functions in the agency. The Regulations require agency's to set up physical space and designate personnel to assist information requestors.

Notably, the Regulations provide for a clear demarcation of responsibilities between the liaison unit and the information committee. The liaison unit coordinates the actual search for information once an information request is received by contacting the head of the unit that the information request relates. If the head of the unit responds that the information cannot be disclosed, the request is forwarded to the information committee that considers the request in line with set guidelines and makes a decision on whether the information should or should not be disclosed. The decision of the information committee is redirected to the head of the unit and the head of the liaison unit who post the agency's response on an e-platform system.

For policy intensive entities that would not attract many information requests, South Africa's Department of Environment provides a good illustration of a lean structure for processing information requests.⁶³ (See box below).

Alongside the implementation structures discussed above, other best practices identified include:

- i. Developing job descriptions for information access officers and networks of information access officers;⁶⁴
- ii. Developing a uniform criterion for information access officers to apply in deciding whether or not to approve an information request;⁶⁵ and
- iii. Developing clear and publicized internal workflow on the processing of information requests.⁶⁶

63 E Moses 'Implementing the right to information: A case study of South Africa' in SETrapnell Right to information: Case studies on implementation (2014)449, http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/RTI_Case_Studies_Implementation_WEBfinal.pdf (accessed 18 May 2018).

64 V Lemieux & SETrapnell Public access to information for development: a guide to the effective implementation of access to information laws (2016) 64, <https://openknowledge.worldbank.org/handle/10986/24578> (accessed 18 May 2018).

65 ADokeniya, 'Implementing the right to information: A case study of Uganda' in SETrapnell Right to information: Case studies on implementation (2014)290, http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/RTI_Case_Studies_Implementation_WEBfinal.pdf (accessed 18 May 2018).

66 Moses (n 63 above)449.

South Africa: Department of Environment: leaner implementation structures for entities with fewer requests

In the Department of Environment, there is no designated unit to deal with information requests. The Department's Deputy Information Officers and frontline staff have been trained on the Promotion of Access to Information Law and how to implement it. The Department has a clear and publicized internal workflow system.

Information requests are received and processed by the Chief Director's office assistant. The legal officers in the Department are trained on the Act and are responsible for reviewing these requests and directing them to the appropriate branch or department within the Department of Environment. All Deputy Director Generals in the Department are designated as Deputy Information Officers. Notably, the workflows are kept at a high level hence staff are accountable to ensure that information requests are responded to. Internal templates have been developed and when timelines are not met, the matter is escalated.

3.1.2 Fees

The Act provides for payment of fees for access to information in two instances: for making copies of the information requested or supplying the information.⁶⁷ One of the challenges encountered in the implementation of South Africa's Promotion of Access to Information Act was the fees charged which hindered the right of access to information.⁶⁸ Similarly, in Uganda the Regulations to the Access to Information

Act set a high fee for information requests, which are assessed per request thus making the cost prohibitive if many requests are made.⁶⁹

India offers the best illustrative practice by providing fee waivers.

Indian Right to Information Act provides a fee waiver for information requests for persons living below the poverty line.

Kenya is yet to develop Regulations on the fees to be paid for accessing information. As a best practice, Kenya should consider waiving fees for persons living below the poverty line.

3.1.3 Forms

The Access to Information Act makes provision for public entities to prescribe a form for making an application to access information. The Act further states that the form should not unreasonably delay requests or place an undue burden upon applicants and no application should be rejected for failure to use the prescribed form.⁷⁰

Experiences from Uganda and South Africa are informative. In Uganda, the Regulations to the Uganda Access to Information Act, 2005 provide for up to fifteen (15) different forms for requesting access to information. Use of a wrong form automatically disqualifies the information request. The challenge has been for information requestors to go through the multiplicity of forms to identify the right form, particularly in situations of limited Internet access and where printed forms are not available.⁷¹ Similarly, in South Africa, form-based information requests have been identified as challenging to illiterate low-income requesters who may not have access to the form of technology.⁷²

⁶⁷ Section 12, Access to Information Act, 2016.

⁶⁸ Moses (n 63 above) 449.

⁶⁹ Dokeniya (n 65 above) 290.

⁷⁰ Section 8(4), Access to Information Act, 2016.

⁷¹ Dokeniya (n 65 above) 289.

⁷² Moses (n 63 above) 449.

Best practice: Single model Form which public entities can adopt with minor modifications

Drawing from the above experiences, the Commission on Administrative Justice should develop a single model Form that public entities can adopt with the minor modifications based on the entity specificities. Public entities should make the Form readily available and should not reject applications not based on the Form.

3.1.4 Transfer of requests

The Act sets the timeline for transfer of requests as five days from the receipt of the application and requires that the information requestor is notified within 7 days. These strict timelines demand that information access officers must quickly make a decision on which public entity holds the requested information, and transfer the request.

Good practices in this regard suggest the development of information asset registers that can be used to identify the entity that holds the requested information.⁷³ The information asset registers should be posted on the websites of public entities.

Best practice: Public entities should develop information asset registers and post them on their website for easy access.

*Sample template for information asset register**

Title of resource: title of resource including additional titles if any Unique number: a unique number identifying each resource

Identifier: identifier or acronym by which the resource is may be commonly known

Description: a description of the information contained in the resource- abstract or content
Subject: keywords and subject indicating the subject matter of the resource

Coverage: geographic area covered by the information in the resource **Date:** the date the resource was created or published

Updating frequency: indicate how up to date the information is, especially for databases **Date modified:** the date on which the resource was last modified

Source: the source(s) of the information found in the resource

Format: physical formats of resource – book, CD ROM, database, collection of documents
Language: the language (s) of the resource content

Publisher: the organization to be contacted for further information on the resource or access
Author: organization or person responsible for the intellectual content of the resource

Rights: statement of the user's rights to view, copy, redistribute, republish all or part of the information held in the resource

Category: a term or terms from the government categorization list.

*Source: VL Lemieux & SE Trapnell Public Access to Information for Development: A Guide to the Effective Implementation of Right to Information Laws (2016)⁷⁶.

⁷³ Lemieux&Trapnell(n64above)75.

3.2 Best Practices in Proactive Disclosure

The Act imposes an obligation on public entities to actively disclose certain information and update this information annually. Further, the Act describes the forms of proactive disclosure as inspection without a charge, supplying of copies to any person on request at a reasonable charge and on the internet provided the information is held by the public entity in electronic form.⁷⁴ The requirement for proactive disclosure came into effect in September 2017. Ideally, public entities should have disclosed the information identified in the Act.⁷⁵

3.2.1 Implementing structures

Lessons from India on the implementation of the Indian Right to Information Act indicate poor implementation of proactive disclosure requirements as a result of poor planning by public entities and lack of clarity on whose responsibilities it is within public entities to proactively publish information – is it the head of a given unit or the access to information officer or the information technology unit?⁷⁶

Best practices from Mexico, discussed under 3.1.1 above underscore the need for proper clarity on responsibilities as relates to proactive disclosure

Mexico: Liaison unit responsible for proactive disclosure and updating of information

As discussed in the box under 3.2.1, in Mexico the liaison unit is responsible for publishing information that should be proactively disclosed and updating the information.

