



MEDIA
COUNCIL OF KENYA



Access to Information in Kenya: A Journalists' Handbook

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Commission on Administrative Justice
(Office of the Ombudsman)
West End Towers (2nd Floor), Waiyaki
Way

Media Council of Kenya
Britam Centre (Ground Floor)
Mara/Ragati Road Junction...



Preface

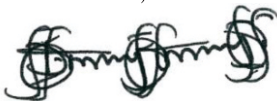
The Media Council of Kenya (MCK) is mandated to among other things ensure the protection of the rights and privileges of journalists and media enterprises. The MCK's 2018-2023 Strategic Plan identifies access to information as a key result area in ensuring the right to access to information held by public entities as enshrined in article 35 of the constitution is upheld.

The Access to Information Act (ATI) was enacted by parliament in 2016 as a way of actualizing Article 35 of the Constitution. Among the beneficiaries of the Act is media, especially when seeking information held by the Government on matters of public interest. The Act is also envisaged to support journalists' access to information when writing investigative and in-depth stories that require facts, truth and have impact on public interest.

However, compliance to the Act among journalists, public officers and the public in general has been low. This book is just one of the interventions the Council has undertaken to sensitize journalists on their right to information.

Without accessing the right information, journalists cannot effectively play their role to educate and inform the public, as well as oversight. It is against this backdrop that the Council partnered with the Commission on Administrative Justice (Office of the Ombudsman) the constitutionally mandated body to enforce implementation of the ATI Act, to author this book.

The Council is therefore confident that this publication will be an invaluable resource for journalists keen on using the right to information as a research tool for their work, and enhancing professional journalism in the country.



Mr. David Omwoyo Omwoyo

Chief Executive Officer and Secretary to the Council



Foreword

In September 2016, Kenya enacted the Access to Information (ATI) Act, 2016. The ATI law provides a framework for actualising the right of access to information guaranteed under Article 35 of the Constitution. Further, the ATI Act places enforcement and oversight powers on the Commission on Administrative Justice (Office of the Ombudsman).

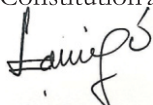
Access to information is a fundamental right, yet, not an end in itself. It facilitates citizens to enjoy other rights and effectively participate in public life. In the same vein, access to information enables the media to play their watchdog role effectively. With proper deployment of access to information, the media contribute to transparent and accountable governance.

It is on the basis of the aforementioned that the Commission singled out the Media as a critical constituency in the implementation of the access to information law. In view of this, the Commission entered into a partnership with the Media Council of Kenya (MCK), the media regulator in Kenya, so that the engagement with journalists is structured and deliberate.

The partnership envisaged development of a sourcebook on access to information for journalists and capacity of reporters and relevant media stakeholders on access to information.

The handbook will be a key reference material for journalists and trainers on how to use ATI as a tool for journalistic research. It was informed by international best practices and standards on the right to information, and has incorporated views from key stakeholders, both within and outside media.

The Commission and the Council are confident that the handbook will provide operational guidance to the users and serve as a valuable resource on how journalists can utilise their rights and privileges as provided for under the Constitution and the ATI Act to do their work effectively.



**LEONARD NGALUMA, MBS
COMMISSION SECRETARY/CEO**



Acknowledgements

We appreciate the efforts of everyone who supported the development of this handbook.

We thank the leadership of the Commission led by Chairperson Hon. Florence Kajuju, Vice Chairperson Comm. Washington Sati, Comm. Lucy Ndungu who is the Access to Information Commissioner, and the Commission Secretary Mr. Leonard Ngaluma, for their strategic guidance and support.

The Media Council of Kenya also invested a lot in this process. The leadership of MCK CEO, Mr. David Omwoyo is highly appreciated for the immense support. Indeed, his visionary leadership contributed to the realization of this handbook. Additionally, the Head of Media Development Strategy at MCK Mr. Victor Bwire and his counterpart Director, Advocacy and Communication at CAJ Ms Phoebe Nadupoi, are recognized for providing technical guidance to the staff involved.

We acknowledge the Technical Committee that steered the process from inception of the idea to the realization of the handbook. The Committee was composed of Dinnah Ondari (manager, accreditation & compliance, MCK); Sammy Cheboi (manager, advocacy & communications, CAJ); Terrence Minishi (manager, regulatory affairs, MCK); Leo Mutisya (manager, stakeholder engagement & professional ethics, MCK), Simon Nzioka (senior legal officer, CAJ), Naserian Karbolo (senior legal officer, CAJ), and Edward Opany (advocacy & communications officer, CAJ).

Lastly, we appreciate the invaluable input by Mr. Henry Maina who provided extensive technical input and feedback to the handbook.

Finally, we thank all our stakeholders who gave their input during the validation workshop and the process in general.



LIST OF ABBREVIATIONS

ATI	–	Access to Information
RTI	-	Right to Information
MCK	-	Media Council of Kenya
CAJ	–	Commission on Administrative Justice
ICT	–	Information Communication Technology
IAO	–	Information Access Officer
PDU	–	Presidential Delivery Unit
CMESP	–	Center for Media Studies and Peace Building
LACC	–	Liberia Anti-Corruption Commission



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Executive Summary

This handbook provides a training module for journalists in Kenya on how best to deploy and use access to information platform as they execute their varied roles. The handbook is also designed to enable journalists to understand the scope and extent of the right to access information and serve as a guide on how best they could exercise and promote the right effectively.

The handbook also spells out how journalists can best use access to information as a critical tool for credible investigative journalism. It is designed for journalists and media practitioners in all sectors including print and electronic who need to get access to information held by public bodies and selected private entities for their stories. In sum, the handbook will serve as a tool for training of trainers and journalists on access to information in Kenya.

The handbook is organized in six sections. Section 1 outlines the nexus between Access to Information and the practice of journalism in Kenya. It explains why journalists need to access to information and how it relates to the Code of Conduct to the Practice of Journalism in Kenya. Unit 2 explains how journalist can use the provisions of the Access to information to advance their work. Unit 3 provides specific information of specific strategies that journalists can use to conduct journalistic research. Unit 4 provides exemptions and grounds for refusal within the ATI framework. It gives scenarios under which journalists may not be given access to certain information under ATI Act 2016. Unit 5 provides the legal framework on the right to access to information. The unit gives insights on how the right to information has been infused in other national and international instruments. Unit 6 contains access to information case studies from Kenya and other countries.



Purpose of the Handbook

The handbook provides a training module for journalists in Kenya on how best to deploy and use access to information platform as they execute their varied roles. The handbook would also enable journalists to understand the scope and extent of the right to access information and serve as a guide on how best they could exercise and promote the right effectively. The handbook would also spell out how journalists can best use access to information as a critical tool for credible investigative journalism.

In sum, the handbook will serve as a tool for training of trainers and journalists on access to information in Kenya.

Who is the Handbook designed for?

Designed for journalists and media practitioners in all sectors including print and electronic who need to get access to information held by public bodies and selected private entities for their stories.

Objectives of the training Handbook

- Increase journalists' knowledge on access to information
- Promote understanding on access to information as a tool for investigative journalism;
- Develop capacity of journalists to promote the right to information

Handbook Layout

The Handbook is divided into six (6) units. Each unit is divided into sessions and each session has a defined topic.



