

**ACCESS TO INFORMATION IN KENYA: A CRITICAL ANALYSIS OF THE
ACCESS TO INFORMATION ACT 2016.**



University of Nairobi

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of Laws Degree (LLM) of the University of Nairobi*

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DECLARATION

I, **ARNOLD MAGINA**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualification.

Signature.....

Date.....

ARNOLD MAGINA

This project has been presented for examination with my authority as the University Supervisor

Signature.....

Date.....

DR NKATHA KABIRA

DEDICATION

To the almighty God,

Thank you for great health and favor during this journey and the blessings that come with believing in you.

To my parents Daves Magina and Betty Magina,

Thank you for your encouragement and patience throughout this journey. You sacrificed to see me through it all with your love and care and above all your stern belief in the pursuit of greatness. To you I say “OCHIO MNO, NYASAYE AMULINDE.”

To my great and humble wife Winnie Achieng,

Thank you for the late nights and early mornings, I would not have made it without your daily encouragement to complete this. Words can't express my gratitude to you. Thank you.

To my siblings, Brian, Emily, Marion, Alvin, Rose, Beryl, Vera Triza, Owen, and Brent Ethen,

It is for moments like this that I feel proud to be the leader of this great team. You are the best I could have asked for and may the odds always be in our favor.

To my lecturer and employer, Elisha Z. Ongoya,

“Very well” thank you for the constant reminder that I need to be the best version of myself amidst the life challenges that I encounter. May the journey that I have begun be fruitful.

ACKNOWLEDGEMENTS

But Jesus looked at them and said, “With man this is impossible but with God all things are possible, for all things are possible with God.” (Mark 10:27) Thank you lord for the strength that made me overcome the various obstacles that came my way through this journey some of which I have only come to know of their existence when I am finishing. Had I known about their existence in advance, it would have affected my commitment to this project.

I acknowledge my very able supervisor, Dr. Nkatha Kabira. You gave me hope when I had totally lost it and was on the verge of giving up. You breathed a fresh lease of life into this project and for that I say “Thank you.”

Special acknowledgment to Sylvia Amamu Chitechi and Michael Olukoye for your research and dedication towards this project was immense.

TABLE OF CASES

Trusted Society of Human Rights Alliance & 3 others –V- Judicial Service Commission & Another [2016] eKLR

Nairobi Law Monthly –V- Kenya Electricity Generating Company & 2 others [2013] eKLR

Femy Care Limited –V- Public Procurement Administrative Review Board & another [2013] eKLR

Andrew Omtatah –V- Attorney General & 2 others [2011] eKLR

Nelson O. Kadison –V- The Advocates Complaints Commission & Another [2013] eKLR

Timothy Njoya –V- Attorney General & Another [2014] eKLR

Jack Mukhongo Munialo & 12 others -V- Attorney General & 2 others [2017] eKLR

Katiba Institute -V- Presidential Delivery Unit & 3 others [2017] eKLR

Constitutional Court of South Africa, Certification of the Constitution of the Republic of South Africa, 1996, Judgment of 6 September 1996, Case CCT 23/96.

Constitutional Court of South Africa, Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, Judgment of 4 December 1996, Case CCT 37/96.

TABLE OF STATUTES

KENYAN LAWS.

The Constitution of Kenya, 2010.

The Access to Information Act Number 31 of 2016.

The County Governments Act number 17 of 2012.

UGANDAN LAWS.

The Constitution of Uganda.

The Access to Information Act number 6 of 2005.

Access to Information Regulations number 17 of 2011.

Official Secrets Act Cap 302 Laws of Kenya

The Evidence Act Cap 6 Laws of Kenya

Parliament (Powers and Privileges) Act Cap 258 Laws of Kenya

SOUTH AFRICAN LAWS.

Constitution of the Republic of South Africa

Promotion of Access to Information Act 2000.

UK LAWS.

Data Protection Act 1998

Freedom of Information Act 2005.

ABBREVIATIONS

CAJ	Commission on Administrative Justice.
CIA	Central Intelligence Agency
CKRC	Constitution of Kenya Review Commission
FBI	Federal Bureau of Investigations.
H.C.	High Court.
KLR	Kenya Law Reports.
MDGs	Millennium Development Goals
NSA	National Security Agency.
S.C.	Supreme Court.
U.N.	United Nations.
USA	United States of America

ABSTRACT

This study analyzes the challenges encountered by Kenyan citizens in accessing information despite there being a comprehensive legislative framework on Access to Information. The study makes three main arguments. The first argument is that although Kenya has an elaborate legislative and institutional framework on Access to Information, nevertheless, Kenyans still face challenges in accessing information due to a culture of secrecy in public and private bodies performing public functions. The second argument is that the failure of the government to participate in the passage of the Access to Information Act 2016 also contributes to the implementation challenges. The third argument is that the Act opens up the possibility of interference by the Executive by entrusting enforcement to individuals within government and its agencies.

In undertaking the study, the methodology employed is doctrinal research methodology that entailed an analysis of primary data that includes the laws, policies, statutes and secondary data that include articles, journals, scholarly material and books. The study relies on two main theories: - democratic theory and the capabilities theory that outlines the role of access to information and its relevance in any democracy. Further, the study draws lessons from Uganda, South Africa and the United Kingdom in a bid to highlight best practices in enforcement of access to information legislation. In conclusion, the study recommends the amendment of several provisions in the Access to Information Act in order to make the Act more effective in realizing goals.

TABLE OF CONTENTS

DECLARATION.....	ii
DEDICATION.....	iii
ACKNOWLEDGEMENTS.	iv
TABLE OF CASES.....	v
TABLE OF STATUTES.	vi
CHAPTER ONE: INTRODUCTION.....	1
1.1 Introduction.	1
1.2 Statement of the problem.	3
1.3 Research questions	3
1.4 Objectives of the study.....	3
1.4.1 General objective.	3
1.4.2 Specific objectives.....	4
1.5 Research hypothesis.	4
1.6 Literature review	4
1.6.1 Secrecy in a democratic state.....	5
1.6.2 Promoting access to information.....	6
1.6.3 Gaps in existing literature.....	10
1.7 Justification of the study	11
1.8 Theoretical framework.....	11
1.8.1 The capabilities theory.....	11
1.8.2 The Democratic theory.	12
1.9 Research Methodology.....	13
1.10 Limitation and Scope of the Study.....	14
1.11 Chapter Breakdown.....	14
CHAPTER TWO: HISTORY OF ACCESS TO INFORMATION IN KENYA.....	16
2.1 Introduction.	16
2.2 Historical developments.....	16
2.3 Process leading up to the Access to Information Act, 2016.....	22
2.4 Impact of Judicial pronouncements on the Access to Information Act, 2016.	24
2.5 Findings.....	27
CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK IN KENYA.	29
3.1 Introduction.	29

3.2 The legal framework.	29
3.2.1 International instruments.	29
3.2.2 Regional instruments.	30
3.2.3 The Constitution.	32
3.2.4 The Access to Information Act 2016.	32
3.3 The Institutional Framework.	38
3.3.1 Information Access Officers.	38
3.3.2 The Commission.	38
3.3.3 The High Court.	39
3.3.4 The Cabinet Secretary.	39
3.4 Findings.	39
CHAPTER FOUR: CASE REVIEW	40
4.1 Introduction.	40
4.2 Case Review 1 Petition 314 Consolidated with J.R 306 of 2016.	40
4.3 Case Review 2 High Court Petition No. 278 of 2011	42
4.4 Case Review 3 Nairobi High Court Petition No 43 OF 2012	44
4.5 Case Review 4 High Court Petition No. 92 of 2011	45
4.6 Case Review 5 High Court Petition No. 549 OF 2013.	46
4.7 Case Review 6 Petition No. 479 of 2013.	48
4.8 Case Review 7 Nairobi Petition No. 182 of 2017	49
4.9 Case Review 8 Nairobi Petition No. 468 of 2017	50
4.10 Findings.	51
CHAPTER FIVE: ANALYSIS OF THE ACCESS TO INFORMATION ACT.	52
5.1 Introduction	52
5.2 The right to access information.	53
5.3 Procedural Guarantees.	55
5.4 Duty to publish.	57
5.5 Scope of Exceptions.	58
5.6 Appeals.	59
5.7 Sanctions and Protections.	60
5.8 Promotional Measures.	61
5.9 Lessons from Uganda, South Africa and United Kingdom.	62
5.10 Findings.	65

CHAPTER SIX: FINDINGS, RECOMMENDATIONS & CONCLUSION.....	66
6.1 Introduction.....	66
6.2 Research Findings.....	66
6.3 Recommendations.....	69
6.3.1 Short term recommendations.....	69
6.3.2 Long term recommendations.....	70
6.4 Conclusion.....	71
BIBLIOGRAPHY.....	72
1. LIST OF BOOKS.....	72
2. LIST OF ARTICLES.....	75
3. LIST OF REPORTS.....	76

CHAPTER ONE: INTRODUCTION.

1.1 Introduction.

This study analyzes the challenges encountered by Kenyan citizens in accessing information despite there being comprehensive legislative framework on Access to Information. The study makes three main arguments. The first argument is that although Kenya has an elaborate legislative and institutional framework on Access to Information, nevertheless, Kenyans still face challenges in accessing information due to a culture of secrecy in public and private bodies performing public functions. The second argument is that the failure of the government to participate in the passage of the Access to Information Act 2016 also contributes to the implementation challenges. The third argument is that the Act opens up the possibility of interference by the Executive by entrusting enforcement to individuals within government and its agencies.

A democratic legal system is founded upon the public rights to information and there is no democracy where the government is operating in secret.¹ While addressing the Athenian Court, Aeschines,² spoke of the importance of the public's right to inspect its government's records when he stated that it is a fine thing to preserve public records as they cannot be altered and neither can they change loyalty with any successive regime as they provide a true picture of the situation as it occurred.³ Aeschines' sentiments were shared by James Madison in his letter⁴ written in 1822 when he opined that, in order to be in charge of their own affairs, the people need to have access to information and that the government that denies its citizens access to information is bound to lead to tragedy and disorganization.

¹ Jimmy Carter, foreword to access to information; a key to democracy, 3 (Laura Newman ed. 2002)

² A Greek orator of the classical age in 330 BC

³ James P. Sickinger, public records and archives in classical Athens, (P. J. Rhodes & Richard J.A Talbert eds.1999) in common law right to information by Joe Regalia accessed on Hein online.

⁴ Letter from James Madison to W.T (August 4, 1822) in the writings of James Madison 103 (Gaillard Hunt edn, 1910)

Indeed, Kenya's current Constitutional dispensation gives primacy to access to information and public participation in governance. Sovereign power is vested in the people and may be exercised directly through periodic elections or through their democratically elected officials.⁵ These people act on behalf of the citizens when they exercise their authority through a social contract which generates shared values and corresponding responsibilities between the state through the elected leaders and the citizens. Public participation is a crucial pillar in any democratic state⁶ as accountability occurs not only through periodic elections but also through regular and systematic engagements and conversation.