3.2.2 Quantity and quality of information published

The Kenya Access to Information Act, while listing the categories of information that public entities should proactively disclose, does not stipulate the quality and quantity of the information to be published. This gives a high level of discretion to public entities as to quality and quantity. In South Africa, one of the challenges identified with the proactive disclosure requirement was the low quality of the information proactively published and the quantity, hence the information was not usable.⁷⁷ Similarly, in India, one of the shortcomings identified was that information proactively disclosed was often incomplete and inadequate.⁷⁸

Best practices to address the above challenges of inadequate, incomplete and poor quality unusable information can be drawn from Mexico's implementation of the proactive disclosure requirements (see box below).

Mexico: Designing uniform formats for posting information

To promote compliance with the proactive disclosure requirements and to ensure that the information published is adequate, good quality and usable, Mexico's implementing body (Institute of Federal Access to Information), designed a uniform format for posting of information on public agency's websites. The implementing body also required public agency's to link their websites to its web portal for monitoring/evaluation of compliance.

Drawing from the above, the Commission on Administrative Justice should consider designing a uniform format for posting information on public entities' websites to meet the proactive disclosure obligations.

⁷⁴ Section 5, Access to Information Act, 2016

⁷⁵ As above.

⁷⁶ Surie & Aiyar (n60 above) 74-75.

⁷⁷ Moses (n63 above) 446.

⁷⁸ Surie & Aiyar (n60 above) 74-75.

3.2.3 Using proactive disclosure to complement passive disclosure (information requests)

The Act provides that public entities are not obliged to supply information that is reasonably accessible by other means⁷⁹ Therefore, information already proactively disclosed should not be the subject of information requests. In essence, the Act envisages a complementary relationship between active and passive disclosure.

Good practices on the complementary relationship between proactive disclosure and passive disclosure arising from information requests are illustrated by the UK ‘virtuous cycle’,⁸⁰ Thailand tracking of a high volume of information requests and US ‘rule of three’⁸¹ and Mexico’s practice of posting information requests and responses online thus increasing the amount of accessible information.⁸² (See box below)

UK: ‘Virtuous cycle’

In this case, proactive disclosure requirements inform the public what information to expect as a matter of course, while the public information requests inform public entities what additional information to proactively disclose. As a result of this ‘virtuous cycle’ public entities in the UK now routinely publish information that was previously handled on a case-by-case basis.

US: ‘rule of three’

In this case, public institutions anticipate that certain information will be requested more than three times and releases that information proactively. The decision on what information will be requested more than three times can be informed, for instance from the searches on an institution’s website. In this instance, information that would be subject to information requests is thus proactively disclosed.

Mexico: an online repository of requests and responses

The practice in Mexico is that all information requests and their responses are posted on the public agency’s e-platform. This creates a database of information from the specific public agency hence reducing case-by-case information requests.

Thailand: tracking high volumes of information requests

In Thailand, public entities track high volumes of information requests to identify popular information that is then disclosed proactively.

3.3 Best Practices in Records Management

The Kenya Access to Information Act sets out specific obligations for public entities with the management of records. Specifically, public entities are required to keep and maintain records that are accurate, authentic, have integrity and are usable and to ensure that the records facilitate the right to access to information. The Act lays minimum standards that public entities must meet to fulfil the specified obligation. To this end, the Act specifically requires that by September 2019, public entities should have computerized their records and information management systems.⁸³

79 Section 6(5), Access to Information Act.

80 *Implementing the right to information: A case study of the United Kingdom* in SE Trapnell *Right to information: Case studies on implementation* (2014) 340-341, http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/RTI_Case_Studies_Implementation_WEBfinal.pdf (accessed 18 May 2018).

81 SE Trapnell & VL Lemieux ‘Right to information: identifying drivers of effectiveness in implementation’ (2014) 55, <http://documents.worldbank.org/curated/en/157641467997846547/pdf/98721-WP-P118353-Box393176B-PUBLIC-RTI-Drivers-of-Effectiveness-WP2-26Nov2014.pdf> (accessed 18 May 2018).

82 Mizrahi & Mendiburu (n 60 above) 125-126.

83 Section 17, Access to Information Act.

The Kenya National Archives and Documentation Service indicates that currently no policies, manuals and guidelines on records management exist for public entities for the implementation of the Access to Information Act, although it has assisted several individual public entities to develop procedures for access to information.⁸⁴

As a starting point, the National Archives recommends sensitization of all staff in public entities on the need to create records and specific training of records management officers on the Access to Information Act, proper records management and repackaging of information for transmission. Further recommendations include automation of records and record management procedures to enhance timely retrieval of information, availability of affordable internet countrywide and leveraging on social media to disseminate information.⁸⁵

In all the jurisdictions reviewed, records management was identified as the key challenge in implementing access to information laws, particularly in timely responses to information requests. In India, lack of electronic records management systems led to delays in searching and retrieving information.⁸⁶

In Mexico, the main challenges identified with records management was a failure by public entities to keep proper records, share information and document their activities.⁸⁷ In South Africa, poor record-keeping posed a challenge in locating and producing the information requested. Indeed, the most common ground for refusal to grant access to information was that the information requested did not exist or could not be found.⁸⁸

Equally, in Uganda, the challenges identified were lack of proper records in public institutions and fragmentation in management, storage, retrieval and dissemination of information within government.⁸⁹

To address, the above-highlighted challenges in records management, there are several illustrative remedial actions taken which point to good practices. (See box below).

Mexico: incremental approach in the reorganization of records

Mexico adopted an incremental approach in the reorganization of records in public agencies in which records generating the most information requests were identified and prioritized. Progressively, the country was able to improve its records management infrastructure while implementing its access to information law.

India: manuals on records management and a records management e-learning module

India developed standard tools for records management in the form of manuals and also trained public officers on records management through online training modules. This was done with a view to systemizing records management throughout the public sector.

South Africa: internal coordination between records management officers and information officers

South Africa undertook joint training between records management officers and information officers on the access to information law to create a common understanding of the law and on the processing of information requests. South Africa also developed internal templates that demonstrate the linkages between access to information and records management. This was done to improve internal coordination in locating and producing records.

⁸⁴ Interview with Kenya National Archives official, at the Kenya National Archives, Nairobi, Kenya on 1 March 2018.

⁸⁵ As above.

⁸⁶ Surie & Aiyar (n60 above) 67.

⁸⁷ Mirhazi & Mendiburu (n61 above) 124-125

⁸⁸ Moses (n63 above) 446

⁸⁹ Dokeniya (n65 above) 294-295.