UNIT 1: ACCESS TO INFORMATION AND THE PRACTICE OF JOURNALISM IN KENYA

In Kenya, government and private sector information has always been deemed as top secret which should not be disclosed or accessed by the citizens. Historically, the culture of secrecy has been a key aspect of Kenya's governance dispensation facilitated by laws such as the Official Secrets Act and the recently enacted Prevention of Terrorism Act. This is aptly illustrated by the figurative description of the word 'serikali' as '*siri kali*' meaning 'hot secret.' As such, disclosure of information has mainly been at whims and discretion of public and private officials regardless of the public interest in the information.

It took over a decade for Kenya to have a Constitution with an express provision on access to information. This was further bolstered in 2016 through the enactment of the Access to Information Act as a way of actualizing Article 35 of the Constitution. The legislation provides a framework through which the public can be involved in governance through public participation and social accountability. Among the beneficiaries of the Act is the media, especially when seeking information held by the state and information of public interest in the private sector. Indeed, the significance of the Act should be seen in light of its potential to facilitate the realisation of the freedom of the media under Article 34 of the Constitution.

According to the Media Council Act 2013, journalism is regarded as the action of collecting, writing, editing, and presenting of news articles in print and audio-visual formats. The Code of Conduct for the practice of journalism in Kenya requires journalists to adhere to the principles of accuracy by obtaining facts from all sides of their stories for accuracy, uphold integrity by being unbiased and report only the truth.

Journalists play a central role in democratic governance through initiation and stimulation of public debates. Yet, for them to



sustain this appetite, they need access to critical information which is held by the state and the private sector. Unfortunately, this is not the case as accessing information continues to encounter mounting challenges with various state organs and private sector either refusing to release public interest information or releasing it in piecemeal. Further, the old tradition and excuse “matter of national interest” that the current Constitution intended to eliminate remains problematic. This is so even with various progressive court decisions to the extent that the public is still not able to scrutinize the actions of security organs, especially procurement.

This is the context that journalism finds itself in regarding access to information tools. The right of access to has become a crucial concept in this context. It guarantees journalists access to information held by public bodies and even private entities, for their stories and investigations, enabling them to exercise their role as public watchdogs in our democracies.

The media should, therefore, use the right to access information to obtain crucial facts that would move their stories beyond merely conveying publicly available issues of public interest, to in-depth and analytical reporting. This would not only enhance the confidence levels among people about journalism but also make significant contribution to engendering greater degree of accountability for decisions relating to development and governance. Additionally, a stronger access to information law like the Kenya’s Access to Information Act should enable journalists to do their work better with support from the management and editors.

With the proliferation of digital media platforms in Kenya, there is need for journalists to be dynamic in the way in which they



obtain and utilize information, tailored for diverse audiences. The role of media in the continuous evolution in information communication technology also comes under critical focus because journalists are under continuous pressure to provide information which is not only prompt, but accurate. This is especially so due to the threat posed by misinformation and propaganda, through the internet. In this context, access to information offers journalists an opportunity to give facts and solid truths.

Research has shown that media is the most trusted institution in Kenya and, therefore, improved media performance, facilitated by access to information to enhance this trust is critical. The time calls upon the media as the fourth estate to emerge to provide the necessary checks and balances through its watch dog role.

Studies by the Media Council of Kenya (MCK) have revealed an overwhelming need for training on how journalists can use the right to access information to enhance their ability to source and compile public interest and investigative stories. This is buttressed by the survey conducted by MCK in 2019 which found, *inter alia*, that 91 percent of the respondent journalists required such training.

Due to low levels of compliance to the ATI Act, journalists writing stories of public interest run the risk of irresponsible reporting which can lead to defamation suits and increase conflict between news sources and subjects. The effect of this, therefore, is skeptical attitudes towards the media as a tool for conveying objective information during electoral processes. In this regard, access to information promotes ethics in journalism and helps protect journalists from avoidable attacks and criticism.

A number of players have come up with ways to enhance information availability to media, which journalists can tap into and enrich their stories with facts and depth. With people



accessing and using a myriad of ICT platforms, accountability and transparency through tracking information posted on open data portals by public agencies has become easy and cheap.

Journalists can use these open data, without necessarily spending a lot of resources during their investigative work. Platforms such as websites, the Kenya Open Data Portal, Integrated Financial Management Systems and Social Media accounts for Government departments and public officials has increased the avenues for holding government to account. In addition, the project has also been mentoring journalists on use of various investigative skills, ICT tools and coaching by senior journalists to investigate and produce highly in-depth stories on corruption and tracking of resource use by the government.

This includes providing relevant information that would enable citizens to make responsible and informed choices rather than acting out of ignorance or misinformation; to the information serving as “checking function” by ensuring that elected representatives uphold their oaths of office and carry out the wishes of those who elected them¹ as provided for in the Constitution and their manifestos.

Unfortunately, the media has not demonstrated fully, its capacity to mediate and guide the transition by articulating and exploring the key issues that need to be addressed; supporting public participation and accountability through its coverage and analysis as well as providing platforms for further engagement.

1



UNIT 2: UTILISING ACCESS TO INFORMATION LAW TO ADVANCE THE PRACTICE OF JOURNALISM

The nature of information

The word information does not enjoy a clearly delineated, universal meaning, but varies according to the context in which it is used. It is, however, defined under section 2 of the ATI Act to mean all records held by public entity or private body regardless of the form in which information is stored, its source or date of production. This implies that that information may also be unrecorded.

What is access to information?

The principle behind the right of access to information is that public bodies hold information not for themselves, but as custodians of the public good and every citizen has the right to access information subject only to clearly defined limitations established by the law.

This right of access to information places two key obligations on the government. First, there is the obligation to publish and disseminate key information about what different public bodies are doing. Second, the government has the obligation to receive requests from the public for information and respond, either by letting the public inspect the original documents or by sending them copies of documents and information held by the public bodies.

Access to information is a right with two parts to it:

Proactive Disclosure

Proactive disclosure means public entities continually make information available without waiting for requests. It is active



transparency. All public and some private entities are required to administratively and as a matter of course release information to the public, without the necessity of formal applications. This is important to enable the public to know what the bodies are doing, enable them to participate in public matters and to hold the bodies to account.

Reactive

The right of all persons to ask public officials for information about what they are doing and any documents they hold and the right to receive an answer. The majority of information held by public bodies should be available, but there are some cases where the information would not be available in order to protect privacy, national security or commercial interests.

Why is the right to access information important?

The right of access to information helps us to enjoy and protect our rights and freedoms, makes institutions more transparent and accountable, improves service delivery from government departments and encourages public participation in matters that concern them.

Parliament passed the ATI Act to:

- make it easier for Kenyans to enjoy the right of access to information that is provided by the Constitution;
- create a way for government bodies and private institutions to provide information when requested;
- make it easier for people to get information from private organisations, especially where that information will help protect the enjoyment of their rights;
- protect people who provide information in the public interest (whistle blowers);



- create a way for educating citizens about the right to information; and
- give the Commission on Administrative Justice powers to ensure the ATI Act is followed.

Who has the right to submit information requests?