The constitution⁷ lays a foundation of the citizen's right to access information and outlines the state's obligation in ensuring access to the citizens through regular and periodic publishes and publication of any information that is important to the nation.⁸ In an effort to ensure proper implementation of article 35 of the Constitution, Parliament passed the Access to Information Act 2016 which was assented into law on the 31st day of August 2016. Therefore, there is need for research to analyze the efficacy of the act in facilitating access to information.

This research begins by interrogating the legislative and policy framework on access to information prior to the passage of the current Constitution and highlights the challenges that the current Constitution and the act seeks to address with much focus being on internalizing the Constitutional provisions on access to information in comparison to the relevant provisions of the act. In conclusion, the paper shall identify any weaknesses in the legislative and policy framework that may require law reform measures.

⁵ Constitution of Kenya, 2010.

⁶ Ibid article 4.

⁷ Ibid article 35

⁸ Ibid.

1.2 Statement of the problem.

Although Kenya has an elaborate legislative and institutional framework on Access to Information, nevertheless, Kenyans still face challenges in accessing information. This study demonstrates that the government's culture of secrecy, its failure to participate in the preparation and passage of the act and the fact that the act entrusts individuals with the enforcement mandate as opposed to the relevant institutions as the main obstacles in enforcement of the act.

1.3 Research questions

This project seeks to answer the following questions.

1. Why do Kenyans face challenges in accessing information despite the existence of elaborate legislative and institutional framework on access to information?
2. What is the history of the Right to information in Kenya?
3. What is the legislative and institutional framework on access to information in Kenya?
4. To what extent does the access to information act facilitate access to justice?
5. What lessons can we learn from comparative jurisdictions?
6. What are the areas for reform on Kenya's legal and policy framework on access to information?

1.4 Objectives of the study.

1.4.1 General objective.

The main objective is to assess why Kenyans face challenges in accessing information despite the existence of elaborate legislative and institutional framework on access to information.

1.4.2 Specific objectives

The study above has the following objectives.

1. To examine why Kenyans, continue to face challenges in accessing information despite the existence of elaborate legislative and institutional framework on access to information.
2. To examine the history of the Right to information in Kenya.
3. To analyze the legislative and institutional framework on access to information in Kenya.
4. To determine the extent to which the access to information act facilitate access to justice.
5. To determine what lessons, we can learn from comparative jurisdictions.
6. To determine the areas for reform on Kenya's legal and policy framework on access to information.

1.5 Research hypothesis.

This study is premised on the Hypothesis that although Kenya has an elaborate legislative and institutional framework around the right of access to information, nevertheless, there are challenges in implementation of the same due to a culture of secrecy in public and private bodies performing public functions, the failure of the government to participate in the passage of the Access to Information Act 2016 and also the individualized approach towards enforcement.

1.6 Literature review

This section reviews the available literature on access to information and identifies the gaps that exist. This is done while considering the fact that most of the literature available in

Kenya was written before the passage of the act and the vast of material is from comparative jurisdictions.

1.6.1 Secrecy in a democratic state.

Several scholars have written on secrecy in democratic states and the impact on access to information. Fredrick Shwarz,⁹ writing about his encounter with government secrecy, makes findings as he conducted the investigations. First, that too much information is not disclosed by the government not for the protection of its citizens, but to avoid embarrassing the government. As an example, he highlights the efforts by the Federal Bureau of Investigation to drive Martin Luther King Jr to commit suicide, the Central Intelligence Agency efforts to enlist mafia in an effort to eliminate Cuba's Fidel Castro and the effort by the National Security Agency to intercept telegrams leaving the United States of America. He goes further to make a finding that all presidents have secretly abused their power in one way or the other.¹⁰

Second, that some government secrets are justified and entitled to protection.¹¹ Third, the public have a legitimate expectation to be informed when power is abused and when the government agencies act beyond their mandate.¹² He opines that even though the story might be sad or embarrassing, those in power owe their electorate the truth and that the electorates are in a position and have the strength to handle the truth as it affects them directly or indirectly and they are bound to learn from the mistakes and make informed decisions once called upon to.¹³

⁹ Chief Counsel of the United States Senate's Select Committee as he then was, created to undertake the first investigation of America's intelligence agencies which was commonly referred to as the church committee after its chair, Sen. Frank church of Idaho writes about his encounter with government.

¹⁰ Supra Pg 235

¹¹ Supra Pg 247

¹² Supra Pg 270

¹³ Supra Pg 300

To Shwarz, the only way towards building momentum for reform is through exposing illegal and embarrassing government secrets and as a nation, it needs not only look at the classification system of information but also interrogate the reasons behind maintaining secrecy and the manner in which it flourishes. He makes a finding that the American system operates in the culture of secrecy as it focuses much on minimum disclosure of information.¹⁴

To this he proposes that there should be a clear timeline or duration within which the information is to be classified. In addition, there should be a clear boundary between legitimate and illegitimate secrecy and that in the event of disagreement, it should be clear who should decide where the boundary lies and a nation should not be concerned about the dangers of disclosure but the disadvantages of minimum disclosure.

1.6.2 Promoting access to information

In addition to writing about secrecy in democratic states, several other scholars have tackled the question of promoting access to information. Edwin Abuya,¹⁵ while interrogating access to information within the Kenyan context and evaluating the challenges facing the right to receive information opines that information is power and not only should individuals be allowed to access information but also the information must be accurate.¹⁶ According to Abuya, the society that is guided by the rule of law has the right to be informed of their rights and state duties and this can only be achieved through the grant of access to all information available for their benefit as the same is held in their trust by the government.¹⁷ Consequently, the grant of access to information will allow the citizens exercise and assert their fundamental rights as it creates awareness of the existence of the rights.¹⁸

¹⁴ Supra Pg 353

¹⁵ Constitutional lawyer as he then was in 2011 in his paper written for Access to information of the African Network of Constitutional Lawyers,

¹⁶ Edwin Abuya, Towards Promoting Access to Information in Kenya, 2011.

¹⁷ Ibid.

¹⁸ David Obrien, the public right to know: The Supreme Court and the first amendment (prereger: New York 1981) Pg. 11

Abuya suggests that once information has been made available to the public, the citizenry is now able to effectively exercise their democratic right to elect and recall leaders based on the available information.¹⁹ Abuya highlights that once the public is well informed, it provides the necessary checks and balances within and outside government as it shall be able to flag out false news or propaganda that is bound to propagate violence and that by sharing information, it protects the public from the unnecessary bureaucracies that exist within government agencies.²⁰ Lastly, in identifying the challenges that access to information laws in African states face, Abuya opines that their provisions are geared towards minimum disclosure and that there is no means to challenge the government's decision to classify information as secret as the decision to classify information as secret is deemed final.

Richard Chapman,²¹ states that openness in government depends on individual understanding and perspectives of the persons involved in the handling of the access to information requests. As such, the freedom of information in his context is viewed as being subordinate²² or partial form of openness in government because it has been associated not with a particular ideology of government but with procedures and subordinate aspects of government.²³ While considering the British government, Chapman acknowledges that the regime of freedom of information has grown piecemeal without prior intent and that the practice of freedom of information always change from time to time. That openness in the British government should be considered in its Constitutional and historical context bearing in mind the fact that although much of the detailed arrangement in British government is written down, there is no codified Constitution as is experienced in all the other countries in the world and that any

¹⁹ Lucas Powe, *the fourth estate and the Constitution, freedom of the press in America.* (University of California press; Berkeley 1991) Pg. 189

²⁰ David Makali, *Media Law and Practice: The Kenyan Jurisprudence* (phoenix publishers London 2003.)

²¹ Richard chapman, 'Openness and freedom of information in local government: concepts and issues' in Richard A. Chapman, and Michael Hunt, *Freedom of Information: Local Government and Accountability.* (Ashgate Publishing, 2012) Pg. 23

²² Bennet, Collin j and Raab, Charles D. 2003 "The Governance of Privacy; Policy Instruments in Global Perspective" Pg. 57

²³ Richard Chapman and Michael Hunt, *Open Government* (London publishers, 1987) 37

comparative study done should be done with the caveat relating to that significant difference.²⁴

Secondly, he states that openness emphasizes the democratic perspectives, being the importance of transparency and accountability. That public interest is better achieved if there was greater amount of openness and transparency and that it's healthy for democracy for a citizen to press to be consulted and informed.²⁵ Chapman emphasizes the need for discussion and awareness on the purpose and importance of open government in-order to empower the people on the pursuit of openness in democratic government.²⁶ Key terminologies must be defined to avoid ambiguity and misconception and that the sections of the law need to be clear and notes of importance the context in which various²⁷ words which have different contextual meaning should be used with clarity to avoid ambiguity.

Chapman states that the definition of democracy in this information era has been changed from a government of, by and for the people to much more general ideals associated with western systems which involve competitive elections, government dependent on popular support with focus the frequency of elections and the size of the turnout, accountability, accessibility and fairness.²⁸ Chapman goes further to state that a good democratic government must at a bare minimum facilitate publicity, accountability and there needs to be a limit to unnecessary secrecy and that in a representative democracy, the decisions being made by the representatives of the people must be communicated to their electorate.²⁹ Lastly, Chapman makes a finding that a good democracy promotes good administration which must work with its citizen's interests at heart and as a priority by maintaining a strict balance between the citizen's public interests and at the same time respecting their right to privacy.

²⁴ Donoughmore Committee, 1932 report of the committee on ministers' powers (Cmd 4060 London)

²⁵ Brook heather, 2005, *Your right to know* (London Pluto press).

²⁶ Supra note 25, 47

²⁷ ibid

²⁸ P. Day, and R. Klein, *Accountability; Five Public Services* (London; Tavistock publications, 1987)

²⁹ Supra Note 23, 78

Pino Akotia,³⁰ writing on audit and accountability, recognizes that good governance is a condition for sound development management and that in-order to ensure there's transparency within government, there's need to maintain proper records. To Akotia, the relationship between record keeping, accountability, transparency and public trust lies at the heart of governance. That effective management of records and information is essential to improving economic efficiency and creating transparency as a means of preventing corruption and that economic confidence demands that information about government policies and programs is made public and available and that major processes of economic policy making and transactions are transparent.³¹

Through his work, Akotia establishes the relationship between reliable and complete records and the evidence base required to inform the national integrity system on the one hand and on the other the audit function which includes accountability which holds individuals and organizations responsible and that the lack of it results in the misuse of resources which leads to corruption and that development of accountability demands an underpinning of information and a system that is open to the discovery and correction of abuse of power.³² Akotia concludes by emphasizing the need for proper legislation to govern government record keeping and management emphasizing the need to control the storage and destruction of government documents and records. He recommends the need to develop a well-structured record keeping system which enhances efficiency of government machinery and supports the objective of accountability.