Civil society members suggested emphasizing or giving pre-eminence (through proper funding, capacity support) to the Kenya National Archives and Documentation Services as it is the primary agency mandated to oversee proper records management in the public services. As a starting point, public entities through the Kenya National Archives and Documentation Services should be supported to organize, package and store for easy retrieval the information that relates to the most frequent information requests.⁹⁰

3.4 Best Practices in Training and Incentives

Kenyan stakeholders interviewed for this handbook underscore the need for training of all public officials on the access to information Act and comprehensive training on specific aspects for public officers involved in the implementation of the Act.

Lessons from India and Mexico illustrate best practices on the training of public officials on implementation of access to information laws. The lessons are drawn cover which institution should conduct the training, the content of the training, how the training is to be conducted and leveraging on information communication and technology.

3.4.1 Agency responsible for training

A dominant trend in both Mexico and India is to have periodic training of all public officials conducted by the implementing agency, with specialized and comprehensive modules for information access officers.⁹¹ (See box below).

India: Training by the implementing agencies at both central and state level

At the national level, India's Department of Personnel Training, which is the implementing agency of the Right to Information Act conducts regular training on the Right to Information Act and its processes for government personnel at the Government's Institute of Secretariat Management (the equivalent of Kenya School of Government). The training includes specialized modules for public information officers.

Mexico: Training by the Institute of Federal Access to Information

The Institute of Federal Access to Information, which is the implementing agency of Mexico's access to public government information law conducts regular training for government officials on the law, its procedures and tools.

3.4.2 Content of training and leveraging on IT in training

Case studies reviewed highlight intensive training on the access to information law, processes of implementing the law and the tools used in the implementation of the law. On leveraging on IT in training, both India and Mexico offer illustrative best practices.⁹² (See box below).

Mexico: e-FAI online course

Mexico's Institute of Federal Access to Information in 2006 developed e-FAI, an online course for all federal officials. e-FAI has seven modules on transparency and access to information, the law and implementing regulations, access to and protection of personal data, organization and conservation of archives and how to assist citizens who approach agencies for information.

India: 15-day online certification course

In 2009, India's Department of Personnel Training launched a 15-day online certification course for public officials, public information officers, civil society organizations and citizens on the Right to Information Act and the process of accessing information.

90 Interview with Transparency International – Kenya Chapter Executive Director, on 3rd April 2018 in Nairobi, Kenya.

91 See Surie & Aiyar (n60 above) 65; Mizrahi & MMendiburu (n61 above) 123.

92 As above.

From the above good practices on leveraging on information technology for training, the Commission on Administrative Justice could consider IT-based courses for all information access officers with modules on the Act and its Regulations, records management, how to assist citizens access information and the tools used.

The Kenya National Archives recommended that the content of the training on records management should include proper records management and repackaging of information for transmission. On the agency to conduct the training on records management, the National Archives should take into account the technical aspects involved.⁹³

3.4.3 Incentives

Lessons from the jurisdictions reviewed indicate that to promote the implementation of the Act across public entities, it is important to create institutional champions to fight the culture of secrecy and hostility towards the law. This can be achieved by identifying best practices among institutions and best individual information access officers. South Africa offers the best illustrative practice.⁹⁴ (See box below).

South Africa: incentives for implementation of the Act and peer learning

The South Africa Human Rights Commission, the implementing agency, hosts the National and Provincial Information Officers Forum, which is an association of information officers from all public agencies at the national, sub-national and municipal level. The South Africa Human Rights Commission and the National and Provincial Information Officers also run the Golden Key Awards that is an annual event held on the International Right to Know Day. The Golden Key Awards highlights the best practices in access to information by national, provincial and municipal public institutions and individuals and awards various categories of awards.

In addition to award based incentives, civil society actors suggested support with IT infrastructure for public entities that excel in providing information. This would take the form of the Office of the Ombudsman determining the best public entity and supporting that entity with IT infrastructure, possibly through external partnerships.

Other forms of incentives include naming and shaming public entities that expressly and habitually withhold information and embedding monetary value and capacity building to awards to individual information access officers.⁹⁵

3.5 Best Practices on Development of Regulations

The Act in several instances requires the Cabinet Secretary in-charge of matters relating to information to make regulations for the operationalization of the Act. Experiences from other jurisdictions are informative on the adequacy or comprehensiveness of the regulations, how much the national government should concede to devolved units to make regulations for their local contexts.

In Uganda, delay in formulating regulations impeded the effective implementation of the Act. The Uganda Access to Information Act took effect in April 2006, while the regulations were operationalized in July 2011. While the public could still make information requests without the regulations, their absence nonetheless resulted in a lack of clarity among public officials on obligations and procedures leading to a denial of information.⁹⁶

93 Interview with the Kenya National Archives in Nairobi, Kenya, 1st March 2018.

94 Moses (n63 above) 433.

95 Interview with Transparency International Executive Director, 3rd April 2018, in Nairobi, Kenya.

96 Dokeniya (n65 above) 289.

Contrastingly, in India, regulations and rules for implementing the Right to Information Act were developed immediately the Act came to effect.⁹⁷ Further, in Uganda, lack of comprehensiveness and inadequacy of the regulations created ambiguity and lack of guidance in the implementation of the Act.⁹⁸

India's experience with regulations in devolved settings reveals that allowing devolved settings develop their Regulations resulted in over 88 different rules and regulations leading to inconsistent fees structures, restrictive formats and varying procedures for accessing information which impeded the implementation of the Right to Information Act.⁹⁹

Uganda & India: Regulations

Regulations for implementation of the Act should be developed as soon as possible.

Regulations should be comprehensive and adequate to provide clarity of obligations and guidance in the implementation

The national government should develop and only in limited instances should counties modify to suit their contexts

3.6 Best Practices in Leveraging on IT for implementation of the Act

The foregoing has highlighted instances in which countries reviewed have leveraged on information technology in the implementation of access to information laws. The areas discussed previously include in proactive disclosure, records management and in training.

Mexico's experience is illustrative on the overall deployment of information technology tools in implementing its Public Access to Government Information Law (see box below).

Information technology in Mexico has been applied in receiving and processing of information requests, in the implementing agency's supervision of compliance with the law and in developing a database on interpretive guidelines on the implementing agency's adjudication.¹⁰⁰

Mexico: overall deployment of information technology to implement the access to information law

Mexico's Institute of Federal Access to Information (IFAI) developed an e-platform System for Information Requests (SISI) to handle information requests. SISI enabled users to make information requests, IFAI to track government responses to the requests and to supervise compliance with the Law.

A Constitutional amendment mandated all sub-national governments with more than 70,000 inhabitants to install electronic systems to enable citizens to make information requests. As of 2014, the e-platform system enabled public officials to communicate with the user, clarify the request or assist the user in refining their search. Users not satisfied with a public entity's response can through INFOMEX request the IFAI to review the decision.

IFAI also created a search engine ZOOM which contained all its decisions and allowed IFAI commissioners, public officers and users to search by topic, agency or date. This systemization of IFAI decisions enabled it to develop interpretive guidelines based on precedent which create certainty in IFAI adjudication and promote public confidence.

Mexico's success in implementing its access to information law is attributed to the use of electronic requests and the use of information technology innovatively.