Access to information is a right under Article 35 of the Constitution. Every Kenyan has a right to seek, receive and disseminate any information that makes it possible for them to enjoy or protect their rights and freedoms as citizens. “Every Kenyan citizen (a natural and legal person with Kenyan nationality) has the right to access information in accordance with the Constitution and the ATI Act

But a "citizen" does not have to be a human person, the ATI Act makes it clear any private body (like a company) is a citizen for this purpose if it is "controlled by" one or more Kenyan citizens. A company in which Kenyan citizens had over 50 percent of the voting shares would be controlled by citizens.”²

The Act provides how citizens may seek and obtain information, unless that information is protected from public exposure by any one or more of nine exemptions. Further, it provides that the Commission on Administrative Justice (the Office of the Ombudsman) and the courts are to protect the right.

Which information does the right to access information apply to?

In principle, all information held in a recorded form by public authorities can be accessed under access to information laws, unless the information is exempt under Section 6 of the Act.

2 Katiba Institute, (2016) Handbook on Access to Information Act, pg 6



It also applies to information held by another individual or private entities if it is necessary for the exercise or protection of any right or fundamental freedom of a citizen.³

Some of the exempt information under the Act include information that may:

- i) undermine the national security of Kenya;
- ii) Prevent the due process of the law;
- iii) Endanger someone's safety, health or life (this may include revealing the whereabouts of a protected witness, whistleblower or human rights defender);
- iv) Endanger a person's privacy;
- v) Breach professional rules of confidentiality (applying to doctors, lawyers and journalists);
- vi) Unduly disclose commercial interests of a company;
- vii) substantially create difficulties for the government in managing the economy;
- viii) Damage a public entity's position in any legal proceedings

Which bodies does the right to access information apply to?

All public bodies are required to disclose information without the need for the applicant to give reasons for requiring the requested information. The Act also covers certain private entities such as those involved in the exploitation of natural resources where information would be needed to protect a right. Certain private bodies that “receive and utilise public resources or engage in public functions/service or have exclusive contracts to exploit natural resources are also treated like public bodies and are required to disclose information.”⁴

3 Constitution of Kenya, Article 35 (1) (b).

4 Section 2, the definition of a private body



Other private bodies may also be required to disclose if the information is of significant public interest, that is, the information is of value in the protection of human rights, the environment, or public health and safety, or the exposure of corruption or illegal actions, or the protection of any right.

Process of requesting for information

To ensure that the information sought is provided quickly, section 9 of the Act, makes it mandatory for the Information Access Officer to provide the information within 21 days of the receipt of the application. If the information requested concerns the life or liberty of a person, it is mandatory to provide it within 48 hours of the receipt of the request with a possibility of an extension in limited cases. In instances where the requested information is held by another body, the entity receiving the request should transfer it to that other entity within five days of receipt of the request and inform the person who made the request within seven days of receipt of the request. The Act provides for penalties in case of failure to provide information in time, or for refusal to accept an application for information, or for giving incorrect, incomplete or misleading information, or destroying information, and so on. In addition, the Commission on Administrative Justice has been empowered to recommend disciplinary action against offending public officers.

By dint of section 7 of the Act, a Chief Executive Officer of a public entity is the Information Access Officer and may delegate this responsibility to any other officer of the public entity (also applies to a private body). The officer receives requests, develops ways of assisting applicants to access information and processes applications for access to information within the set timelines under the Act.



If your request is not answered (mute response/“administrative silence”), or if the public body refuses to provide you with the information (refusal), or if the answer doesn’t really answer your question, you may make a request for review within the organization, the Commission on Administrative Justice or the High Court.

The appeal should be done within 30 days from the time the decision was formally communicated to the person. The Commission may allow a longer period.

Can personal information be corrected, updated or annotated?

Yes, a person may request for correction of personal information that is outdated, inaccurate or incomplete. In such instance, the Act provides for a request for correction to be done in writing to the institution holding the information indicating the information to be corrected. The correction should be done within a reasonable period failure to which the person making the request may appeal to the Commission. It is instructive to note that failure to make correction upon notification or request is a criminal offence that attracts a fine of not more that 500,000 shillings or imprisonment for a term of not more than six months or to both.

Offences and Penalties

Section 18 of the Act outlines the offences and penalties under the act, the offences include alteration, defacement, blocking, erasure,

			Sentence upon Conviction	
	Person/Ent	Offence		



	ity		Fine (Sh) (up to)	Term of imprisonment (not exceeding or both)
1.	Information access officer	Refuse to put oral applications into writing.	50,000	3 Months
		Refuse to accept an information request.		
		Failure to respond to information request within the stipulated time.		
		Failure to provide information that is capable of being read, heard or viewed by an applicant with disability.		
2.	Person	Charging a fee exceeding the actual cost of making copies.	100,000	6 Months
		Failing to respond to information required for protection of a right.		
		Failing to respond to a request to correct personal information or to correct, delete, destroy or annotate information within a reasonable time.		
3.	Person	Knowingly disclosing	1,000,00	3 Years



		information under the exemption clause (unless in public interest).	0	
4.	Person	Altering, defacing, concealing or erasing records with intent to prevent disclosure of information.	500,000	2 Years
5.	Private body	Failure to make public available the name and contact of the information access officer.	500,000	-
6.	Person	Providing false information intended to injure another person.	500,000	3 Years
7.	Person	Failing to attend proceedings before the Commission in line with Summons issued. Causing obstruction or disturbance in the course of proceedings before the Commission.	300,000	3 Months
8.	Person to whom information is disclosed	Conveying to others altered information, concealing some information, misrepresenting information with intent to deceive.	200,000	1 Year



UNIT 3: EXERCISING THE RIGHT OF ACCESS TO INFORMATION IN JOURNALISTIC RESEARCH

This Chapter explains the process of filing information, timelines, and strategies journalist can use to make their requests successful. This will provide a guide ranging from the submission of a request, taking into consideration some strategic to the tactical approaches relevant to journalists who want to integrate use of access to information laws into their information-gathering work.

When is the right time to submit access to information request?

If you are thinking of presenting an access to information request to a public body, you should try to find the information by checking whether the entity holding the information has already published the information on their websites, media, publications or any other platform since nobody is obligated to supply you with information that you could reasonably get hold of by other means.

While many journalists prefer to try these conventional means of getting information before initiating a formal request, filing a formal request ensure the journalist can get accurate and verifiable information. Submitting an access to information is, therefore, not a last resort as most commentators may have indicated.

There are occasions when you might not want to waste time with the other ways of getting information and you will go straight to submitting an information request:

- you are making a request for information which is sensitive and you want to be able to prove that you got it via legal channels using the law, in case the government later claims that the information was leaked or that it is incorrect or incomplete;



- you suspect that you may not get the information unless you use the formal legal mechanism of the access to information law;
- you suspect that you will be refused the information and you want to make sure that refusal is formal and in writing; and
- you think access to information is a really good thing and you want to defend the right by using your access to information law as much as possible.

Always plan ahead to save time: Think about submitting a formal access to information request whenever you set out to look for information. It is better not to wait until you have exhausted all other possibilities. You will save time by submitting a request at the beginning of your research and then carrying out other investigations in parallel.