David Luyomba,³³ writing on rights appertaining to land while conducting a case study of Uganda's land rights, opines that proper record keeping is aimed at ensuring efficiency in land management and facilitate access to the information. To Luyomba, the maintenance of

³⁰ Akotia P in James Lowry and Justus Wamukoya, Farnham, 'Integrity in government through records management: essay in Honour of Anne Thurston', (edited by, Ashgate Publishing Limited 2014) 6

³¹ Ibid, 7

³² Ibid

³³ David Luyomba, 'The state of digitization of the land registry operations in Uganda' (journal of the south African society of archivists, vol., 46, 2013.) 25.

proper records aid in maintaining efficiency, openness and accountability and helps maintain order by minimizing disputes within the institution by protecting citizen's rights to ownership through proper documentation.³⁴ Luyomba concludes by stating that the maintenance of proper records aids in resolving any disputes relating to ownership and access to land.

Lastly Dr. Collins Odote,³⁵ writing on Kenya's policy framework on access to information, makes a finding that access to information is widely recognized but countries are slow in adopting and recognizing it in their domestic legislation. That in Kenya, the delay in the passage of the access to information legislation was necessitated by the fact that the constitution does not prioritize its passage as it does other rights as there still exists legislation that restrict the right to information. He recommends for a change in the culture of government secrecy, the creation of awareness platform to enlighten the citizens on their right to access information, the need to put in place proper record management systems and lastly a review of all laws to ensure that they are in tune with access to information law.

1.6.3 Gaps in existing literature.

In this project, the major gap encountered is that all literature existing on the Access to Information Act, 2016 either was written pre coming into force of the Act and therefore touched on what was going to be the new legal position, or written after passage and was more of a commentary on what was covered by the Act. However, there is no literature specific to Kenya's Access to Information Act that attempts to assess how implementable the Act is and the challenges facing attempts to implement the Act. As such, this paper comes to bridge that gap. As will be discussed in later chapters and eventually concluded, this paper seeks to appraise the existing provisions of the Act with emphasis on its implementation and to conduct a comparative study on countries with better implementation mechanisms in place for persons seeking access to information

³⁴ Ibid 25, 34.

³⁵ Dr. Collins Odote, "Access to Information Law in Kenya; Rationale & Policy framework" A research prepared for the Kenyan Section of the International Commission of Jurists (ICJ Kenya.)

1.7 Justification of the study

This study is justified on the grounds that the existing literature fails to highlight the challenges faced by Kenyans in accessing information held by the state. It is beneficial to the society and specifically to scholars, government agencies and law makers as it not only identifies implementation shortcomings of the access to information act but also makes recommendations for reform to the legislative and policy gaps geared towards making the provisions of the act implementable.

1.8 Theoretical framework.

This research is underpinned by the capabilities theory as it relates to the ability of an individual to achieve a desired lifestyle based on the available instruments and circumstances, and the democratic theory which allows them to make an informed decision within their democratic space in not only delegating their powers to the government but also keep the government in check based on the information readily available to them to inform their decision.

1.8.1 The capabilities theory

This theory, developed by Sen,³⁶ and Nussbaum,³⁷ as a theory of ethics focuses on the human abilities to be important in their general pursuit of personal growth and gratification by providing a conducive environment within which they flourish. To this end, in order to ensure that every citizen enjoys and engages in activities that are conducive to human flourishing, they need a conducive environment for them to make their own life choices and in order to enable this, they need to have proper institutional and legislative support to enable them make informed choices. Towards this end,³⁸ the theory develops ten human capabilities in which practical reason and affiliation are granted special preference because they form the basis

³⁶Sen, A. *Inequality Reexamined*. Cambridge: Harvard University Press, (1992), p. 207.

³⁷Nussbaum, M. *Nature, function and capability: Aristotle on political distribution*. *Oxford Studies in Ancient Philosophy*, (1988) Suppl. Vol.: 145–184

³⁸Nussbaum, M. *Aristotelian social democracy*. In: R. Douglass and G. Mara (eds.) *Liberalism and the Good*. New York: Rutledge, (1990) 203–252.

upon which the individuals make informed choices.³⁹ This theory is however critiqued on various bases. Cohen criticizes its emphasis on human freedoms terming it as a misleading position,⁴⁰ while Rawls criticizes it for emphasizing on capabilities than resources available.⁴¹

1.8.2 The Democratic theory.

The concept of democracy⁴² which originated as a political and philosophical thought during the classical antiquity in the Greek city of Athens and highlighted by James Madison in his writings,⁴³ is that of self-government and for such to work, there is need for an informed electorate and for the electorate to fully appreciate knowledge, there must not be unreasonable restrictions on information and those who hold the information should not be allowed to unreasonably withhold information.⁴⁴ According to this theory, there is a need for unrestricted access to information by citizens in order for them to gainfully participate in the democratic processes around them,⁴⁵ and to enable them keep the government and its officials in check.⁴⁶ Westhuizen,⁴⁷ in discussing this theory argues that people need to access varied but correct information to inform their choices while Heinz,⁴⁸ in that regard argues that in a democracy, free speech and access to varied information through an open society helps cure ignorance and intolerance by encouraging debate and constructive discussions on public affairs.

³⁹Nussbaum, 'M. *Women's capabilities and social justice.*' Journal of Human Development (2000) 1(2): 219–247.

⁴⁰ G. A. Cohen, "Equality of What? On welfare, goods and capabilities" in Martha Nussbaum and Amartya Sen: *The Quality of Life* (Oxford: Clarendon Press 1993) 9-29.

⁴¹ Rawls: *Collected Papers* (Cambridge M.A: Harvard University Press 1999) 456.

⁴² John Dunn, *Democracy: The Unfinished Journey 508 BC – 1993 AD*, Oxford University Press, 1994,

⁴³ The Writings of James Madison 103 (Gaillard Hunt ed. 1910.)

⁴⁴ Meiklejohn, A. (1961). The First Amendment is an absolute. *The Supreme Court Review*, 245-266.

⁴⁵ Law Society of Kenya "Freedom of Expression in Kenya: A Review of the Recent Past" (2003) in Ojienda T. (eds) *Constitution Making and Democracy in Kenya: Building Constitutionalism*, Palco Enterprises Limited, Nairobi (2003) 100

⁴⁶ Blakemore, M., & Craglia, M. Access to public-sector information in Europe: Policy, rights, and obligations. (The Information Society, 2006)22, 13-24.

⁴⁷ Westhuizen J "Freedom of Expression" In Wyk D.V. *et.al* (eds), *Rights and Constitutionalism: (2005) The New South African Legal Order*, (Clarendon Press, Oxford) 270.

⁴⁸ Heinze E "Viewpoint Absolutism and Free Speech" (69 *The Modern Law Review*, 2006) 554

This theory is however critiqued for being ‘elitist’ by Peter Medding and as idle romantic idealism by Hyland James.⁴⁹ In essence the criticism revolves around what they term as incompatible comparisons between ancient democratic Athenian states of between 30,000 and 40,000 citizens with modern states that are way more populated.⁵⁰ Their argument is that even if citizens had to directly participate in only the most important political and administrative decisions of the countries, they would find themselves burdened with thousands of matters to consider and submit their views on every week. Consequently, Governments would stall and therefore, it becomes apparent that there is need for elected representation. Their arguments then take the view that, if proponents of democracy argue that the right to information helps in decision making, then only those taking part in decision making should have the information needed to make decisions. Consequently, there is justification behind laws that limit citizen’s access to information.

This critique is countered by the position that representative democracy demands accountability to the electorate.⁵¹ Therefore, in as much as citizens are not in decision making capacity, they need information to hold their representatives accountable necessitating the need for access to information held by the state.

1.9 Research Methodology

The study relies on doctrinal research methodology and utilizes qualitative research methods which is an analysis of textual material as it entails analyzing both primary and secondary data available on the subject at hand. The Primary sources are first-hand information or direct evidence which also include eye witness accounts. Secondary sources analyzed include the Kenyan laws, case laws, books, journals and other publications. In doing this analytical study, the author’s focus shall be delimiting the concept of access to information, the theoretical

⁴⁹ James L. Hyland, *Democratic Theory: the philosophical foundations*, (Manchester University Press, 1995) 246-250. And Peter Y Medding, “‘Elitist’ Democracy: An unsuccessful critique of a misunderstood theory”, (Monash university, 1967)

⁵⁰ *Ibid*, Hyland, 247.

⁵¹ Article 19, ‘Access to information: an instrumental right for empowerment’, 2007.

concept, discussions of the concept through writings of various authors on the subject, the nature, form and content of the concept in Kenya, the limitations of the concept existing in its current nature and lastly attempting make proposals to fix the limitations.

Beyond but supplementing the doctrinal study, the author draws lessons from other jurisdiction in order to obtain insights on the best approaches to take in further improving Kenya's legal and institutional framework. Three jurisdictions have been chosen for this particular comparative study being Uganda, South Africa and the United Kingdom in attempt to help in formulating proposals to strengthen Kenya's existing formulations.

1.10 Limitation and Scope of the Study.

This study interrogates the efficacy of the legislative and institutional framework on access to information in Kenya in the wake of the passage of the Access of Information Act 2016 which has not been fully appreciated by the citizenry. The study is limited to the extent that although the paper interrogates the efficacy of the access to information legislation, the newly promulgated act has not been fully appreciated by the stakeholders in the legislative and institutional regime for one to really make a conclusive determination on its efficacy. This paper therefore shall focus mainly on the efficacy of the legislative and institutional framework of the access to information in Kenya in light of the historical impediments experienced prior to the promulgation of the laws and based on comparative analysis.

1.11 Chapter Breakdown.

Chapter One: Introduction; lays down the basis of the research project by setting out the hypothesis and the research questions that the paper shall endeavor to answer. Chapter Two: History of the Right to Information; sets out the background being the history and development of the Right to information legislation in Kenya. Chapter Three: Legislative and Institutional Framework; highlights the legislative and institutional framework on access to

information. Chapter Four: Case Review; conducts a review of cases that highlight the challenges encountered by citizens in their effort to access information. Chapter Five: Critical Analysis of Access to information; critically analyses the Kenyan, access to information legislation and draws lessons from Uganda, South Africa and the United Kingdom. Chapter Six: Findings, Recommendations and Conclusion; Summarizes the Research findings, makes recommendations from the interrogations conducted in the chapters above and concludes the paper.

CHAPTER TWO: HISTORY OF ACCESS TO INFORMATION IN KENYA.

2.1 Introduction.

This chapter examines the history of access to information and answers the question, what was the legislative and institutional framework on access to information before the promulgation of the constitution⁵² and the passage of the act.⁵³ The chapter utilizes the historical research methods in its analysis. The chapter proceeds on the hypothesis that Kenya had an inadequate legislative and institutional framework on access to information which necessitated the constitutionalisation of the citizen's right to access information and the legislation governing it. The chapter is guided by articles by prominent scholars, academicians, Constitutional lawyers and case laws decided before the passage of the Access to Information Act influenced by the limited or non-existent laws on access to information. Together they have helped shape the form or mode in which the access to information legislation has evolved in Kenya.

2.2 Historical developments.

The participation of Kenyan citizens in the making of policies and being involved in making decisions on matters that directly affect them was limited or constrained up to and until the later years of 2000s.⁵⁴ Before this period, the executive and the government at large had the absolute influence in making of policy decisions. This was without consultations with the various agencies that were involved in the championing for the citizen's right to participate or get involved in the decision making. It was also to the exclusion of the citizens themselves who were to be affected by the said policies. As a result, the majority of the citizens were not involved in policy formulation.