⁹⁷ *Surie&Aiyar(n60above)64.*

⁹⁸ *Dokeniya(n65above)290.*

⁹⁹ *Surie&Aiyar(n60above)62.*

¹⁰⁰ *Mirhazi&Mendiburu(n61above)125-126.*

3.7 Civil society

The jurisdictions reviewed to emphasize the role played by civil society groups in implementation the access to information laws. In the UK, civil society organizations were key in the success of proactive disclosure by pushing for routine publication of information previously released through case by case information requests.¹⁰¹ In Mexico, civil society organizations played a key role in awareness creation and training on the Public Access to Government Information Law, hence strengthening the demand side.¹⁰² In Uganda, civil society groups pushed for the drafting and passing of Regulations for implementation of the Uganda Access to Information Act.¹⁰³ In India, civil society groups have also sustained pressure on the government to ensure proper implementation of the Right to Information Act as well as conducted public awareness and training.¹⁰⁴

UK: Proactive disclosure

In the UK civil society organizations were instrumental in broadening the contours of proactive disclosure by pushing for routine publication of information released as a result of information requests.

Uganda: Development of Regulations

Civil society groups in Uganda were key in putting pressure on the government to draft and pass Regulations to operationalize the Access to Information Act.

India:

In India, civil society organizations have monitored government implementation of the Right to Information Act. Civil society organizations have also conducted public awareness and training of public officials on the Right to Information Act.

Mexico:

In Mexico, civil society organizations have been instrumental in strengthening the demand side.

Kenya has a vibrant civil society. It is imperative that the Access to Information Act, 2016 was a culmination of efforts Kenya civil society dating back to 1990s. Civil society was at the forefront in the passing of the Act. Interviews with Kenyan civil society organizations indicate the below-discussed roles in the implementation of the Act.

Driving/Support for public demand for information

This role would be twofold. First, it would entail sensitizing the public on the right to access to information through public awareness campaigns to educate the public on the Act and on how to make information requests. According to civil society experts, supporting public demand has been most effective in India where the public awareness campaigns have aimed at demonstrating the practical value of access to information to ordinary citizens, for instance, use of information to achieve social and economic gains such as fair wages. Public awareness campaigns that held the public view the right to information in the context of the exercise of civic duty, for instance, ensuring prudent use of resources by public entities or equality, equity and inclusivity in public affairs.

101 *AcasestudyoftheUnitedKingdom(n80above)340-341.*

102 *Mirhazi&Mendiburu(n61above)133-137.*

103 *Dokeniya(n65above)289-290.*

104 *Surie&Aiyar(n60above)72-74.*

Second, civil society would actively make information requests to push for the setting up of information processing systems and test the effectiveness of the systems in place. When civil society organizations make information requests, then they can assess the effectiveness of the systems in place.

Capacity building for public officers in the implementation of the Act

Civil society organizations together with the Office of the Ombudsman can conduct capacity building for public officers on the provisions of the Act, how to process information requests, the penalties involved and the reporting requirements under the Act. The main objective of the capacity building would be to equip public officers with the requisite knowledge, competences and skills to implement the Act.

Support in organizing, packaging and storage of information and data

As discussed earlier, records management has proved the weakest link in all countries reviewed in implementation of the access to information legislation. Specifically, retrieval of information has proved difficult thus impeding timelines in processing information requests. Civil society would play the role of assisting public entities in organizing, packaging and storing information in a form that lends itself to easy retrieval and also organizing the information in a form that is readable and beneficial to information requestors. This would also entail emphasizing the role of the Kenya National Archiving and Documentation Services.

Monitoring implementation of the Act

Civil society organizations can monitor implementation of the Act through initiating litigation in instances in which information is denied, through social audits and preparation of shadow state reports to international and regional human rights monitoring bodies.

Contribute to the development of Kenya specific jurisprudence on access to information

Civil society organizations can contribute to the development of Kenyan jurisprudence on access to information through seeking an interpretation of unclear or contentious provisions in the Act from the Courts thus developing a body of jurisprudence on the Act.

3.8 Implementation of access to information in devolved settings (County governments)

While the Access to Information Act applies to both the national and county government, the County Government Act places specific obligations on county governments concerning the right of access to information. Section 96 of the County Government Act exclusively addresses itself to access to information held by county governments, unit or department of the county and requires county governments to designate an office to enhance access to information. The Section further obligates county governments to pass legislation to guarantee access to information.¹⁰⁵

Several other provisions in the County Government Act invoke the right of access to information. These include the county government principle of public participation which is the bedrock of devolved governance and is preconditioned on access to information, data, documents and other information related to policy formulation and implementation.¹⁰⁶

¹⁰⁵ County Government Act, Section 96: (1) Every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other State organ in accordance with Article 35 of the Constitution. (2) Every county government and its agencies shall designate an office for purposes of ensuring access to information required in subsection (1). (3) Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information.

¹⁰⁶ Section 87, County Government Act.

Additionally, the county media is obliged to observe access to information,¹⁰⁷ while the county communication framework is required to facilitate public communication and access to information.¹⁰⁸

In terms of developing access to information legislation at County level, Makueni County Public Participation in Governance Bill, 2014 contains express provisions derived from Article 35 of the Constitution on how to access information from the County Government.¹⁰⁹ Kisumu and Kwale Counties also have access to information legislation. Each of the 47 County Governments has a website in which the counties post weekly activities. In the context of proactive disclosure, there is minimal information contained in the county websites (such as functions, policies and manuals) which addresses the requirements of proactive disclosure as set out in the Access to Information Act. Even then, the quality and quantity is wanting.¹¹⁰

Some of the notable practices in counties concerning access to information are discussed below. In terms of responsiveness to persons with a disability, Vihiga County's website enables persons with visual disability to navigate through the JAWS programme. In Taita Taveta County, the County uses Twitter which is converted to SMS hence reaching a large majority of the population who may have a mobile device but not necessarily be on Twitter. Taita Taveta also has physical Citizen Information Centers which could serve as points for information requests as envisaged in the Access to Information Act.

Kwale County has Biashara Centers which are akin to Huduma Centers and could also serve as points for access to information requests. The Council of Governors has been supporting County Dialogues, whose concept mirrors the Devolution Conference but at the local level. These County Dialogues could also serve as avenues for dissemination of information by county government under the proactive disclosure requirements.¹¹¹

Further, the Council of Governors has been conducting the Devolution Sensitization week, which it envisages will be conducted in all the 47 Counties. The Devolution Sensitization week is instrumental in access to information as citizens can access information on any given county.¹¹²

In terms of technical support and to enable county governments to comply with the access to information requirements, the Council of Governors recommended capacity building for County Directors of Communication, Records Managers and County Directors of Information Technology.