The newsroom culture for access to information

Does your media house have a culture of using the access to information law to get information? If not, you might be the first person to start doing so and you might need to change the newsroom culture. In particular, you might need to persuade your editors and owners that submitting and pursuing access to information is not a waste of time but is actually a useful part of your journalistic activity. If there seems to be resistance, there are a few things that you can do which might help:

- Take your time to inform your colleagues about the access to information law and get support for building it into newsroom strategy before bringing it up in a meeting;



- Collect examples from the country or from other countries about how access to information can lead to strong stories and exclusives [see Chapter 6]
- Explain to your colleagues that access to information is not only for investigative journalists but for all reporters researching a story and for all types of media outlet;
- Organize an in-house training session and invite experts from the Commission on Administrative Justice to explain to your colleagues how the access to information law works and to demystify it so that it is not seen as something which will be too time consuming;
- Submit a few requests on your own initiative, and then write stories based on them. Share the experience with your colleagues and encourage them to try to use the access to information law.
- If you have foreign correspondents based in countries with strong access to information laws, talk to them about submitting some requests in those countries in order to get information and also to gather positive examples of how access to information laws can result in useful stories.

Involve the media owners, the editors and your colleagues in using access to information. If your colleagues are skeptical about the value of access to information requests, one of the best ways to convince them is to write a story based on information you obtained using an access to information law. Mentioning in the final article or broadcast piece that you used the law is also recommended as a way of enforcing its value and raising public awareness of the right.



Information requests and the Information Access Officer

If you are planning to submit an access to information request to a particular public body for the first time, you might want to consider your relationship with the Information Access Officer of the body and depending on your relationship with IAO, you might want to let them know that you plan to submit a request, explaining that it is your legal right under the law, and that it is a different process from getting a comment and opinion. Additionally, you may decide just to keep these arguments in your mind in case you do get that angry phone call.

Another problem that may arise is that if it is obvious that the request comes from a journalist, it is passed to the public relations officer rather than being processed as an access to information request. This should not happen and, if it does, you should complain to the public body and make it clear that you would like your request to be treated on an equal basis with other requests.

Talk to other journalists and find out their experiences of submitting requests and if they have had the problem of receiving complaints from any public or private body or of requests not being treated as ordinary access to information requests. If this seems to be a common problem, you might want to consider raising it with the Commission and probably make a story out of it.

<https://www.businessdailyafrica.com/economy/Kenyan-firms-slow-in-enforcing-Access-to-Information-Act/3946234-3955564-126nyqy/index.html>



Where should I submit my request?

Once you know the information you want to access, identify the relevant public or private body. In most cases this would be obvious, but in some cases you might have a slight doubt, in which case it is worth checking on the websites of the relevant bodies to see which institution is responsible for that area of activity. A quick phone call to each institution might clarify.

When making phone calls or writing an email, you do not have to mention that you are a journalist nor why you want the information, especially if you think that this might set some alarm bells ringing inside the institution.

If you are not sure the institution which holds the information or where to submit your request, there is nothing which stops you from submitting the request with two, three or more bodies at the same time. In some cases, the various bodies will give you different answers, but this can actually be helpful in giving you a fuller picture of the information available on the subject you are researching.

If the information you have sought is not held by the public body you filed an information request to, the body has an obligation to transfer the request to a body that holds the information and they should inform you upon such a transfer.⁵

Should I let them know that I am a journalist?

There are pros and cons to letting the IAO know that you are submitting the request as a journalist.

5 Section 10 (3)



Pros	Cons
<p>More information</p> <p>In some instances, journalists tend to get answers faster and more information than other people. Even though this should not be the practice, you could try to take advantage of this positive discrimination.</p>	<p>Refusal</p> <p>Signaling that you are a journalist might increase resistance to providing an answer out of fear that the information will be used in a critical story.</p>
<p>Cost</p> <p>A journalist may be allowed to access information free of charge. In some countries like the USA, search fees are waived for journalists while in some countries, the journalists are not required to pay photocopying charges.</p>	<p>Destruction of crucial information</p> <p>Signaling that you are a journalist might encourage public officials to hide or even destroy information in order to cover up corruption or other wrong-doing.</p>
<p>Time Frame</p> <p>In some countries and instances journalists have a right to preferential treatment and to be provided with information in a shorter timeframe than other requestors.</p>	<p>Losing exclusive stories</p> <p>If the records of requests submitted are public as done in some countries where they are posted on line, then asking requests as journalist might tip off other journalists that you are on to a story.</p>

Identify yourself as a journalist: The law allows Kenyan citizens to access information but if you want to let the public body to know that you are a journalist then you could write your request on your media house's letterhead, if this is acceptable with the organisation. Another option is to mention in the letter



or e-mail that you are a journalist and/or who you work for as specific media outlet. However, if you do not want to give the game away it might be worth using a different address and personal email accounts.

What should I say in the request for information?

It is recommended that your request for information should be clear and specific about the information, records or documents you are looking for. In most cases it is not required by law to identify a specific document by any formal reference but if such a reference is known by the requester, then it would hasten access.

At the same time, try to have in mind the job of the IAO who has to answer your request; the clarity of your request will help him or her identify the information you need. A well-formulated request also gives public bodies fewer reasons to reject your request for not being clear (although it should be noted that a request for information cannot be rejected based on this fact).

In the first request for information, it is important to keep it simple and not ask for huge volumes of information nor include multiple requests in the same letter. This increases your chances of getting quick answers and you can make follow ups if necessary.

If you have a lot of requests, you might want to submit a series of requests broken down by subject since this helps the public body to forward the requests internally to the relevant departments so that they can prepare the response.

Always mention your right to access information: The law does not require that you mention the access to information law



as outlined in Article 35 of the Constitution and the ATI Act, but this is recommended because it shows you know your rights and is likely to encourage correct processing of the requests according to the law.

Hiding the real request in a more general one

If you are concerned that your request for information might indicate to the public body that you are working on a particular story or looking for particular information, you might want to “disguise” your request by asking a more general question. However, if you decide to hide your real request in a more general one, then you should make your request broad enough so that it captures the information you want but not so broad as to be unclear or discourage a response. Specific and clear requests tend to get faster and better answers.

a. What information should I provide when making request for information?

It is advisable to provide your name and address and an email address if you want to access the information electronically in soft copies. The access to information law does not encourage making anonymous request since the right is only enjoyed by citizens. It is also a good idea to give a phone number in case the public official wishes to contact you to clarify your request; that could speed up the process of getting the information.

If you work near the public body (for example you work in Nairobi or the County Headquarters where the documents are kept), you may also ask to inspect original documents. This can be helpful when researching information that might be held in a large number of documents that you would like to have a look



through. Such inspection is free and should be arranged at a time that is reasonable and convenient to you.

b. How do I make my information request?

An application to access information should be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested. This generally means either sending by post or hand-delivering a written request to the public body.

Presently, there are no official templates for making an information request in Kenya but public bodies are encouraged to prescribe such forms as may be necessary. However, the law indicates that an information request should not be rejected simply because it is not presented in a prescribed form.⁶

Journalists are advised to make request in writing and to save a copy or a record of it so that in the future you are able to demonstrate that your request was sent, in case you need to make an appeal against failure to answer, for example. This also gives you some evidence of submitting the request if you are planning to do a story on it.

There are a number of ways that you can do this:

- If you deliver the request by hand, take two copies and get one of them stamped
- If you send it by post, use recorded or registered mail

6

Section 8 (4)



- If you send an e-mail, do it with an automatic “return receipt”, but be aware that this function may not yet be a legal proof
- You might want to scan a copy of your request before posting it or scan the request that has been submitted which has the official stamps on it. This makes a good image to illustrate your story and to post on your website.

c. Do I have to pay a fee for making information requests?