⁵² Constitution of Kenya in 2010

⁵³ Access to Information Act 2016.

⁵⁴ Huntington, S and Nelson, J (1976), *No Easy Choice: Political Participation in Developing Countries*. Cambridge, MA: Harvard University Press.

The freedom to access information was greatly curtailed since the government limited the space for civic engagement.⁵⁵ Any individual who criticized or questioned the government for its excesses was detained without trial and trumped up charges leveled against them. However, with the introduction of multi-party democracy, there was witnessed some gradual restoration of respect to human rights by the government on the bare minimum. This led to the revamped efforts by the civil society groups to champion for the rights to access information.

Until the passage of the act,⁵⁶ there was limited legislative framework that underscored the right to information as provided for in the new Constitution. This period was characterized by not only a lack of a proper legislative framework but also the use of legislation that were out of tune with the letter and spirit of the Constitution as they were restrictive in providing access to information. The government operated in secret thus creating an environment in which access to information has historically been denied allowing the state a free hand to violate its citizen's rights without any checks and balances.⁵⁷

Some of the legislation include the Official Secrets Act⁵⁸ that was mainly aimed at preservation of state secrets and state security with no provisions that allows for the government openness, The National Security Intelligence Service Act⁵⁹ whose aim is the establishment of the National Security Intelligence Service and also provide for the issue of warrants authorizing certain actions to be taken by the service in the National Interest.⁶⁰ The above legislations gave the government through its agencies unqualified powers to classify

⁵⁵ Murunga, GR (2007) 'Governance and the Politics of Structural Adjustments in Kenya' in Murunga, GR and Nasongo, WS (eds) Kenya: The Struggle for Democracy. London and Dakar: Zed Books/CODESRIA, pp.263–300 at 264, 266.

⁵⁶ *Access to Information Act* No. 31 of 2016.

⁵⁷ Department of Defense, Committee on Classified Information, Report to the Secretary of Defense by the Committee on Classified Information (Washington, D.C.: Department of Defense, 8 November 1956), 6.

⁵⁸ Cap 187 Laws of Kenya

⁵⁹ Act No 11 of 1998.

⁶⁰ See Preamble to the act.

certain information as secret which powers could not be challenged by anybody in any forum whatsoever.

Basheer,⁶¹ and Lilian,⁶² conducting a research on behalf of transparency international which mainly focused on corruption and the effects it has on the citizenry, the public service is unsatisfactory and deteriorating in most developing countries. This is despite the considerable investment as the poor and the disadvantaged are disadvantaged in terms of delivery of public services. This was found to be as a result of unnecessary obstacles erected by the bureaucracies and the lack of a proper complaint mechanism leading to lack of transparency and accountability in the public service.⁶³ This comes at a time when there was pressure on governments world over to implement the minimum standards of governance at a time when corruption was the problem to the underprivileged in the society as most of them had to pay bribes to get services.

The research's main focus was on the citizen's service delivery through the various stages. These included, the subscription stage when the citizens subscribe to receive the services, the methods used to ascertain the amount to be charged for a specific service, the modes of payment for the services, the means through which a citizen can raise a complaint and lastly the manner in which the complaints are handled.⁶⁴

In the subscription process, one was required to provide a lot of information which was not in the custody of the applicants at that time. This forced them to bribe the various officials to get the said documents. Red tape in the subscription process encouraged graft as desperate consumers were forced to pay to bribe their way into getting the various government facilities

⁶¹ Head of Knowledge and Information Services, Transparency International, Secretariat. (2002)

⁶² Legal Advisor, Transparency International in Nigeria. (2002)

⁶³ Basheerhamad Shadrach and Lilian Ekeanyanwu, Improving the transparency, quality and effectiveness of pro-poor public services using the ICT's, an attempt by transparency international.

⁶⁴ Ibid

thereby abridging the process.⁶⁵ In terms of billing, there were no figures cast in stone required for one to get certain services. The result was people paid different amounts depending on their ability. Such figures could not be accurately verified as most consumers or citizens were often issued with estimates of the billing for the various services making it difficult to know the exact amount or costs of various services. This created opaque systems of billing which provided a fertile ground for corruption.

Payment enforcement were not only those that were in default affected but also those who have no outstanding issues with the authorities affected. An example is given of the power company that instead of disconnecting the power source of the individual user who is in default of payment by disconnecting their respective power meters, the company goes ahead to disconnect the entire power line from the pole thereby disconnecting even those users who have fully paid up their dues with the company.

The report focused on the enhanced participation in policy making by the citizens who are the subjects of the policy and who are better placed to understand their desires and aspirations and are better placed to decide the manner in which they wish to exploit the available resources. According to the report, when the policy making process is participatory it fosters collective responsibility in enforcement and implementation as it makes the citizenry feel part of the legislative system as they are involved directly in the process aimed at eradicating poverty. That the only way a national policy can succeed is when its embraced fully by the citizenry as they participated actively in its making. Generally, the policy aimed at eradicating poverty is supposed to be driven by the demand to eradicate poverty in order to maintain continuity and generate support from not only the persons mandated to implement but also the persons who stand to benefit from its implementation as they all need to be equipped with all the information to enable them make informed decisions. There is a need to

⁶⁵ Ibid

share responsibility to make decisions in order to allow for informed and meaningful feedback as all the stakeholders will take responsibility for the success and failure of the policy as it shall build confidence and mutual trust to the policy as its guaranteed due to transparency and shared values. There was bias in the effects of corruption in policy making as there was excessive regulation as poverty eradication resources were diverted thereby undermining the government efforts to eradicate poverty and increase revenues collected to eradicate poverty.

Access to information helps individuals participate effectively in the democratic processes under our Constitutional dispensation. These include voting and submission of memoranda in the event of vetting of various office holders by the various government agencies to determine the suitability and ability to govern the electorate and to perform various state functions and duties.⁶⁶ According to Will Staton,⁶⁷ a citizenry with access to information is aware of the misdeeds and character of its leaders making it able to hold them accountable in their actions both in private and in public.⁶⁸ For a long time, Kenyans have struggled to access to information held in the guise of national security which information ought to be available for the public consumption freely to enable them make informed choices of the type of leadership they want. As a result, the public has been excluded from being part of the decision-making process in public affairs.

As Peter aptly puts it, the citizenry has been disillusioned leading to the absurd categorization of people as the "wananchi" and the "wenyenchi". This signifies that there are those who own the country while others are just part of the country. The former has little or insignificant

⁶⁶ Access to Information in Kenya, issue 155 October/November by Peter Gathu & Henry Kahindi.

⁶⁷ Will Staton is the Assistant Director of Talent for Democracy Prep Public Schools in New York City. Formerly a history teacher, as well as a religious studies and history major. Will remains passionate about international affairs. When he's not traveling the country to deliver career readiness professional development, Will reads and writes about a variety of personal and political topics.

⁶⁸ Asingo, Patrick O, Democracy without informed citizens: the influence of partisan cues on political perceptions of uninformed Kenyans

impact on the welfare and policy making processes in the country to their detriment where the latter benefits.

Kenya has ratified several international and regional legal instruments that make provision for access to information. They include the Universal Declaration of Human and Peoples Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights which obligates the state to take positive measures to provide for and implement the right to access information which form part of the laws of Kenya.⁶⁹

Access to information had been safeguarded both in the national⁷⁰ and county legislation⁷¹ but despite that, there were challenges towards achieving the same. This is as the said rights could not be exercised without a proper framework in place to aid with the implementation. There has been an elaborate lobby for a legislative framework on access to information before the passage of the constitution with the former constitution⁷² making provision for the right to hold and receive information without interference from the state but the same right was subjected to the unlimited restrictions on grounds of national security, safety and health of the citizens thus making it hard for the citizens to enjoy the said right as it was limited by the broad spectrum of limitations.⁷³ The above restrictions were in themselves in contravention of the principle of maximum disclosure⁷⁴ which mandates the state to ensure maximum disclosure of information and protecting the citizen's right to receive the

⁶⁹ Article 26 (2) of the Constitution of Kenya, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

⁷⁰ Constitution of Kenya 2010

⁷¹ Section 96 County Government's Act, 2012.

⁷² Section 79(1), Former Constitution of Kenya.

⁷³ Section 79(2) Former Constitution of Kenya.

⁷⁴ Maximum disclosure principle provides for prompt disclosure of information as it advocates for the disclosure of all government or public information. It covers the freedom to access information in all public bodies and private bodies that carry out public functions or where their activities affect the public rights or civil liberties. Disclosure and access to information is the general rule which imposes an obligation on the state to proactively and regularly publish information in its possession without any prompting from the public or citizenry. It goes further to establish minimum standards under which the public records are to be stored and maintained by public bodies and provides for offences for the obstruction of access to information or the willful destruction of records.

Further, the principle advocates for the minimum exceptions of information that should not be disclosed as it provides that exceptions should be precise and narrowly drafted to protect a legitimate interest from harm and as such, they should be based on the content rather than on a particular class and the refusal to disclose must be justified.

information which protection also covers non-citizens provided they are within the territory of the state. As much as the constitution protects the right to access information,⁷⁵ the necessary stakeholders are not well informed of their duties and obligations in ensuring maximum disclosure and the means through which to acquire the said information due to lack of public awareness in terms of the procedure and the complaints mechanisms available.⁷⁶

2.3 Process leading up to the Access to Information Act, 2016.

The first attempt in establishing Access to Information legislation was undertaken through extensive research by the civil society spearheaded by International Commission on Jurist-Kenya. This was between 2001 and 2002 at a time when most of the civil society organizations were focusing on the state of the health and welfare of the citizens and the effect of the rampant corruption within government which directly affected service delivery leading to poor living standards by its citizens. The International Commission of Jurists,⁷⁷ drafted the Right to Information bill and introduced the same in Parliament as a private member bill in 2001 but it was not debated upon and neither did it pass through the various stages in Parliament before Parliament was dissolved to prepare for the 2001 general elections.⁷⁸

There was a second attempt to pass access to information legislation in 2005 which was a result of redrafting of the bill before the house earlier as a private member bill and again it was not discussed in time suffering the same fate as the earlier bill. The third attempt to pass the access to information legislation was in the aftermath of the 2007 post-election violence when the commission of inquiry into the post-election violence famously referred to as the

⁷⁵ Article 35 of the Constitution of Kenya, 2010.

⁷⁶ Jimmy Carter, Access to Information, A key to democracy, 2002.

⁷⁷ ICJ Kenya – Towards implementation of Access to Information in Kenya.

⁷⁸ Article 19, Kenya: Realizing the Right to Information, 2014.