The content of the training should include the Access to Information Act, record keeping and packaging of information. The Council of Governors also identified additional areas of support to include peer-to-peer learning among counties and internet connectivity in counties.¹¹³

India, Mexico, South Africa, Uganda and the UK all have aspects of devolution. Several informative lessons can be picked from each of the countries. For instance, as already discussed, in India, allowing the development of rules and regulations for the implementation of the Act at state level resulted in varying regulatory framework across the country which hindered the implementation of the Right to Information Law. In South Africa, as pointed out, there have been instances of peer learning among sub-national and municipal level information officers based on experience sharing.

107 Section 93, County Government Act

108 Section 95, County Government Act

109 See Section 30, Makueni County Public Participation in Governance Bill, 2014.

110 Interview with the Council of Governors in Nairobi, Kenya, 9 March 2018.

111 As above.

112 As above.

113 As above.

3.8.1 Best Practices from Mexico

Mexico's offers the best illustration of implementing access to information laws in devolved settings.

In Mexico, the Public Access to Government Information Law does not apply to devolved settings. Mexico has 33 separate jurisdictions, 31 states, Mexico City and the national government, the Federation, with each having its access to information law. Below is a review of the implementation of access to information laws across the 31 states, the Federation and Mexico City.

Mexico's 31 States enacted their access to information laws between 2002 and 2008. Pointedly by 2016, seven (7) States had amended and replaced their laws up to three (3) times, while at least all 31 States, the Federation and Mexico City had amended and replaced their laws twice.¹¹⁴

The distinctions between the laws at State and Federal level decreased transparency in Mexico. In 2015, the Mexican Congress passed a law to address the heterogeneity of access to information laws across the country.¹¹⁵ This law, the General Transparency Law, standardized the access to information legal framework in Mexico across Federal and State levels.

Existing literature reveals that despite the promulgation of the General Transparency Law, there are significant differences across the 33 jurisdictions to the quality of laws, the effectiveness of the laws, institutional design and the oversight body.¹¹⁶

On oversight and enforcement, each jurisdiction in Mexico is obligated to create specialized and independent oversight bodies with a mandate to oversight implementation of the law, monitor compliance and sanction non-compliance.¹¹⁷ The National oversight body (Federal Institute for Access to Public Information (IFAI)) has an overarching mandate over the 32 independent oversight bodies. It supervises decisions from each of these bodies.

The State-level oversight bodies and the IFAI form the national deliberative authority which has power to supervise public policies relating to access to information throughout the country.¹¹⁸

The political and legal diversity of implementers increases the likelihood of enforcement. Thus the diversity of legal implementers increases the effectiveness of the access to information law.¹¹⁹ The institutional design of the oversight mechanisms, in which greater independence and autonomy increases compliance with the law.¹²⁰

114 Garcia, A 'Transparency in Mexico: An overview of access to information regulations and their effectiveness at the federal and state level' (2016) 7, https://www.wilsoncenter.org/sites/default/files/transparency_in_mexico_an_overview_of_access_to_information_regulations_and_their_effectiveness_at_the_federal_and_state_level.pdf (accessed 23 May 2018). (Transparency in Mexico).

115 Transparency in Mexico (n114 above) 8-9.

116 Transparency in Mexico (n114 above) 13-17.

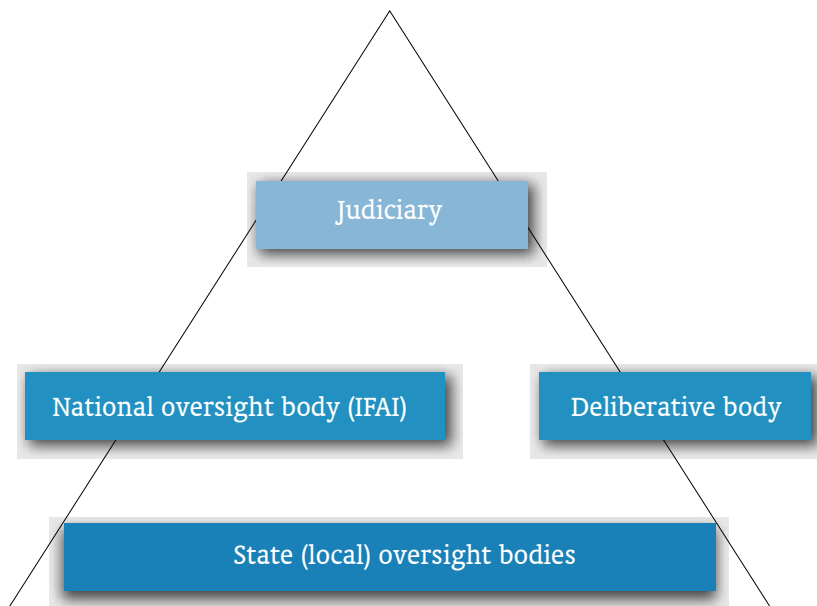
117 Transparency in Mexico (n114 above) 19.

118 Transparency in Mexico (n114 above) 21.

119 Transparency in Mexico (114 above) 24.

120 As above.

Illustration of access to information monitoring mechanisms in Mexico



Mexico: Development of a model law for all States to adopt

Following heterogeneity of laws across Mexico, the Mexican Congress developed a model law containing the normative framework of access to information across all jurisdictions. The essence was to define the rights and obligations that State laws should contain. This prevented heterogeneity of legislation across the country that would create in the overall complex access to information framework and defeat implementation.

Mexico: Establishment of State-level independent oversight mechanisms

Mexico allowed States to establish its independent oversight mechanisms. The implementing agency, IFAI build their capacity as well as supervised by their decisions. Significantly, the Mexican experience is that the larger the diversity of legal and political implementers the greater the likelihood of implementation of access to information laws.

Mexico: Establishment of a national inter-governmental deliberative body

Mexico also established a national inter-governmental body bringing together the 32 oversight institutions at State level and the IFAI to build synergies for implementation of the law, continuous learning through peer learning and networking.

4.0 Sequencing Implementation

This section seeks to answer the question on the sequencing of implementation of the Access to Information Act. What order are the components for successful implementation to be carried out? Are there certain elements that must be in place before the law can be implemented or is it possible to effectively implement access to information laws without these elements?

Experiences from other jurisdictions point at a general level:

- i. Phased approach
- ii. Single approach

Canada, Jamaica and South Africa adopted the phased implementation approach to afford agencies time to prepare for implementation. In Jamaica, implementation started with groups of public bodies that it was anticipated would generate a lot of information requests. In the United Kingdom, as discussed elsewhere, implementation was initially to start with the central government, then local authorities and finally semi-autonomous agencies and the police. This approach was however abandoned in 2001 and 2005 implementation was carried out in a single approach, that is, for all public bodies at once.¹²¹

There is no settled theoretical explanation on effectiveness in the implementation of access to information laws. Below is a review of expert accounts of former Information Commissioners/ Directors of implementing agencies who have implemented access to information laws in their own countries.

Cayman Islands

The first Coordinator for the Freedom of Information Unit in the Government of Cayman Islands identifies ten (10) activities that must be carried out in the first six (6) months of the implementation of the access to information laws.

Setting up the Unit charged with the implementation of the law, this includes deciding on leadership, recruitment, budget, and roles and reporting.