No fee may be levied in relation to the submission of an application. A public entity or private body from which an application for access to information has been made may charge a prescribed fee for the provision of the information and the fee shall not exceed the actual costs of making copies of such information and if applicable, supplying them.

Journalists are encouraged to check the rules about fees before making a request for access. That way, if a public official suddenly asks you for money, you will know what your rights are.

d. In what format can I access the requested information?

You can access to the requested information in different formats, including:

- Inspection of originals;
- Photocopies sent by post or collected;
- Attachments to e-mails;
- DVDs or CDs;
- Flash Disks.

It is important specify the format you prefer and you have a right to receive the information in that format, unless it is impossible or too expensive.



Journalist should always state the format they prefer to access the information in. If you want information electronically, make sure to give your e-mail address. The advantage of electronic information is that it usually saves you from paying the photocopying and postage fee, and delivery of the information is often faster.

e. When will I receive the information?

The IAO is required to make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application. However, where the information sought concerns the life or liberty of a person, the IAO should provide the information within forty-eight hours of the receipt of the application.

Extension in case of complex request

Where the request is for large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder or if consultations are necessary so as to comply with the request. The information officer can extend for not more than 12 days. This, however, applies only to requests for information concerning the life or liberty or urgent of a person.

Media's use of the RTI Act for the purpose of investigative journalism – the Indian experience: (Extracted from *Right to Information Learning Programme in India for civil society and media representatives from Kenya*).

Mr. Shyamlal Yadav, a Senior Assistant Editor of the, Indian Express, the largest circulated English language national daily in India on his experience of using RTI for the purpose of investigative journalism. He explained how his RTI based investigative stories on the amount of foreign



travel undertaken by public functionaries resulted in the Central Government launching austerity measures to reduce expenditure on foreign visits for Ministers and senior bureaucrats. He pointed out that this intervention resulted in systemic reform with the Central Government making it compulsory for reports of such foreign tours to be placed on the websites of the respective departments for the reference of the general public. His RTI intervention also showed that the Government did not have in place a policy for using the frequent flyer miles accumulated on account of air travel of government functionaries and they were using it for personal purposes. When his investigative stories highlighting these gaps were published, the Government decided on a new policy to pool in those miles for official use and issued a circular prohibiting their use for personal purposes. He demonstrated how media could use RTI for bringing about greater accountability in government and also initiate policy reform. He emphasised that RTI was very useful for strengthening and successfully exercising the right to freedom of speech and expression and the freedom of the press.

In another case Mr. Yadav was able to show through information obtained under the RTI Act, that most ministers under the Central Government were not making mandatory disclosure of their assets and liabilities under the Code of Conduct applicable to them. After he published this story, the practice had improved and in 2016 all Ministers had declared their financial assets and liabilities publicly. His RTI-based stories brought to light several developments within government agencies that had remained secret until then. He said through RTI he had exposed a story about a public sector company – Life Insurance Corporation of India, which had pocketed huge amounts of premiums because the policies had lapsed without giving any warning to the policyholders. This resulted in the company announcing revival of the policies as and when the policyholders paid their due premiums. He also shared his experience of how he brought to light the lapses in implementation of the financial inclusion scheme meant for the impoverished segments of society in India called the Prime Minister's Jan Dhan Yojana. His RTI interventions showed that bank officials were depositing a rupee each in these accounts from



their own pockets in order to prevent them from becoming dormant. This investigative story also showed that the newly opened bank accounts were not being used by the rural poor despite the government's best intentions. Another RTI intervention that he made was in relation to the illegal surveillance mechanisms that security agencies had put in place. In India, rules laid down by the Supreme Court and the Indian Telegraph Act and the Information Technology Act required authorisation from the Secretary of the Ministry of Home Affairs before the security agencies eavesdrop on the telephonic conversations of suspects of crime. These rules have been laid down to protect the citizen's fundamental right to privacy. However, security agencies were illegally tapping telephones, without proper authorization in many cases. RTI interventions carried out by Mr. Yadav revealed this serious violation of lawful procedures. As a result of the widespread uproar caused by the media story on this issue, the government was compelled to streamline its telephone tapping procedures further. So Mr. Yadav said that RTI was not only a source of information for an exciting media story but it could also lead to systemic reform. He also informed participants about his latest book on investigative journalism using RTI as a tool and urged them to read it to better understand how useful RTI can be for a media professional.



UNIT 4: EXEMPTIONS AND GROUNDS FOR REFUSAL WITHIN THE ATI FRAMEWORK

Journalists should always seek to know whether the information you are requesting may fall under exempt information as outlined in Section 6 of the ATI Act. Sometimes the exceptions may be invoked because the information you are asking for is politically sensitive and a public body may restrict access to that information by applying one of the exceptions.

If you anticipate that exceptions might be applied to your information request, separate the question about the potentially sensitive information request from the other information that will expressly not fall under exempt information then split your question in two and submit the two requests separately.

Another strategy which journalists can use to avoid refusals is to write or broadcast a story that the request has been submitted. This can put pressure on a public body to process and respond to the request.

For example, if your Television or radio station is following a controversial story about a shortage of medicines in a county hospital, when you submit the request for information to the county government about the spending on medicines, you might want to announce this on air and also post news about the request on your website. You can update the information as and when you get a response to the request – or if the deadline passes and there is no response you can make this into a news story as well. Doing this has the additional benefit of educating the public about the right of access to information and how it works in practice.



What happens if I am not granted information request?

There are a number of ways in which you can be disappointed with an information request:

- You only get part of the information you asked for (but no formal refusal) – partial response
- You are told that the information “is not held” by that body;
- You are granted partial access but some information is withheld on the basis of exceptions;
- You are refused access to all the information or documents that you asked for;
- You are given information in an edited format;
- The period for processing the request has been extended;
- The processing of your request is deferred by that body;
- Payment of fee has been imposed by the body; and
- You do not get any reply at all (“administrative silence” or a “mute refusal”).

In all these cases you have a right to appeal to the Commission on Administrative Justice or to the High Court.

Before appealing to the Commission on an incomplete access, check that your information request was in fact clear enough or whether it was possibly open to misinterpretation. If you think that it was not clear, then you might want to go back to the public or private body informally and try to clarify.

In case the information is not held by the body you made the request to, the body is mandated to transfer the request to a body holding the information and communicate the decision to you. It might be worth trying an informal clarification about what you



wanted before launching a formal appeal. If, however, you think that there was a deliberate obstruction, a formal appeal is recommended. In the case of partial access, full refusal or administrative silence, the best option is often to appeal to the Commission for a review of the application as per the law.

Journalist should always make a story out of the refusals. The refusal to grant access following a request is often a story in itself. In the United Kingdom (UK) for example, the government's refusal to release legal advice relating to the Iraq War was a story that ran repeatedly.

The reluctance of the UK Parliament to release MPs expenses in spite of court rulings to do so was also an ongoing story – and when the information was eventually leaked it was a major scandal which caused quite a few members of parliament to resign, resulted in an order to MPs to pay back a total of as much as €1.5 m and sold a lot of newspapers in the meantime. [See Heather Brooke brief in Chapter 6].