Waki Commission,⁷⁹ in an effort to conduct a comprehensive, transparent and unhindered investigations into the injustices that had been witnessed recommended the immediate enactment of an access to information legislation as it provided that it was necessary to enact the freedom of information legislation to enable the relevant actors access to all the relevant information that might aid in the arrests, detention and prosecution of persons responsible for violation of human rights.⁸⁰

The need for a comprehensive access to information legislation was again spelt out in the post-election peace legislation⁸¹ which was necessitated by the peace agreement between the then President Mwai Kibaki and Raila Odinga⁸² by laying emphasis on the need for a legislation that would accelerate planned legislative and institutional reforms through transparency and accountability in government,⁸³ and to foster maximum disclosure within the government and its agencies.⁸⁴ Following the promulgation of the constitution in August 2010, there were express provisions that guaranteed the freedom of expression,⁸⁵ and the right to information.⁸⁶ These guarantees gave new impetus to the lobby for the passage of the access to information legislation culminating to the draft Freedom of Information Bill in 2011.

The new approach ensured that there was a clear differentiation and distinction between the right to access information and data protection on the basis that although they were related,

⁷⁹ The mandate of the Commission of Inquiry into Post-Election Violence (CIPEV) was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters

⁸⁰ Report by the Commission of Inquiry into the Post-Election Violence, Pg. 455.

⁸¹ National Accord and Reconciliation Act 2008,

⁸² The National Accord and Reconciliation Act of 2008 is an act of the National Assembly of Kenya that temporarily re-established the offices of Prime Minister of Kenya, along with the creation of two deputy prime ministers. This act followed the February 28, 2008 power-sharing agreement between the then President Mwai Kibaki and opposition leader Raila Odinga, who became the first prime minister of Kenya since 1964, when the Constitution of the newly created Republic abolished the office. The agreement was necessitated by the 2007-08 Kenyan crisis.

⁸³ Edwin Abuya, April, 2011, Towards Promoting Access to information in Kenya.

⁸⁴ The Police, The People, The Politics, Police Accountability in Kenya 2006. A joint report by the Commonwealth Human Rights Initiative and the Kenya Human Rights Commission.

⁸⁵ Article 33 Constitution of Kenya.

⁸⁶ Article 35 Constitution of Kenya.

they were separate and distinct issues leading to the tabling of the first comprehensive Access to Information Bill in 2011 before the national assembly.⁸⁷ In 2012, in order to enable further stakeholder consultation and input, to review the need for a clear oversight mechanism for proper implementation and also to provide for a time frame in which appeals are to be determined and also to provide for proactive disclosure by the government and its agencies, the bill was recalled by the Commission of Implementation of the Constitution in exercise of its mandate to ensure proper implementation of constitutional state obligations. Unfortunately, just like the previous bills, the same was not passed before Parliament proceeded to the 2013 General Elections.⁸⁸

2.4 Impact of Judicial pronouncements on the Access to Information Act, 2016.

Before the passage of the act, various judges in various judgments touching on access to information highlighted what ought to be provided for in an access to information legislation which pronouncements informed the stakeholders on what to look out for in a legislation on access to information. These, in one way or the other, worked towards enriching the reviews and debate on the access to information legislation upon being presented to Parliament and also through the public participation forums to which the said bill was taken through before being promulgated. The first case is the case of Famy Care Limited.⁸⁹ The case set to distinguish between a person and a citizen and their respective rights for purposes of ascertaining their rights and duties under the constitution⁹⁰. The case before court was in regard to the government's open international tender for the procurement of various commodities to be funded by the government through the Kenya medical supplies agency. Famycare limited a limited liability company incorporated in India sought to compel the Principal Officer of the Pharmacy and Poisons Board to provide information through affidavit

⁸⁷ Report of The Constitution of Kenya Review Commission, VOL 2.

⁸⁸ Freedom of Information and Data Protection, A report by the Commission on Implementation of the Constitution

⁸⁹ Famy Care Limited –vs- Public Procurement Administrative Review Board & 4 others [2012] eKLR

⁹⁰ Article 35, Constitution of Kenya 2010

being the correspondence between the board and the other interested parties concerning the drug “Depo-Provera” under registration certificate No. 0782 in the context of tender No. *KEMSA/01T60/2011-2013*”

It further sought to compel the Principal Officer of the Kenya Medical Supplies Agency to provide information through affidavit being the copies of the technical committee’s minutes and evaluation report and the tender committee minutes relating to the tender number. When the matter came up for hearing, their applications were challenged on the basis that it is a company incorporated in India and as such cannot enjoy the right to access information under the constitution. The court sought to determine only one issue of whether a company incorporated outside the jurisdiction is entitled to enjoy the right to access information. In making the determination, the court highlighted the importance of the right to access information in enhancing the national values and principles set out in the Constitution⁹¹ and emphasized that it forms a great pillar in strengthening the values and that without it, it’s impossible to achieve the greater values of democracy, the rule of law and social justice.⁹²

The Court went further in its interrogation of the right of access to information as protected under the Constitution as it has an implicit limitation as the right is limited to Kenyan citizens unlike the right to correction of information which is available to any person as the right is limited by making specific reference to the scope of persons who can enjoy it as it made a distinction between a citizen and a person. In doing so, the Court acknowledged the fact that the Constitution must be construed as a whole and that when construing the meaning of a given word, it should strive to give consistent meaning throughout the Constitution as the text permits. That the constitution is not to be interpreted in a manner in which one provision

⁹¹ Article 10, Constitution of Kenya.

⁹² Preamble to the Constitution of Kenya.

destroys or contradicts the other but should strive to sustain each other in-order to maintain harmony, completeness and constitutional paramountcy.⁹³

To enable set the distinction, the court interrogated the constitutional definition of a person,⁹⁴ which broadens the definition to include a company, association or a body of persons whether incorporated or unincorporated leading to the inference that the rights which accrue to a person can also be exercised by a juridical person to the extent that the right permits. On the other hand, it was noted that the constitution does not define a citizen but citizenship has been provided for as a chapter on its own under chapter three of the Constitution by providing the mode of acquisition of citizenship, the entitlement of citizens and the manner in which those entitlements can be taken away by the state which by inference provides for citizens to mean natural persons as a juridical person can neither be born nor married as contemplated by the chapter on citizenship. Thus, the court was clear to state the right to access information is limited by reference to a citizen and cannot be exercised by a juridical person.⁹⁵ This is made clearer by the fact that the right to access information under the constitution only refers to a citizen while the same provision entitles any person to correction or deletion of any information found to be misleading or untrue.

Thus, upon interrogating the issues above, the court found that the rights protected under article 35 (1) and 38 are aimed at organizing a democratic state and juridical persons are excluded from asserting these rights and that a reading of the Constitution and an examination of the words "person" and "citizen" within the Constitution can only lead to the conclusion that a excludes a juridical person and a natural person who is not a citizen as defined under chapter three of the Constitution thus excluding Famycare from enjoying those rights.

⁹³ Tinyefuza -V- the Attorney General Uganda Constitutional Appeal No. 1 of 1997

⁹⁴ Article 260 Constitution of Kenya.

⁹⁵ Constitution of Kenya.

The other case which has given impetus in the manner in which debate on access to information was to be conducted was the case of Charles Omanga⁹⁶ which provided that before applying to court for enforcement of a breach of an access to information request, the person ought to demonstrate first that the information has been requested for and the request denied. On the other hand, the Kenya society of mentally handicapped case,⁹⁷ the court set out to determine that where the applicant has not made a formal request for information from the state agency they cannot seek compulsive orders as the agency is required first to consider the request for information first and in the event the request is declined, then the court will assess the reasons for the denial and the agency given a chance to justify their denial and its only after the agency fails to justify the denial that the compulsive orders are issued. ⁹⁸

The above history, case law and many opinions from the civil society and other interested groups and forums helped enrich the content of the Access to Information Act 2016 passed overwhelmingly by our Parliament.

2.5 Findings.

The main findings from this chapter are as follows; Firstly, the post-independence legal regime adopted colonial legislation that was secretive and restrictive on access to information. This meant that to a large extent, the default position was secrecy and access to information requests being regularly denied.

Secondly, the regime in existence lacked an implementation framework making it largely arbitrary in terms of billing, procedures, and complaints mechanisms, further hampering the citizenry's access to public information. This uncertainty reinforced the difficulty in accessing information and discouraged the same.

⁹⁶ Nairobi Constitutional Petition No 29 of 2014 consolidated with Constitutional Petition Number 65 of 2014 *Charles Omanga & 8 others -V- Attorney General & Another* [2014] eKLR

⁹⁷ *Kenya Society for the Mentally Handicapped -V- The Attorney General* Nairobi Petition No. 155A of 2011 (Unreported)

⁹⁸ *Andrew Omtatah Okoiti -vs- Attorney General & 2 others.* Nairobi Constitutional Petition No. 92 of 2011 eKLR

Thirdly, the enactment of the Access to Information Act was largely by the efforts of civic organizations with many bills tabled in Parliament failing for lack of political goodwill for the right of access to information. This may be in part due to the bureaucratic red tape and schemes of 'kick-backs' that made the leadership class a beneficiary of the status quo.

Fourthly, the enactment of the Constitution of Kenya 2010 providing for the right of access to information and specifying a period of enactment is one of the factors that forced Parliament to pass an Access to Information Act to provide for the mechanisms of enjoying that right.

Fifthly, after the promulgation of the constitution, Courts have been involved in several instances in the advancement of jurisprudence around the right and the persons entitled to enjoy of the same in Kenya. Based on this, there has been reinforcement of the right, and the expansion of the understanding of its scope and nature as under the Constitution and under the Access to Information Act.

CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK IN KENYA.

3.1 Introduction.

This chapter interrogates the legislative and institutional framework on access to information in Kenya. The Kenyan legislative and institutional framework on access to information is relatively comprehensive as it entails provisions in the Constitution and in statutes giving the legal underpinnings and foundation in addition to the institutional framework which comprises the entire body of offices and officers tasked with facilitation of access to information requests. This chapter shall begin by laying bare the various legal conceptualizations of the right of access to information and to individually break them down in a thematic study based on the major concerns on access to information. Lastly it shall break down the institutional framework mandated to facilitate and ensure actual access to information.

3.2 The legal framework.

3.2.1 International instruments.

The first encounter with access to information was during the seventh plenary meeting of the United Nations General Assembly in 1946 when it established the commission to deal with the problems raised by the discovery of atomic energy when it mandated the commission to submit its reports and recommendations to the security council and that all those reports and recommendations be made public unless the security council directed otherwise in the interest of peace and security.⁹⁹

Later on, in 1948, the United Nation General Assembly adopted the Universal Declaration of Human Rights which guarantees the freedom of opinion and expression as a human right that

⁹⁹ Resolution 59(1), United Nation General Assembly , 4th December 1946.

encompasses the freedom to hold opinions without interference, the freedom to seek, receive, and impart information and ideas through any media regardless of frontiers.¹⁰⁰

Thereafter, on 19th December 1966, the General Assembly further adopted the International Covenant on Civil and Political Rights and its optional protocol considering the obligation of states under the charter of the United Nations to promote universal respect for the observance of human rights and freedoms. The convention guarantees the right to information in similar terms as the Universal Declaration of Human Rights but goes further to provide instances upon which it can be restricted by basis the same on the national legislation being majorly the protection of national security or public order, public health or morals and for the respect of rights or reputation of others.¹⁰¹

3.2.2 Regional instruments.

The African Charter on Human and People's Rights also referred to as the Banjul Charter is an international human rights instrument that promotes and protects human rights in the African continent. It was adopted by member states of the Organization of African Union in Nairobi on 27th day of June 1981 and came into force on 21st October 1986. This was motivated by the duty to promote human and people's rights and freedoms, taking into account the importance attached to these rights and freedoms in Africa, by providing that every individual shall be guaranteed the right to receive information and that they shall have the right to express and disseminate his opinions within the law.¹⁰²

In 2002, the African Commission on Human and Peoples Rights adopted the declaration of principles of freedom of expression in Africa in considering the key role of the media and other means of communication in ensuring full respect for freedom of expression in promoting the free flow of information and ideas, in assisting people make informed choices

¹⁰⁰ Article 19 Universal Declaration of Human Rights.