- i. Setting up the law's steering committee comprising of representation across government. This steering committee in her view will be responsible for giving reports on implementation, developing action plans, address the special challenges of various agencies, IT training, records management and public participation.
- ii. Launch of the implementation process through public awareness, the introduction of the law to government officials and the public.
- iii. Conduct baseline surveys on preparedness on records management.
- iv. Create job descriptions and designation of information managers for each agency and create a network of information managers.
- v. Develop a nation-wide implementation plan, conduct public participation on the plan and ensure adoption by Cabinet.
- vi. Create a list of all public authorities including their contact details (chief officers, email address, fax).
- vii. Analyze the public's needs regarding access to information – what type of information do they need, what type of requests are they likely to make, how it can be made easier for them.
- viii. Create model public authority plans and implementation
- ix. Develop consultation paper on policy issues to be resolved by Regulations to the law and process for review of sectoral laws.¹²²

¹²¹ Lemieux & Trapnell (n64 above) 63

¹²² Lemieux & Trapnell (n64 above) 64.

Jamaica

According to Alyair Livingstone, the Director of Access to Information Unit in Jamaica, during the 18 months before the commencement of the law, the Jamaican Access to Information Unit engaged in the following activities:

- i. Encouraging buy-in by involving the partnership and collaboration of key individuals. This was mainly for amendment of the law and development of regulations.
- ii. Identifying key persons who would be responsible for responding to information requests from all government entities.
- iii. Formation of a task force that visited all ministries to assess registries and to meet with permanent secretaries to discuss deficiencies in staff and records management.
- iv. Record management practices which involved collaborative training by the government archivist across government entities.
- v. Formation of critical partnerships with civil society, media, cabinet, academia, religious organizations and lobby groups.
- vi. Formation of the Access to Information Association of Administrators comprising of all responsible government officers. The Association was mandated to meet every Wednesday to share experiences arising from information requests.
- vii. Formation of the Advisory Committee of stakeholders comprising of civil society, private sector and media whose mandate was to provide the government with recommendations on best practices. This Committee met every 3rd Wednesday of the month and the Director of the Access to Information Unit and Administrators were present.
- viii. Intensive training of government officers, which was undertaken in the first five months. The training focused on the interpretation of the provisions of the Act, record management, change management and case studies.
- ix. Development of informational publications for government officers, stakeholder groups and the general public. These included: Guidelines for the discharge of functions by public officers; training manual, user guide, road map and newsletters and pamphlets.¹²³

Scotland

The Scotland Information Commissioner, Kevin Dunion, in his 2004 Annual Report highlighted the preparations made by his office in preparation for the implementation of the Scottish Freedom of Information (Scotland) Act, 2002. Notably, the Information Commissioner was appointed in February 2003 while the Act came into force on January 1, 2005.¹²⁴ The activities included:

- i. Holding a Freedom of Information conference, which was attended by members of the public, public authorities, the UK Information Commissioner, representatives from the European Union and civil society organizations. The conference provided an overview of the Act, the Data Protection Act and publication schemes.

¹²³ A Livingstone 'The implementation of the Access to Information Act: The Jamaican experience- challenges and successes' (2005) 6-7 Resource paper presented at the National Workshop organized by the Commonwealth Human Rights Initiative on Effective implementation: preparing to operationalize the new India Right to Information Law, 24-26 May 2005, New Delhi, India, <http://www.>

¹²⁴ *ScottishInformationCommissioner,AnnualReport2004,8.*

- ii. Research on public bodies' preparedness for implementation of the Act. This was through the use of questionnaires and follow-up interviews. Most public authorities indicated that they would meet the deadlines set in the Act. A major concern among most authorities was records management.
- iii. Public awareness to the general public using a three-pronged strategy involving a general public awareness campaign to promote the new right; promotion to rights provider organizations and their networks (aimed at creating demand for information); and training and information for groups who are likely to use the right once it comes into effect such as journalists' unions and community organizations.
- iv. Approving publication schemes – this also involved the development of model publication schemes to guide public authorities.¹²⁵

4.1 Common themes

The common themes identified in the activities undertaken in the initial stages of implementation of access to information laws include:

- i. Strengthening institutional capacity through training on the provisions of the law and record management practices;
- ii. Formation of committees of information access officers; and
- iii. Public awareness and surveys to establish the preparedness of public institutions.

The Commonwealth Human Rights Initiative suggests training public officials, public awareness, records management and proactive disclosure as activities that must be undertaken early in the implementation of access to information laws.¹²⁶

5.0 Appendices

- i. Flowchart on the processing of information requests
- ii. Sample internal workflow
- iii. Sample information request application form
- iv. Action plan
- v. Web posting sample for proactive disclosure

6.0 Case law

Who can access information in Kenya? (Section 4)

1. **Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others [2013]127 eKLR [Kenya]**

The petitioner filed a petition challenging the procuring process and alleged breach of certain rights and freedoms. The petitioner averred that Kenya Medical Supply Agency had denied access to the information in the minutes of the evaluation and technical reports of the tender and from Pharmacy and Poisons Board, it sought disclosure of any correspondence between it and any of other parties concerning a certain drug in the context of the tender to enable it to prosecute the petition.

¹²⁵

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¹²⁷

KEMSA raised a preliminary objection that the Petitioner was not entitled to seek enforcement of Article 35 on the ground that it was a foreign company incorporated in India. The court agreed with the respondent's argument and dismissed the petition. It held that the right to information is only enjoyable by Kenyan Citizens, and not foreign citizens nor juridical persons such as corporations or associations.

2. Nairobi Law Monthly Limited v Kenya Electricity Generation Company and 2 others [2013] eKLR¹²⁸ [Kenya]

This petitioner requested information from the respondents regarding certain contracts that had been entered by them to drill geothermal wells. The petitioner was investigating a series of transaction undertaken by the respondents and had implicated them in corrupt dealings in its October 2011 edition.

The respondents resisted the demand. The petitioner filed the petition claiming that the respondents had violated Article 35, 33 among other principles enshrined in the Constitution of Kenya, 2010. In determining the application of Article 35 the court sought to interpret 35(1) (a) particularly the meaning of the 'state' and concluded that the respondents were a public entity or a state corporation. The court determined that the press is entitled to exercise its freedom of expression and the media as seen in the cases before the courts internationally. The respondents argued that the petitioner not being a natural person but a juristic person is not a 'citizen' for Article 35 and is therefore not entitled to seek enforcement of its provisions. The court held that a body corporate or a company is not a citizen for Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article. The court thus found that there had been no violation of the rights to the petitioner.

3 Katiba Institute v Presidents Delivery Unit and 3 others [2017] eKLR¹²⁹ [Kenya]

The petitioner deposed that the respondent on diverse dates in 2017 published advertisements in the media, through billboards and in business messaging or tags. The petitioner then wrote to the respondent seeking information on how many advertisements had been published, the total cost incurred as well as the government agency that met the cost. The petitioner avers that the respondents refused and failed to supply the information sought under Article 35(1) and violated the values and principles enshrined under Article 10 of the Constitution especially the rule of law, good governance, transparency and accountability. The determination of the case made a great variation from the earlier cases. The learned judge considered that the Access to Information Act under Section 2 considers a citizen to include a juristic person whose director(s) is a citizen.