Check list before writing a story about incomplete access and refusals:

- Look carefully at the request for information to see whether it was clearly worded and whether the public or private body might have misunderstood what you were asking for. You do not want to criticize a public body for failing to answer a request that was badly written or confusing. If you are not sure, ask a couple of your colleagues;
- Check carefully which information you were given (if any) as well as what you were refused. That way you can



make a clearer story focusing on what the public or private body is actually refusing to provide;

- Be very clear if you are planning to appeal or not; it is not wise to state in an article or on the air that you are planning to appeal against a decision and then do nothing – public or private bodies will get used to the empty threats and may be even less inclined to grant information in future if they think that they can get away with it. You may need to discuss with your organization’s lawyers before you take a decision on whether or not to appeal, or talk to the Commission to advice.

When public interest overrides secrecy

Section 16 of the Act provides for protection of disclosure in public interest of information relating to violations of the law, corruption, abuse of public office, mismanagement of public funds and conflict of interest among others.

For example, information about a contract between a public body and a private contractor will contain information about the money paid for the services of that contractor. If the contractor offered the government a very low price for its services, they might not want to disclose that information as it would hurt their ability to negotiate a higher price with other clients in the future. But on the other hand, the public has a right to know how public funds are being spent, and there is a strong public interest in knowing that taxpayer’s money is being used properly, so the information should be disclosed.

In this kind of example, public officials have to apply what is called the “public interest test”. They have to consider the



exceptions, and the possibility of not releasing the information, and then they have to consider the public's interest in knowing the information. Many access to information laws have this kind of test built into them. In other cases, the enforcement agency or the courts will consider the public interest when there is an appeal. In a well-functioning access to information regime, there will be many cases when transparency overrides secrecy.

Even if an exception applies, that does not mean you cannot get any information. There are instances where public bodies are obliged to black out or otherwise remove the sensitive information and give you the rest of the document. If the information is in electronic form, then the sensitive information can be removed electronically, but in that case the public or private body should tell you that they have done some "editing" and mark where that was and they should justify in detail why it was necessary.

For journalists, even partial access to information can be useful for two reasons. First, you can make use of the information you get and you can write a story about what the government is not giving you. Second, you can use the information you have received to make a follow-up request for the remaining information.

Copyright problems / reuse or publish the information

Copyright and rules on re-use of public sector information are important issues which journalists need to be aware of. Generally, if information is released from public authorities under access to information laws, it may be re-used by the media for stories and radio and TV programmes and for posting on blogs. Because of the importance of freedom of expression, in



some countries this is considered to be “fair use” of the material and not subject to copyright and reuse licenses. A journalist may need to check the rules in the country. Also, if you plan to make use of a large volume of information such as an entire database, then you may need to check with the public institution about the rules on re-use.



UNIT 5: LEGAL FRAMEWORK ON THE RIGHT TO ACCESS TO INFORMATION

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. The scope of this right has been by the United Nations Committee in General Comment No. 34.⁷
- 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 right of access to information.
- African Charter on Human and Peoples' Rights at Article 9 guarantees the right of every individual to receive information.
- United Nations Convention Against Corruption underscores the role of information in fighting corruption and requires States to ensure the public has effective access to information.

⁷ UN Human Rights Committee, General Comment No. 34 (2011) Geneva, para 18 and 19..



- African Convention on Combating and Preventing Corruption requires States to ensure realization of the right of access to information for eradication of corruption.

Right of access to information in Kenya

Constitution of Kenya, 2010

Key points

- Right of access to information is primarily guaranteed to citizens only
- The right places on the State two sets of obligations – active and passive transparency
- The right is not absolute and access to information may be limited by law
- 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 and freedom of the media.

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 of access to information is primarily guaranteed for Kenyan citizens. The Constitution does not define ‘citizen’ and construes citizenship as only applying to natural persons.⁸ However, the Act has defined it and broadened its meaning to include juristic persons.⁹

Second, the right of access to information is a general right that encompasses the overall volume of information held by the State, with the exception of 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 in regard to 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 publicise 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 protection of rights.

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

⁸ See, Chapter Three, Constitution, 2010 on citizenship.

⁹ Section 2 of the Access to Information Act.



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.¹⁰ The Constitution also guarantees the freedom of expression, freedom of the press, right to privacy, right to fair hearing, political rights and economic, social and cultural rights which draw from the right of access to information.¹¹

The above provisions of Article 35 of the Constitution are further concretised in the ATI Act. Other laws that relate to access to information include the County Governments Act, 2012 which sets out obligations of County Governments in regard to access to information. Section 96 specifically addresses itself to access to information held by county governments, unit or department of the county and requires county governments to designate an office with a view to enhancing access to information. This provision further obligates county governments to pass legislation to guarantee access to information.¹²

10 Article 54(c) Constitution

11 Articles 31, 38 & 43 & 50 of the Constitution.

12 County Governments 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 sub-section (1). (3) Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information.



A number of other provisions in the Act invoke the right of access to information. These include the principle of public participation which is the bedrock of devolved governance and is pre-conditioned on access to information, data, documents and other information related to policy formulation and implementation.¹³ Additionally, the county media is obliged to observe access to information,¹⁴ while the county communication framework is required to facilitate public communication and access to information.¹⁵

Other laws include the Kenya Information and Communications Act whose section 93 allows for access to information held by the Communications Authority of Kenya;¹⁶ the Public Finance and Management Act, section 10 (f) of which provides for publishing and publication of all reports of the parliamentary budget office 14 days after their production,¹⁷ and publication of budget estimates; and the Public Procurement and Asset Disposal Act, which requires publication of information relating to all contract awards by public bodies.¹⁸ Similarly, the Ethics and Anti-Corruption Commission Act at Section 29 requires the Commission to publish and publicise information within its mandate affecting the nation in accordance with the right of access to information in the Constitution.¹⁹

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- 13 Section 87, County Governments Act.
14 Section 93, County Governments Act
15 Section 95, County Governments Act
16 Section 93, Kenya Information and Communications Act.
17 Section 10 (f) Public Finance Management Act.
18 Section 138, Public Procurement and Asset Disposal Act
19 Section 29, Ethics and Anti-Corruption Commission Act.



Conversely, a number of other laws contain provisions that have the potential of undermining access to information. These include the Official Secrets Act which prohibits public officers from disclosing information obtained in the course of duty;²⁰ the Public Archives and Documentation Services Act which restricts access to records until 30 years after their closure;²¹ the Ethics and Anti-Corruption Commission Act which requires every member and employee of the Commission to sign a confidentiality agreement;²² the Statistics Act which restricts access to statistical information to officers working for the Kenya National Bureau of Statistics;²³ and the Public Service Commission Act which requires every member and employee of the Commission to sign a confidentiality agreement thus entrenching a culture of secrecy.²⁴

International principles on access to information

In 1999, Article 19, commissioned a set of principles upon which ATI laws should be based. They include:

Maximum disclosure: ATI laws should be guided by the principle of maximum disclosure with a limited scope of exceptions; requiring information and public bodies to be defined widely. This principle also recommends that the willful destruction of records should be labeled a criminal offence and prescribes minimum standards for maintenance and preservation of records by public bodies.

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- 20 Section 3, Official Secrets Act, Chapter 187 of the Laws of Kenya
21 Section 6 (1) Public Archives and Documentation Service Act.
22 Section 29 (5) Ethics and Anti-Corruption Commission Act.
23 Section 22 Statistics Act, 2006.
24 Section 99(4) Public Service Commission Act, 2017



Obligation to publish: Public bodies should be under an obligation to publish key information.

Promotion of open government: Public bodies must actively promote open government, active promotion, public education, and actively tackle the culture of official secrecy.