¹⁰¹ Article 19 International Covenant on Civil and Political Rights.

¹⁰² Article 9 African Charter on Human and Peoples Rights.

and facilitating and strengthening democracy. It acknowledges that public bodies hold information as custodians of the public good and everyone has a right to access information subject to clearly defined rules established by law. It guarantees the right to information in accordance with the following principles;

First, everyone has a right to access information held by public bodies, second, everyone has the right to access information held by private bodies which is necessary for the exercise or protection of the right. Third, any refusal to disclose information shall be subject to appeal to an independent body and/or court. Fourth, the public bodies shall be required even in the absence of a request to publish important information of significance public interest. Fifth, no one shall be subject to any sanction for releasing in good faith information of wrongdoing or that which would disclose as serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society and lastly, secrecy laws shall be amended as necessary to comply with freedom of information principles.¹⁰³

Lastly, in 2013, the commission adopted a model law on access to information which is not binding on any member states but forma a guide to the passage of the access to information within the member states. The objectives of the model law are first, to give effect to the right to information as guaranteed by the African charter on human and peoples rights. Secondly, to establish voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to accurate information from information holders as swiftly, inexpensively and effortlessly as is reasonable. Thirdly, to ensure that in keeping with the duty to promote access to information, information holders create, keep, organize and maintain information in a manner that

¹⁰³ Article 4 Declaration of Principle of Freedom of Expression in Africa.

facilitates the right of access to information. Lastly to promote transparency, accountability, good governance and development by educating people about their rights under the act.

3.2.3 The Constitution.

The Constitution is the basic foundation of Access to Information rights in Kenya.¹⁰⁴ The formulation of this right is broad as it grants citizens the right to access information that is not just held by the state but also that which is held by another person. Taking into account the Constitution's definition of person,¹⁰⁵ this means that a citizen can request information from not just an individual but also from a legal entity. It is however important to note that whereas a citizen can make an unqualified request for information from the state, that is without having to justify the request, any request of information from an individual must be justified as the request for information held by another person must be made strictly in exercise or protection of any right or fundamental freedom.¹⁰⁶ The other provision that promotes access to information is the provision imposing on state entities a duty to publish. In particular, the Constitution mandates the state to publish any information affecting the citizens.¹⁰⁷ Further, the obligation does not cease at publishing but rather the state is also mandated to publicize and make it known that certain information exists and that it can be accessed in a certain manner.¹⁰⁸

3.2.4 The Access to Information Act 2016.

The act contains a raft of provisions spread out under various thematic headings. The Act has parts dedicated to preliminaries,¹⁰⁹ laying down the foundation for the right to information,¹¹⁰ providing for access to information, the process of review of commission decisions,¹¹¹

¹⁰⁴ Article 35 Constitution of Kenya.

¹⁰⁵ The Constitution of Kenya, article 260.

¹⁰⁶ Ibid, article 35(1)(b).

¹⁰⁷ Ibid, article 35(3).

¹⁰⁸ Ibid.

¹⁰⁹ The Access to Information Act number 31 of 2016, Part I.

¹¹⁰ Ibid part II.

¹¹¹ Ibid Part III.

establishment and empowerment of the commission,¹¹² provision on delegated powers,¹¹³ and miscellaneous provisions.¹¹⁴ Part I concerns preliminaries and of importance in this section are three main things, the Preamble of the Act, the Interpretation section and the objects and purposes of the Act. The Preamble basically restates the purpose of the act which is to effect the constitutional provisions, confer on the relevant body the oversight and enforcement powers and thereby highlighting the major roles of the act which are to give effect to the mechanism of enjoyment of the right to information and to not only create but also empower the body mandated with oversight.

The interpretation part generally highlights the meaning of various terms as used in the Act. Of key importance are the definition of the terms: Commission in that it clarifies that no new commission is created but rather the enforcement of the Act is mandated to the Commission on Administrative Justice; the definition of personal information in so far as this is a ground of exemption and therefore it is crucial that no ambiguity lies here; and information in so far as it clarifies that access is limited to records without regard to the form in which the information is stored. The objects and purpose section are important in that it highlights the major issues that the Act's amendment sought to address. It lists as its objects giving effect to the Constitutional Right to Information;¹¹⁵ to provide a framework that encourages pro-active disclosure by public and private entities;¹¹⁶ to provide a framework to facilitate disclosure by private entities;¹¹⁷ to promote the culture of openness through periodic and regular disclosures by public entities; make provision for the protection of informers;¹¹⁸ and to provide for a framework within which public awareness on the right can be raised.¹¹⁹

¹¹² Ibid Part IV.

¹¹³ Ibid Part V.

¹¹⁴ Ibid, part VI.

¹¹⁵ Ibid, section 3(a).

¹¹⁶ Ibid, section 3(b).

¹¹⁷ Ibid, section 3(c).

¹¹⁸ Ibid, section 3(d).

¹¹⁹ Ibid, section 3(e).

The next part of the Act concerns itself with restating the right of access to information as provided for under the constitution as it restates the right as it is.¹²⁰ Of importance in this section is that the Act provides for a default position being that there lies a duty of disclosure unless exempted from disclosure.¹²¹ This part also restates the duty of disclosure and the duty to publish annual reports of specified types of information.¹²² The Act then provides for a raft of grounds based on which information requests may be denied which generally revolve around national interest reasons, invasion of privacy of individuals and professional confidentiality.¹²³ Part III concerns itself with setting out an institutional framework that will facilitate access to information. It begins by designating an information officer who shall be the CEO of a public entity, with ability to delegate such powers to another official.¹²⁴ As defined under the Act, a CEO of a public entity shall be the Principle Secretary in cases of ministries, department director in corporate entities or any person charged with principle administrative functions within public entities.¹²⁵ The effect of this is that the task of facilitating access to information is placed on administrators of public entities rather than on newly hired and created positions.

This part also provides a tentative framework on access to information requests making it mandatory that they must be made in writing with the option of use of standard forms to be provided by the public entity.¹²⁶ Further, it provides for timelines for processing the requests, circumstances where extensions of processing time may be allowed, and that any responses to be done communicated to the persons making the requests in writing.¹²⁷ Should there be a need to transfer the application to a relevant public entity, the Act prescribes timelines

¹²⁰ Ibid, section 4(1).

¹²¹ Ibid, section 4(4).

¹²² Ibid, section 5.

¹²³ Ibid, section 6.

¹²⁴ Ibid, section 7.

¹²⁵ Ibid, section 2.

¹²⁶ Ibid, section 8.

¹²⁷ Ibid, section 9.

guiding the same being within 5 days of receipt of request,¹²⁸ with the receiving public entity bound to process the same within the timelines set under the Act as if the request was brought to them. The Act further provides a comprehensive list of various grounds based upon which access to information requests to public entities may be denied, with a condition that the said responses be sent to an applicant within 15 days of receipt of information requests.¹²⁹

The Act proceeds to clarify that information requests shall be processed without charging of fees, and if charged shall be to cover only costs of making copies of the information requested.¹³⁰ Should information supplied be inaccurate, incorrect or need updating, the Act allows the applicant to apply for correction which shall then be done by the public entity at its expense.¹³¹ Part IV of the Act concerns itself with review of decisions of public entities by the Commission of Administrative Justice. It begins by laying down a list of grounds upon which one may seek review of decisions of public entities relating to access to information requests.¹³² It provides the timeline for seeking review being within 30 days of the decision being rendered, and that the same may be upon application or on the initiative of the commission itself.¹³³ When a review of decision is done, the commission is required where necessary to notify other persons or entities that could be affected by the decision.¹³⁴

Importantly, the Act protects persons who disclose confidential information obtained in the course of their employment provided that the disclosure was made in public interest.¹³⁵ The same section provides that disclosure is made in public interest in the event that it relates to a breach of the law. The act goes further to invalidate any non-disclosure agreement that it geared towards inhibiting the release of information in public interest and criminalizes the

¹²⁸ Ibid, section 10.

¹²⁹ Ibid, section 11.

¹³⁰ Ibid, section 12.

¹³¹ Ibid, section 13.

¹³² Ibid, section 14.

¹³³ Ibid, section 14.

¹³⁴ Ibid, section 15.

¹³⁵ Ibid, section 16.

giving of false information with the intention of injuring another person. To facilitate accountability, the Act obligates the public entities to keep accurate records,¹³⁶ and penalizes the erasure, blockage, defacement or alteration of records.¹³⁷ Interestingly, the Act privileges information that when published turns out defamatory if the said information is supplied to the public entity by a third party or another person.¹³⁸

Part V confers upon the Commission oversight and enforcement function and powers. This part empowers the Commission to review decisions based on access to information, and further empowers the commission to designate one commissioner as an access to information officer.¹³⁹ The Act tasks the commission with various functions which include review, receiving reports of implementation of the Act, promoting public awareness among other functions.¹⁴⁰ Importantly, the Act empowers the commission such that its decisions bind both national and county governments. The Act further empowers the Commission to handle any complaints under the Act,¹⁴¹ with the procedure being similar to that of seeking review.¹⁴² In furtherance of its roles, the Commission is empowered to issue summons, question persons or compel disclosure by persons.¹⁴³ If satisfied that a decision was not proper, the commission may issue appropriate remedy, with a person who is dissatisfied by the commission's decisions granted leave to appeal to the High Court within twenty one days. Further, the enforcement of orders of the Commission shall be by way of ex-parte application by way of summons in the High Court to be enforced as a decree of the Court and shall be enforced as such should no appeal be filed within 30 days.¹⁴⁴

¹³⁶ Ibid, section 17.

¹³⁷ Ibid, section 18.

¹³⁸ Ibid, section 19.

¹³⁹ Ibid, section 20.

¹⁴⁰ Ibid, section 21.

¹⁴¹ Ibid, section 22.

¹⁴² Ibid, section 14.

¹⁴³ Ibid, section 23.

¹⁴⁴ Ibid, section 23.

The Commission is required to receive reports by public bodies as required by the Act. It is also tasked with developing and publishing details on reporting requirements applying to public entities and also as applicable to relevant public bodies.¹⁴⁵ Specifically, as regards investigations, the Commission is empowered to do certain things inter alia to summon and enforce attendances of people and require the production of certain information.¹⁴⁶ In conducting an inquiry, the Commission is empowered to utilize the facilities of a public entity at its expense and later on to verify the correctness of a report that arises out of the same process. Part VI of the Act concerns regulations that are to be passed by the Cabinet Secretary in charge of Information in consultation with the Commission to make the act more effective.¹⁴⁷ The same section proceeds to list a variety of things that regulations should cover which are inter alia the manner of making applications, standard forms for requesting information and measures for record keeping. As a precaution, the Act specifies the legislations and Constitutional provisions that should guide the passage of these regulations.