The court further stated that under Section 21 of the Act it was not a condition precedent for the petitioner to first file a complaint with the Commission of Administrative (CAJ). The court ordered that the information be availed to the petitioner.

Refusal to grant information must be justified (Section 4(c), Section 6)

¹²⁸ Constitutional Petition 486 of 2017

¹²⁹ Petition no. 418 of 2017

4. **Zebedeo John Opop v The Independent Electoral And Boundaries Commission [2017] eKLR¹³⁰**

The Petitioner requested from the 1st Respondent records and documents in their custody of the elections of the Bonchari Member of National Assembly seat held on 8th August 2017. The documents requested for by the petitioner included the number of voters identified by the electronic voter identification devices at every polling station; Copies of Forms 32A (Voter Identification & Verification Forms) at every polling station; Polling Station Diaries as prepared and submitted by the respective presiding officers at every polling station to file an election petition. The issue before the court was whether the Respondent had established that the refusal to grant access to information is justified under the exceptions under Section 6 of the Access to Information Act. Justice Mativo stated,

“Accountability is unattainable if the government has a monopoly on the information that informs its actions and decisions. Access to information is not only fundamental to a properly-functioning participatory democracy it also increases public confidence in government and enhances its legitimacy.”

The court held that the refusal to grant access must be reasonable and justifiable. He further emphasized that proceedings under the Access to Information Act differ from ordinary civil proceedings in certain key respects:

These disputes involve a constitutional right of access to information. Access to information disputes is generally not purely private disputes (requesters of information often act in the public interest and the outcome of these disputes, therefore, impacts the general health of our democratic polity.)

The court found that the respondent had violated the right of access to information and ordered that the petitioner be granted access into the requested forms.

5. **Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009) [South Africa]**

The applicant, Mr. Brümmer a journalist, made a request to the Department of Social Development for access to information relating to a government tender that the Department was alleged to have awarded to IT Lynx Consortium. The applicant alleged that he required the information to report accurately and properly on an article that he was writing. The information requested by the applicant comprised records which pertain directly and indirectly to the State Information and Technology Agency (Pty) Ltd for the design, development and implementation of a grant administration system. In the first instance, he was denied the information on the ground that the information was the subject of civil litigation between the Department and the consortium which would impair the impartiality in the trial. On appeal, it was held that his application was brought after the 30-day limit as prescribed in Section 78(2). He contested the constitutionality of the 30-day limit as it impeded his right to access the court. The respondents opposed the application. They submitted that the High Court should not condone Mr. Brümmer’s non-compliance with the 30-day limit as he had not provided a satisfactory explanation for the delay. The court held that section 78(2) was unconstitutional in that it failed to give relief to a person who is refused information. The court laid down that the importance of the right to a country that is founded on values of accountability, responsiveness and openness cannot be gainsaid. For those values to affect, the public must have access to information held by the state.

¹³⁰ *Bernstein and Others v Bester NO and Others* 1996(4) BCLR 449(CC)

6. Case of Claude-Reyes et al v Chile Judgment of September 19, 2006, Series C No. 151 [Inter- American Court of Human Rights]

In 1998, Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero were denied information by the State on information they requested from the Foreign Investment Committee on mining and deforestation project that could impact the environment and sustainable development of Chile.

The Commission stated that the refusal occurred without the State “providing any valid justification under Chilean law” and supposedly they “were not granted an effective judicial remedy to contest a violation of the right of access to information”. Further they “were not ensured the rights of access to information and judicial protection and no mechanisms were guaranteeing the right of access to public information.”

The Court found unanimously that the State had violated Article 13 (Freedom of Thought and Expression) in relation to Article 1(1) (Obligation of Non-Discrimination) and Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention. Article 13 was held to encompass the right to access information held by the state. They further opined that the right is as an essential component of democracy as it enables citizens to be informed and thus promotes effective participation in government. The court further held that the state should always avail justification whenever it withholds information.

Nature of information not subject to disclosure and requestors of information need not show a legitimate interest for requesting information (Section 4(2), Section 6)

7 Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd [2006] (6) SA 285 (SCA) [South Africa]

The appellant, Transnet Limited (state-owned company) acting through its wholly-owned subsidiary, National Ports Authority of South Africa, invited tenders for a waste removal contract. SA Metal Machinery Company (Pty) Ltd was an unsuccessful bidder in a public tender and it sought documents related to the winning tender from the state-owned Inter Waste (Pty) Ltd under the Promotion of Access to Information Act (PAIA). Transnet Limited provided access but justified deleting certain details related to the calculation of the tender price and relying on exemptions for duty of confidence and harm due to exposure of trade secrets. The respondent, SA Metal Machinery, applied to the High Court at Cape Town which granted an order in the terms of the Act directing the appellant to disclose a completed schedule of Inter Waste’s tender as submitted to the appellant. On appeal by Transnet Ltd, the court found that there would be neither commercial harm nor a breach of confidentiality to Inter Waste Ltd. It concluded that a confidentiality clause cannot protect a contract between a state company and a third party from disclosure after the contract had been awarded. The Court also affirmed that a requester need not show legitimate reasons for requesting information.

Who bears the evidentiary burden to justify the refusal to grant information? (Section 9)

8. President of the Republic of South Africa and Others v M & G Media Ltd (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011) [South Africa]

The publisher of the Mail and Guardian newspaper requested the Promotion of Access to Information Act that the President make public a report drafted by two South African judges on the 2002 presidential elections in Zimbabwe. The judges observed the elections at the request of President Thabo Mbeki. The office of the President declined to release it because it would reveal information supplied in confidence by Zimbabwean government officials and that the report was obtained to help the President formulate executive policy.

The issues for determination before the Constitutional Court were:

1. How was the state to discharge its burden, under the Information Act to show that its refusal to grant access to a record is justified?
2. Under which circumstances is it proper for a court to exercise its powers, under the Information Act, to examine the contested record to determine whether it should be released?

The court held that the evidentiary burden rests with the holder of information and not with the requester. The majority concluded that courts are empowered to examine the contested record to determine whether exemptions claimed by the state are proper. The majority held that this power should be invoked when it is in the interests of justice to do so. The Court found that under the law the disclosure of the information is the rule and exemption from disclosure is the exception. It stated that the constitutional guarantee of the right of access to information held by the state gives effect to principles of accountability, responsiveness and openness as founding values of constitutional democracy. The right of access to information has a close connection with the realization of other rights under the Bill of Rights. It however also recognized that there exist reasonable and justifiable limitations to the right.