Limited scope of exceptions: Exceptions should be clearly and narrowly drawn and subject to strict harm and public interest tests. The three-part test to establish this is:

- a) The information must relate to a legitimate aim listed in the law;
- b) Disclosure must threaten to cause substantial harm to that aim;
- c) The harm to the aim must be greater than the public interest in having the information. It is important that refusals meet a substantial harm test and there should be the case for overriding public interest even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim if the benefits of disclosure outweigh the harm.

Processes to facilitate access: Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available. This should be at three different levels, including within the public body, appeals to an independent administrative body and appeals to the courts.

Costs: Individuals should not be deterred from making requests for information by excessive costs.

Open meetings: Meetings of public bodies should be open to the public.



Disclosure takes precedence: Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

Protection of whistle blowers: Individuals who release information on wrongdoing – whistleblowers – must be protected.



UNIT 6: ACCESS TO INFORMATION CASE STUDIES FROM KENYA AND OTHER COUNTRIES

Courts and administrative bodies in different countries have made decisions guaranteeing the right to access information in general and expanding and elaborating different aspects of the regimes of access to information.

A select case below highlight some of the areas that has been elaborated after media practitioners, media development organizations, civil society organisations and individuals challenged decisions of different public bodies and private entities refusing to grant access to information.

Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 Others [2013] eKLR

Issues: (i) the right of a citizen to access information; and (ii) whether a juristic person was a citizen within the meaning of Article 35 of the Constitution

In October 2011, The Nairobi Law Monthly published an article regarding a series of transactions undertaken by the Kenya Electricity Generating Company Ltd (KenGen). In that article, the Nairobi Law Monthly implicated KenGen and its then Managing Director, Edward Njoroge of corrupt dealings in awarding contracts to six companies to drill hydrothermal wells. Immediately after publication of the article, KenGen denied those allegations and filed a defamation suit against the publication. In response, the Nairobi Law Monthly wrote to KenGen requesting for particular sets of information on the matters arising from the article. KenGen did not provide the information, a move that prompted the Nairobi Law Monthly to go to court seeking orders to compel KenGen to provide the information. In a sworn affidavit, the then KenGen argued that the company held information for the benefit of its owners, the



public, and that disclosure of such information must be based on the provisions of the Companies Act which were not inconsistent with the provisions of the Constitution. Additionally, KENGEN added that even though it was largely owned by the state, it was a publicly listed company, and its disclosure of information would not be made under the constitutional provisions on access to information, but as envisaged under statutory provisions governing its operations.

The court ruled that citizens had a right to access information held by the state and its agents and KenGen had an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. However, the court upheld the view that the right to access information extended only to natural persons who were citizens and not to corporations like Nairobi Law Monthly. It is worthwhile to note that this was a minimalist decision which was decided before the Access to Information Act was enacted.

Katiba Institute v President's Delivery Unit & 3 Others **[2017] eKLR**

Issues: (i) Whether a juristic person was a citizen in the context of the right of access to information; (ii) Whether it was mandatory for a requester to seek the intervention of the Commission on Administrative Justice before moving to court

In August 2017, Katiba Institute (KI), a Kenyan organization that focuses on governance, sought information from the President's Delivery Unit (PDU) about the government's advertisement during the 2017 electioneering period. According to KI, PDU had published various advertisements in the media, on billboards,



and through social media. Katiba Institute, therefore, requested information on how many advertisements had been published, through what media, schedules and dates when it was done, copies of the documents advertised, costs incurred, and the government agency that met the cost.

In September 2017, Katiba Institute approached the High Court after PDU failed to provide the requested information. Before the High Court, it sought, among other things, a declaration that PDU's failure to provide the information sought and to publicise the information was a violation of the right to access information under Article 35 of the Constitution, as well as Article 10 of the Constitution.

Katiba Institute submitted that it had not received any information in response to its request, and that Article 35(1) of the Constitution “grants a citizen the right to seek and have information from a State or State organ”. It argued that because PDU was a public body, it was bound by Article 35 of the Constitution.

The PDU on the other hand argued that Article 35 of the Constitution applied only to “citizens who are natural persons but not [Katiba], a juristic person”. It also submitted that the information that Katiba sought was freely available from the Auditor General and Parliament as those bodies were “constitutionally mandated to [oversee] public expenditure”. The PDU also argued that the information was exempted from disclosure under sections 6(1)&(2) of the Act, which provided for an exemption if the information sought would undermine national security. Further, it urged that Katiba's suit was



premature since the intervention of the Commission on Administrative Justice had not been sought.

While underscoring the constitutional and legal frameworks for access to information, the court explained that the law did not place any conditions on the access to state information and that “once a citizen places a request to access information, the information should be availed without delay”. In this context, the right was not affected by the reason why a citizen sought the information or even what the public officer perceived to be the reason for seeking the information. Further, the court observed that, under Article 35 of the Constitution, the State had an obligation to proactively publish information in the public interest and to provide access to such information.

The court also cited two South African cases (*President of the Republic of South Africa v. M & G Media* and *Brummer v. Minister for Social Development*) to highlight the “importance of the right to access information as a founding value of constitutional democracy” and its role in forming a “basis for accountability, responsiveness and openness”. It also cited Article 19 of the Universal Declaration of Human Rights, Article 19(2) of the International Covenant on Civil and Political Rights, and Article 9(1) of the African Charter on Human and Peoples’ Rights, and. [para. 39] He stated that, by virtue of Article 2(5) of the Constitution, these international instruments – which had been ratified by Kenya – were part of the Kenyan law.

The court did not accept the argument put forward by PDU that Katiba was a juristic person and so could not access information. It noted that section 2 of the Act defined a citizen, as “any individual who has Kenyan citizenship, and any private entity



that is controlled by one or more Kenyan citizens.” Katiba fell into the latter category and was, thus, entitled to “seek and have information as a citizen”.

With regard to the PDU’s argument that the information sought was exempted by section 6(1)&(2) of the Act, the Court held that it was up to PDU to show how the information sought affected state security. It observed that the information sought concerned the nature of the advertisements, dates of publication and their cost, and reasoned that that information “cannot be information that affects state security”. It was for PDU to demonstrate why access was denied which obligation had not been discharged in the present case. The Court, therefore, went on to endorse the position that any limitations to the right of access to information should “apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information”. It also held that the High Court had unlimited jurisdiction and it was not mandatory for a requester to first seek the intervention of the Commission on Administrative Justice before moving to court.

In light of the above, the Court held that the government had violated Katiba’s rights “under the Constitution and the law”. He added that “[w]e must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of rights. It is integral to the democracy conceptualized by our Constitution in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused”. It, therefore, issued the orders sought and ordered that the PDU provide the information Katiba Institute sought.



Peter M. Kariuki v Attorney General [2011] eKRL

Issues: (i) access to information for the exercise or protection of a right of fundamental freedom, and (ii) whether salaries and allowances of members of the Kenya Defence Forces are exempt from disclosure under section 6(1)(a) of the Access to Information Act)

Peter Kariuki, a former officer of the Kenya Air Force, was relieved of his duties, arrested, detained, and eventually tried and convicted after the 1982 attempted coup. He brought a suit to challenge the conditions of his detention as violating his fundamental rights. In connection with this legal challenge, Mr. Kariuki sought from the Department of Defense employment records, payment vouchers, and current salary records for officers who were at the same rank with him at the time of his dismissal. The Court ordered the Department of Defense to grant him access to the records and information, but the Department of Defense refused, asserting that salaries and allowances of Armed Forces personnel were confidential and personal.