Part VII makes provision for annual reports, reports by public entities and offences and penalties. The annual reports in question are reports by the Commission to the Cabinet Secretary as regards the Commission's assessment of the performance of Government in regard to access to information.¹⁴⁸ The reports by public entities concern annual reports on the information requests received, the way they were processed and general administrative that help facilitate access to information.¹⁴⁹ Offences created are inter alia disclosure of confidential information, failure of an information officer to assist in the making or processing of requests for information, or failing to respond to such requests within

¹⁴⁵ Ibid, section 23(7)

¹⁴⁶ Ibid, section 24.

¹⁴⁷ Ibid, section 25.

¹⁴⁸ Ibid, section 26.

¹⁴⁹ Ibid, section 27.

prescribed timelines.¹⁵⁰ Lastly, the Act provides for statutes that stand amendment in order to come into conformity with the Act.

3.3 The Institutional Framework.

The institutional framework that facilitates the legislative regime on access to information in Kenya comprises the following; information access officers, the Commission, the High Court and the Cabinet Secretary for Information.

3.3.1 Information Access Officers.

Information Access Officers (IAOs) are designations of the Act used to refer to Chief Executive Officers of public entities who are more or less persons in administrative capacity within public entities.¹⁵¹ They are the primary persons tasked with receiving information requests and processing them. Further, in executing this, they are tasked with assisting persons make the same applications as per regulations should there be.¹⁵² The IAOs are allowed to delegate their functions to persons within the entities they are in.¹⁵³

3.3.2 The Commission.

The Commission is the second point of call after an access to information request has been denied or processed conditionally such that the requester is not satisfied. This as per the Act is the Commission of Administrative Justice and the commission is supposed to designate one commissioner as an access to information officer.¹⁵⁴ The commission is tasked with several functions under the Act beyond review including inter alia receiving reports from public entities and compiling an annual report to the cabinet secretary for information.¹⁵⁵ In

¹⁵⁰ Ibid, section 28.

¹⁵¹ Ibid, sections 2 and 7(1).

¹⁵² Ibid, section 8.

¹⁵³ Ibid, section 7(2).

¹⁵⁴ Ibid, section 2.

¹⁵⁵ Ibid, section 21.

exercise of the same, it is empowered to do certain things which include inter alia summoning people or ordering production of witnesses in order to better coordinate its functions.¹⁵⁶

3.3.3 The High Court.

The High Court's role in access to information is two-fold; first, it acts as an enforcement mechanism and secondly as an appellate forum. Should a person obtain a successful review of a decision of a public entity, the person can apply to the Court for the order to be registered as an order of the Court.¹⁵⁷ As an appellate body, should a person be dissatisfied with the outcome of a review by the Commission, he can appeal to the Court within 30 days.¹⁵⁸

3.3.4 The Cabinet Secretary.

The cabinet secretary's roles are firstly to make regulations to better facilitate the effecting of the provisions of the Act,¹⁵⁹ a role carried out in consultation with the Commission. The CS is also mandated to receive the annual report from the Commission on the Government's implementation of the Act and to table the same before Parliament.¹⁶⁰ The CS is also tasked with reporting the steps Government is taking to improve access to information by Citizens.

3.4 Findings.

The main finding of this chapter is that by and large, Kenya has a robust legislative and institutional framework on access to information covering a large extent of the relevant areas of concern in an access to information legislation.

¹⁵⁶ Ibid, section 23.

¹⁵⁷ Ibid, section 23(5).

¹⁵⁸ Ibid, section 23(4).

¹⁵⁹ Ibid, section 25.

¹⁶⁰ Ibid, section 26.

CHAPTER FOUR: CASE REVIEW

4.1 Introduction.

This chapter critically analyses select judgments in order to demonstrate the challenges faced by citizens in their effort to access information. It shall illustrate the tensions that exist in the implementation and enforcement of right to access information as encountered by citizens. Further it goes to demonstrate how the government either in itself or through its agencies strives to ensure that it maintains its culture of secrecy and the manner in which it has gone at length to ensure minimal disclosure of information held by itself while illustrating the efforts made by individuals and the citizens in trying to access the said information.

4.2 Case Review 1 Petition 314 Consolidated with J.R 306 of 2016¹⁶¹

This case was delivered on the 29th day of August 2016 just two days to the date of assent of the act¹⁶² and month to its commencement being the 21st day of September 2016. The petitioners in this matter sought to challenge the criteria used by the Judicial Service Commission to advertise and shortlist candidates for interview for the positions of Chief Justice, Deputy Chief Justice and Judge of the Supreme Court following the retirement of Dr. Willy Mutunga, Kalpana Rawal and Philip Tunoi.

4.2.1 Brief Background.

The Commission proceeded to advertise for the vacancies in the positions above and invited applicants to submit their respective applications by the 6th day of July 2016. In the advertisement, the Commission listed the requirements provided for in the constitution in addition to others not expressly provided for in the constitution. The requirements included, a clearance certificate from the Higher Education Loans Board, Kenya Revenue Authority, Director of Criminal Investigations, Advocates Complaint Commission, Ethics and Anti-

¹⁶¹ Trusted Society of Human Rights Alliance & 3 others –V- Judicial Service Commission & Another [2016]eKLR

¹⁶² Access to Information Act 2016

Corruption Commission and a recognized Credit Reference Bureau. The commission then proceeded to shortlist candidates for the respective positions without giving reasons for shortlisting some of the applicants who applied and for failing to shortlist the other applicants who were believed to be qualified for interview for the positions. These applicants included Professor J. B. Ojwang, a judge of the Supreme Court who had applied for the position of Chief Justice whose requirements for qualification are similar to those of the position he currently holds, Justice Aaron Ringera, who served as a judge of the Court of Appeal and currently serving in the East African Court of Justice and lastly Professor Makau Mutua, a respected jurist and scholar.

The three were believed to be persons with solid credentials and serving the public in different public offices and as such there was the need to inform the public the reasons for failure to shortlist them as the failure to get shortlisted implied a lack of integrity by the said persons which is a good ground for their removal from office. The petitioners sought information regarding the criteria used by the commission to shortlist candidates for the various positions. The Judicial Service Commission failed to avail the information sought necessitating the filing of the petition to compel the commission to release the information sought.

4.2.2 Summary of issues arising and determination.

The main issues for determination relevant to the petition were whether the Judicial Service Commission was mandated to furnish the petitioners with the information sought and whether the Commission satisfied its obligation to furnish the information sought. In analyzing the issues arising, the court relied majorly on the constitutional provisions on access to information¹⁶³ and privacy¹⁶⁴ and the regulations to the judicial service¹⁶⁵ and the fair

¹⁶³ Article 35 of the Constitution of Kenya.

¹⁶⁴ Ibid Article 31.

¹⁶⁵ Regulation 5 of the first schedule to the Judicial Service Act.

administrative action legislations.¹⁶⁶ The court made a finding that the Commission was under an obligation to furnish the petitioners with the information sought in a precise manner as could be permitted by the circumstances and any decision not to release certain information must be justified while considering and respecting the applicant's right to privacy.

4.2.3 Analysis.

The Judicial Service Commission has a duty to be confidential with the personal and sensitive information it receives through the numerous applications it receives daily in order to protect the applicants and third parties whose information is disclosed through the applications.¹⁶⁷

The duty above could be interfered with by the courts in the event it is used to circumvent the commission's legal mandate, where its used to perpetuate an illegality, where it's unfair and unreasonable, where the discretion is fettered and due to a failure to exercise discretion. In addition to that, every citizen is entitled to be given written reasons concerning any administrative action taken against them¹⁶⁸ and the failure by the commission to supply the information requested was found to be unjustified.

4.3 Case Review 2 High Court Petition No. 278 of 2011¹⁶⁹

The petition related to a request for information made by the Nairobi law monthly magazine to Kenya Electricity Generating Company regarding contracts signed with other companies for drilling geothermal wells.

4.3.1 Brief background.

The magazine, company incorporated in Kenya was investigating various transactions undertaken by the company. It published its findings in its 2011 edition implicating the

¹⁶⁶ Section 4(2) of the Fair Administrative Action Act, 2015.

¹⁶⁷ Regulation 5 of the first schedule to the Judicial Service Act

¹⁶⁸ Fair Administrative Action Act, 2015

¹⁶⁹ Nairobi Law monthly –V- Kenya Electricity Generating Company & 2 Others [2013] eKLR

management in corrupt dealings which findings were denied by the company which led to the magazine request for information on the issues raised for purposes of verification. The company refused to release the information sought, leading to the filing of the suit to compel the release of the information.¹⁷⁰

4.3.2 Summary of issues arising and determination.

There were three main issues for determination being first; what are the circumstances under which an obligation to provide information arises; secondly, whether the company is obligated to release the information sought and thirdly whether the company is entitled to enjoy the right to access information. The court in making its determination relied majorly on the constitution with specific reference to article 35 on access to information, article 2(6) which domesticates international conventions to which Kenya is a party and which forms part of the Kenyan law and in that regard made reference to article 19 of the universal declaration of human rights as adopted by the United Nations in 1948, Article 19 of the International Convention on Civil and Political Rights adopted by the United Nations in 1966 and lastly article 9 of the African Charter on Human and Political Rights the Banjul charter. Any public company is obligated to supply information upon request by a citizen and a natural person being a citizen of the republic of Kenya is entitled to request for information.¹⁷¹ Finally the company is obligated to release the information sought unless there are sufficient legitimate reasons to warrant the refusal to disclose.

4.3.3 Analysis.

The right to information is at the center of other rights to be asserted by any citizen as it's through it that awareness is created. Parliament is yet to enact the legislation governing access to information and as such it is difficult to determine the circumstances under which it

¹⁷⁰ Cap 486 Laws of Kenya.

¹⁷¹ article 35(1)(a) of the Constitution of Kenya

can be enforced. That being the case the only criteria or standard applicable were from other jurisdictions that had already adopted the access to information legislation and the universal standards on access to information. The right to information entitles a citizen to information while imposing a duty to the state to publish information and provide open access to specific information upon request. In order to determine the nature and form of information to be disclosed, the country needs to enact the access to information legislation to guide the courts in their interpretation. These considerations to ensure maximum disclosure with limited exceptions, to broaden the definition of a citizen for purposes of access to information and the request need not have reasons for the request. The public entities are obligated to disclose information held and can only refuse to disclose for legitimate reasons and in the event that there is need to restrict access, the reasons must be disclosed and the same subjected to the legitimacy test before being upheld in light of the limitations embedded in the constitution.

4.4 Case Review 3 Nairobi High Court Petition No 43 OF 2012¹⁷²

The matter arose after the petitioner was aggrieved by the tendering process relating to an open International tender to procure family planning items which was to be funded by the government of Kenya through the Kenya Medical Supplies Agency.