9. Case of Gomez Lund v Brazil Judgment of November 24, 2010, Series C. No. 129 [Inter- American Court of Human Rights]

The relatives of the victims sought to discover the truth about the outcome of operations conducted by the Brazilian army between 1972 and 1975, which aimed to eradicate a small leftist guerrilla movement known as the Guerrilla do Araguaia. Allegations of arbitrary detention, torture and forced disappearance of some 70 people, including local civilians, were supported by testimonies and documents provided by journalists and former army officials.

However, under the Brazilian dictatorship in 1979, amnesty laws that precluded any criminal investigation into ‘political offences’ carried out during military rule were enacted.

The government refused to comply with several court orders to disclose information related to Araguaia operations. In 2010 the Supreme Court of Brazil upheld the amnesty laws, finding that the actions of the military regime were political and therefore protected.

Applicants filed a petition with the Inter-American Commission on Human Rights, which in turn referred the case to the Inter-American Court of Human Rights. The Court recognized that the right to truth arises from the right to seek and receive information guaranteed by Article 13 of the American Convention, in addition to Articles 8 and 25 guaranteeing the right to an effective remedy for Convention violations. When a right to truth claim is made, a state is under a duty to respond in good faith to the requests of investigating authorities or the victims and their relatives. Neither “state secrets,” nor “confidentiality of information,” or “national security” may serve as legitimate grounds for the non-disclosure of information about serious human rights violations.

The court opined that the burden of proof regarding the non-existence of relevant records lies with the state. It further held that a decision to refuse access to information can never depend exclusively on a state body whose members are suspected of committing the illicit acts. By denying and delaying access by the victims’ relatives to relevant army archives and other information, the government had violated their Article 13 right to information, read together with Articles 1(1) (obligation to respect rights and freedom), 8(1) (duty to investigate) and 25 (access to court) of the Convention. The Court held that Brazil’s amnesty law is ‘incompatible with the American Convention and void of any legal effects’.

When a legitimate public interest is at stake, information must be disclosed (Section 6 (4))

10. Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland [2005] 1 All SA 559 (SCA) [South Africa]

In October 2002 the Association applied to the Pretoria High Court for an order declaring that it had a right of access to a report compiled by a commission of enquiry known as the Ralushai Commission to investigate disputes relating to irregularities and malpractices in the appointment of certain traditional leaders in that province. This report was held by officials in the Ministry. The Association also sought an order setting aside a decision by the Minister's information officer denying it access to the report. The Minister appealed concerning the interpretation and application of s 44 (1) of the Promotion of Access to Information Act 2 of 2000 that provides for circumstances when an information officer of a public body may refuse a request for record under the office. The court found that the Minister had not proved that the disclosure of the report would frustrate the deliberative process and thus dismissed the application.

11. Centre for Social Accountability v Secretary of Parliament and Others [2011] (5) SA 279 (ECG)

The applicant, an independent institution that engages in social accountability and gathers information on the management of public resources, made an application to the second respondent seeking access to records relating to the alleged abuse of the Parliamentary travel voucher system during 2004 by individual Members of Parliament. The alleged abuse had attracted wide media attention and came to be known as the "Travelgate" scandal or saga. The claims made against the Members of Parliament amounted to fraud and other civil claims and parliament appreciated the sensitivity of the issue and the public interest which it attracted. The applicant's requests to the respondents were rejected because the information related to personal information about the members.

The court held that under Section 11(1) of Promotion of Access to Information Act (PAIA) a public body is obliged to grant access to the records held by it. The only instance it may refuse is premised on the ground under Chapter 4 of the PAIA Act. Further, in terms of Section 81(3) (a) of PAIA, the onus is on the public body to prove that the refusal is covered by one of the grounds under Chapter 4. Therefore, the grant of access to State information is thus the rule and the refusal of the exception. With regards to the claim of personal information and the need for protection of the right to privacy for the members, the learned judge,

Alkema J pronounced himself on the matter concerning the case of Bernstein¹³¹ and others, stating that information about the personal life of the Member of Parliament was his own business and the state had no concern in it. However, information as to how they executed their parliamentary duties was the business of the state and the state had the right to know.

Accordingly, an order was made to release the information relating to claims in respect of travel vouchers issued to Members of Parliament in their official capacities.

12. Corporate Officer of the House of Commons v Information Commissioner and Others [2009] 3 All ER 403 [United Kingdom]

In 2005 and 2006 the applicants, Jonathan Ungoed-Thomas, Ben Leapman, and Heather Brooke individually requested specific details on the allowances related to certain Members of Parliament including Tony Blair, David Cameron and Gordon Brown as well addresses of their second homes. After the requests were refused, the applicants filed complaint under section 50 of the Freedom of Information Act of 2000 to the Information Commissioner, who ordered disclosure.

The Corporate Officer of the House appealed to the Information Tribunal, advancing that disclosure of the requested information could result in prejudice to the rights or legitimate interests of individual MPs. The Tribunal rejected claims made by the Corporate Officer, who appealed the Tribunal's decision to the High Court of Justice.

The Court began by establishing that there was an obvious legitimate public interest at stake, given taxpayers' right to be informed of how the government makes use of taxpayer money. The Court then concluded that, as a matter of law, the Information Tribunal had given sufficient consideration to the MPs' reasonable expectations regarding the extent of information to be made public. Contrary to the Corporate Officer's claim, the information that had been presented to MPs with the coming into force of section 19 of FOI Act (publication schemes) had indicated an expansion rather than a restriction of rights to access information. Given that MPs knew or should have known that the FOI Act would make more information publicly available, it was not unreasonable for the Tribunal to dismiss the claim that MPs had formed a reasonable expectation that disclosure would be limited to total expenditures rather than specific details.

6.1 Global and regional framework on the right of access to information Key points

- International Covenant on Civil and Political Rights, at Article 19 encompasses the right of access to information held by public bodies.
- Convention on the Rights of the Child guarantees the right of access to information for children in Articles 12 and 13.
- Convention on the Rights of Persons with Disabilities at Article 21 requires States to specifically guarantee the right of access to information to persons with disabilities.
- Convention on Elimination of All Forms of Racial Discrimination at Article 5 requires States to eliminate racial discrimination in freedom of expression including the right of access to information.
- African Charter on Human and Peoples' Rights at Article 9 guarantees the right of every individual to receive information.
- UN Convention Against Corruption underscores the role of information in fighting corruption and requires States to ensure the public has effective access to information.
- African Convention on Combating and Preventing Corruption requires States to ensure the realization of the right of access to information for the eradication of corruption.

The Universal Declaration of Human Rights (UDHR) was the first international instrument to guarantee the right of access to information. Article 19 provides for the right to seek and receive information and ideas. While Article 19 does not expressly mention the right of access to information, the right to seek and receive information and ideas is understood to encompass the right to information, that is the right to request and be given information held by public bodies.

Article 19 of the UDHR laid the foundation for the development of the right of access to information in legally binding treaties at the global and regional level.

6.1.1 International Covenant on Civil and Political Rights

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right of everyone to freedom of expression which includes freedom to seek, receive and impart ideas of all kinds regardless of frontiers, in writing or print or the form of art or through any media of his.