The Court ruled that the Defense Forces are subject to the Constitution, pursuant to Articles 3 and 10. Article 10 stipulates transparency and accountability as among the national values binding all state organs. The Court further ruled that Article 35 on the right to information grants Mr. Kariuki the right of access to the information requested from the Department of Defense. The Court thus rejected the Attorney General's assertion that defense salary and allowance records were confidential, and compelled the Department of Defense to provide this information to the Mr. Kariuki and to the court. It further stated that "records regarding salaries and benefits payable to public officers cannot be classified as private or confidential." The



Court recognised as relevant that the underlying case related to serious alleged violations of constitutional rights.

South Africa: Claase v Information Officer of South African Airways`1 (PTY) Ltd. (39/06) [2006] ZASCA 134

Issues: (i) access to information for the exercise or protection of a right or fundamental freedom, (ii) access to information held by a private body, and (iii) compensation for unreasonable denial of access to information.

A retired South African Airways pilot was contractually entitled to two free business class tickets each year as part of his retirement package. When he attempted to benefit from this for a specific flight, the airline told him that no business class seats were available though he witnessed passengers upgraded and was later told through telephone that a record existed showing that a seat had indeed been available. Pursuant to the Promotion of Access to Information Act (PAIA), and in order to support his claim that the airline violated his contractual rights, he requested records to prove that he was denied the seat improperly. In response, the airline provided some information but not the particular record requested. The court of first instance ruled that the pilot had not sufficiently established that the record was necessary to protect a right; and that the information already provided by the airline was sufficient to satisfy his request. He appealed to the Supreme Court of Appeal which subsequently ruled that the pilot had established sufficiently the existence of the record sought and the necessity of its disclosure to protect his right; and that the airline had not provided the specific relief sought and must do so.



Section 50(a) of PAIA provides for the right of access to records of private bodies if “that record is required for the exercise or protection of any right.” Section 53 requires that, where making a request for privately held records, the requester provides sufficient evidence to establish (a) the existence of the records requested, and (b) “the right the requester is seeking to exercise or protect” and “why the requested record is required for the exercise or protection of that right.” Section 9 of PAIA provides for access to information “as swiftly, inexpensively and effortlessly as reasonably possible.”

The Court ruled that the pilot had the burden only to present facts that “prima facie, though open to some doubt,” establish that a record existed for which disclosure was required to protect a particular right. The Court also ruled that the pilot was entitled to disclosure of the specific record requested, as section 50 provided for access to “any record” in any form or medium. The Court ordered a punitive award of costs against the airline for failing to adhere to the spirit and the letter of section 9 of the law as it had made disclosure slow and burdensome.

Liberia: Center for Media Studies and Peace Building (CEMESP) V. Liberia Anti-Corruption Commission (LACC), IIC-D001-07-2013

Issues: (i) whether the asset declaration of Cabinet ministers could be disclosed on the basis of public interest in fighting corruption, (ii) whether the disclosure would constitute intrusion of privacy rights, and (iii) whether the Executive Order No. 38 which barred disclosure could override the Freedom of Information Act.

In November 2012, the Center for Media Studies and Peace Building (CEMESP) requested copies of asset declaration forms of Cabinet ministers and their deputies. The Liberia Anti-



Corruption Commission (LACC) asked CEMESP to pay the cost of reproducing the declaration forms, but later denied the request based on Liberia Freedom of Information Act. In particular, LACC alleged that requested information fell within the definition of personal information and according to section 4.5 of the Freedom of Information Act was exempt from disclosure. Additionally, it argued the disclosure would be in breach of the LACC's duty under section 10.3 of Executive Order No.38, indicating that declaration was a classified information only accessible to the authorised personnel. Lastly, CEMESP was constitutionally privileged from disclosure in the absence of a court order.

In January 2013, CEMESP submitted a complaint to the Independent Information Commissioner about the LACC's denial, seeking the commissioner's intervention and grant of access.

The Information Commissioner first referred to alleged exemptions provision of the Freedom of Information Act. While the Commissioner agreed that asset declarations fell within personal information, applying public interest test, it concluded that LACC failed to prove existence of "harm" that would be "greater than public interest in having information disclosed."

With respect to section 10.3 of Executive Order No. 38, the Commissioner established that the latter was inconsistent with Freedom of Information Act. The Commissioner concluded that in the event of clash of norms, according to section 1.7 of FOI, the latter had primary value and prevailed over administrative orders.

Lastly, referring to the Article 16 of the Constitution, the Commissioner concluded that the disclosure would not



constitute “unwarranted intrusion” or disturbance of privacy rights, but rather strengthen the fight against corruption.

Peru: Cardenas v Mayor of Huapango [2010-487]

Issues: (i) whether a requester was entitled to access information on trips by public officials as a way of promoting open government, and (ii) whether access to information could be denied upon payment of the requisite fees.

Mario Cueto Cárdenas, a journalist, requested from the General Secretary of the City Council of Huamanga, all information related to trips approved and taken by public officials to other cities within and outside the country, including dates, purposes and money allocated for per diem. After receiving no response from the Mayor and City Council, a demand of *habeas data* (i.e. an individual complaint based on a fundamental right to know information stored about oneself) was filed with the court of first instance, which dismissed the demand. Cárdenas appealed the decision.

The Court overturned the decision of the lower court, ruling that the City Council must deliver certified copies of the information requested once the applicable fee payment had been received from the requester. The Court’s reasoning was based on (1) the principle of publicity, (2) the right to access information (as protected by the Law on Transparency and Access to Information), and (3) Law 27619 which regulated foreign travel authorization of public servants and officials. First, all information possessed by the state was governed by the principle of publicity, which obligated government bodies to produce and keep information related to the travels and expenses of their officials.



Second, the right to access information was explicitly embedded in the statutory law of Peru. Third, Law 27619 provided for the documentation and retention of all information needed to satisfy such travel requests. The Court, therefore, ordered delivery of the requested information as soon as the requisite fee had been paid and warned that continuation of such failures to provide information could result in further corrective action.

Insert briefs about Heather Brooke – UK-
<https://heatherbrooke.org/>

Heather Rose Brooke is a journalist and Freedom of Information campaigner. She is largely known to have utilized the access to information law in the United Kingdom to help expose the 2009 House of Commons expenses scandal, which resulted in the resignation of the Speaker of the House of Commons and a number of members of parliament standing down in the 2010 general election.

But there are many other information requests she made that has big effects like the British Broadcasting Corporation (BBC) Board of Governors Meeting in January 2014. She is the author of the book *Your Right to Know: A citizen's Guide to Freedom of Information*

Insert Brief about Hub for Investigative Media (<https://him-ug.org/>)

Hub for Investigative Media (HIM) is a Ugandan civil society organization that has in the last five years cut its niche in promoting knowledge, application and implementation of Access to Information Act, 2005. Edward Ronald Sekyewa, the Executive Director, a seasoned journalist has made numerous information requests with mixed results.





P.O. Box 43132
00100 Nairobi, Kenya
T +254 (020)2737058
M +254 727 735252
E info@mediacouncil.or.ke
W <http://www.mediacouncil.or.ke>