4.4.1 Brief Background.

Aggrieved by the tendering process, the petitioner sought to compel the principal officers for the pharmacy and poisons board and the agency to disclose on oath correspondence and minutes relating to the award of the tender being tender No. KEMSA/01T60/2011-2013.

4.4.2 Summary of issues arising and determination.

The main issue for determination was whether a company incorporated outside the country can assert its right to access information. The court endeavored to interpret the constitution in a manner that promotes its purpose, values and principles, advances the rule of law and

¹⁷² Femy Care Limited –V- Public Procurement Administrative Review Board & another

human rights and freedoms in order to permit the development of the law. The court found that the company as incorporated outside the jurisdiction cannot assert the rights to access information as the right is only applicable to citizens.

4.4.3 Analysis.

The right to access information aims at maintaining accountability, good governance and transparency because and informed citizenry is better placed to demand accountability from its leaders and also use it to determine which leader is better placed to articulate their needs and through which forum. The court found that the right to access information is protected by the constitution albeit limited only to citizens unlike the other rights that have a broadened application and as such there is a clear distinction between a citizen and a person. This was a clear and deliberate intention by the framers of the constitution which distinction ought to be respected.

4.5 Case Review 4 High Court Petition No. 92 of 2011¹⁷³

The petition sought to compel the Judicial Service Commission to disclose information relating to the criteria of selection of candidates for the position of Chief Justice and Deputy Chief Justice.

4.5.1 Brief background.

This came after the conclusion of public interviews by the Judicial Service Commission for the position of Chief Justice and Deputy Chief Justice and nominated Dr. Willy Mutunga and Ms. Nancy Barasa to the President for appointment.

4.5.2 Summary of issues arising and determination.

The main issue in the case was whether there was a prima-facie case before it to warrant the issuance of orders of mandamus to compel the Judicial Service Commission to release

¹⁷³ Andrew Omtatah –vs- Attorney General & 2 others [2011] eKLR

information to the petitioner and the public. The court found it necessary for any applicant to make a request to the relevant agency first before and the request rejected before applying to court seeking to compel the agency to release the information. The petitioner in the matter had not demonstrated to the court that he had indeed made a request for information to the judicial service commission before applying to court for orders of mandamus and as such, the court could not compel the commission to release the information at this stage.

4.5.3 Analysis

There are parameters that guide the commission in exercise of its discretion to disclose information within its custody at the shortlisting stage. The information is very critical at that stage and the commission is supposed to exercise the highest-level of transparency and confidentiality at the same time.¹⁷⁴ For the court to compel the commission to disclose any information within it, the person seeking to compel needs to demonstrate that he has made a formal request to the commission and the request rejected on flimsy grounds that they are entitled to an order to compel the commission. Lastly there was no express requirement to warrant the commission to notify the applicants the reasons for the failure to shortlist in order to give them an opportunity to respond before proceeding with the interviews but it could have been a good practice and workable if time was not of essence in the recruitment process.

4.6 Case Review 5 High Court Petition No. 549 OF 2013¹⁷⁵

The petition arose from the refusal by the advocates' complaint commission to give the petitioner certain information pertaining to Mr. Mathew Oseko advocate.

¹⁷⁴ Regulation 23 of the first schedule to the Judicial Service Commission Act

¹⁷⁵ Nelson O. Kadison –V- The Advocates Complaints Commission & Another [2013] eKLR

4.6.1 Brief background

By a letter dated 4/10/13, the petitioner wrote to the commission requesting information concerning certain complaints made against the advocate on the ground that such information was necessary to challenge the appointment of Oseko to public office in the Homa-bay county on account of integrity. The commission through its secretary responded to the request in part declining to give information on the basis of advocate-client confidentiality. Dissatisfied by the response, the petitioner moved to court seeking to compel the commission to release the pleadings filed with it.

4.6.2 Summary of issues arising and determination.

The main issue was whether the reasons given by the commission for the refusal to furnish the information sought by the petitioner were legitimate and tenable. The court found that the advocates complaint commission being a statutory body established under the advocates act is a state and as such its obligated to provide information held by it upon request by a citizen. The reasons it gave for the failure to give the information was found untenable as the commission is a public body and once a complaint has been filed with it, it becomes a public document open to anyone.

4.6.3 Analysis.

The main reason for refusing to disclose was the advocate client privilege as was asserted by the commission. This was found to only bind and apply to the advocate not to disclose any information reposed to him during the continuance of the retainer and cannot be applied by the commission to justify a refusal to release information. Once a complaint is filed, the client is deemed to have waived his right to confidentiality as relates to the issues placed before the commission as privilege only operates to protect the client and cannot be asserted by a third party or any public entity to circumvent its duty to disclose. These public bodies are mandated to protect the members of the public and are supposed to ensure they apply

themselves in the public interest by ensuring that the complaint mechanisms are open and transparent.

4.7 Case Review 6 Petition No. 479 of 2013¹⁷⁶

4.7.1 Brief background.

The petitioner herein challenged the constitutionality the section of the income tax legislation to the extent that it contradicts the provisions of the constitution. The petitioner, through his advocate, had sought information from the Kenya Revenue Authority to confirm whether indeed all the members of parliament had paid their taxes as directed by the honorable Justice Warsame and the efforts made by the authority to collect the taxes.

4.7.2 Summary of issues and determination.

The main issue was whether the income tax legislation is inconsistent with the constitution to the extent that it contradicts the constitution by mandating the tax officer to treat as secret any information relating to the income of any person and to treat as confidential all instructions relating to the administration of the income tax. The court upon analyzing the petition found that the petitioner had no demonstrated the manner in which his right to information had been breached as it was difficult to determine the nature and form of the information he sought.

4.7.3 Analysis.

A tax officer is mandated to deal with any information relating to the income of a person as secret and the officer cannot be compelled to produce such information provided, they were procured in the course of his duties.¹⁷⁷ The state is indeed mandated to disclose the information it holds but this has to be considered in terms of the nature and form in which it is sought and that there should be clear set out parameters within which information access can be restricted which parameters are to be justifiable and in line with the constitutional

¹⁷⁶ Timothy Njoya –vs- Attorney General & another [2014]eKLR

¹⁷⁷ Section 125 Income Tax Act Cap 470 Laws of Kenya.

limitations. The limitation under the income tax was found to be reasonable and justifiable as tax returns are confidential and any information received should be treated as such.

4.8 Case Review 7 Nairobi Petition No. 182 of 2017 ¹⁷⁸

This petition challenged the constitutionality of the election's offences act to the extent that it proscribes the government from publishing any information on its achievement during the election period.¹⁷⁹

4.8.1 Brief background.

The elections offences act makes it an offence for the government to publish its achievements during the election period which offence is punishable by a fine of two million or to imprisonment for a term not exceeding six years. It was the petitioner's contention that the section prohibits the government from accomplishing its constitutional mandate to publish information it holds for public interest and that to that extent, the act contradicts the constitution. That in light of national values of transparency and accountability, the government should be allowed to showcase its achievements in the projects and programs that it had pledged to its citizens.

4.8.2 Summary of issues and determination.

The main issue for determination was whether indeed the section of the act should be declared unconstitutional to the extent that it prohibits the government from publishing its achievements within the election period. The court upon analyzing the case found that the petition lacked merit as it found that the section was aimed ensuring that there was level playing field for all candidates vying for various seats and a repeal of that section would give the incumbent government advantage over those outside the government.

¹⁷⁸ Jack Mukhongo Munialo & 12 others v Attorney General & 2 others [2017] eKLR

¹⁷⁹ Section 14(2) Election Offences Act No. 37 of 2016

4.8.3 Analysis.

The limitation was found to be a periodic and justifiable and in line with the constitutional limitation as it only applied during the election period which occurs once in every five years and such, the government's mandate cannot be curtailed by the limitation. In addition to this, the limitation is aimed at protecting the public resources from waste by government agencies and officials to the disadvantage of those outside government as its also against the principles of public finance. The election offences act is a tool aimed at ensuring free and fair elections by ensuring that all those involved in one way or the other to jeopardize the elections are held accountable to their actions.

4.9 Case Review 8 Nairobi Petition No. 468 of 2017¹⁸⁰

The petition was instigated by the publications by the Presidential Delivery Unit herein referred to as the unit on diverse dates, in the media, billboards and business messaging or tags

4.9.1 Brief background.

The petitioner, sought information from the unit seeking to know how many advertisements it had been published through the media, the total costs incurred and the entity that paid for the advertisements. The basis of the petition was a refusal by the presidential delivery unit to supply the petitioner with the information regarding the form, nature and costs of the various advertisements which the unit ran through the mainstream media made despite the express prohibition by the elections offences act against the government advertising its achievements during the election period.

4.9.2 Summary of issues and determination

The main issue for determination was whether the unit is obligated to release the information sought. The court found the unit's open refusal to release the information was in breach of the

¹⁸⁰ Katiba Institute vs. Presidential Delivery Unit & 3 others [2017] eKLR

unit's duty to release information to any citizen upon request, the act having broadened the definition of citizen to also include juridical persons. It was on the above basis that the court had to compel the unit to release the information as sought by the institute.

4.9.3 Analysis

The act broadens the definition of a citizen to include a private entity controlled by one or more citizens by extension including a juristic entity whose director is a Kenyan citizen to be entitled to access information.¹⁸¹ It was never disputed that the director of the institute was a Kenyan citizen entitled to assert the right to access information. The unit never gave reasons to support or justify the claim that the information sought affected the state's security and as such the court found the reasons advanced as being unjustified and untenable in an open and democratic society. It was not enough for the unit to only allege without explaining the circumstances under which the information falls under the restriction.

4.10 Findings.

From each of the cases reviewed, we derive the following findings. First, there is tension between the state's obligation to allow access to information and the extent to which it should exercise that obligation. Secondly, there is tension between the circumstances under which the allow access to information and who can be allowed access. Thirdly, there is tension between the state's obligation to allow for access to information and the circumstances under which the court can issue an order compelling the issuance of the information. Fourthly, there is tension as to what constitutes reasonable disclosure of information and the grounds for refusal to disclose and lastly, there is a tension between the constitutional right to access to information and the extent to which the same is considered limited under various legislations.

¹⁸¹ Section 4 of Access to information Act

CHAPTER FIVE: ANALYSIS OF THE ACCESS TO INFORMATION ACT.

5.1 Introduction

The Constitution of Kenya guarantees the right to information as the foundation for the exercise or protection of any other right.¹⁸² It mandates Parliament to enact legislation to fulfill its international obligations in respect of human rights and fundamental freedoms which includes the freedom of information.¹⁸³ The act provides for strong procedural guarantees,¹⁸⁴ as well as a narrowly crafted set of exceptions.¹⁸⁵ It also provides for an administrative appeal to the Commission on Administrative Justice;¹⁸⁶ and a subsequent appeal to the High Court if a party is still aggrieved by the decision of the Commission.¹⁸⁷ It mandates public bodies to publish information within a specified timeframe,¹⁸⁸ which concept that has been elusive in many Right to Information legislations the world over.¹⁸⁹

This chapter analyzes the Access to Information Act while paying critical attention to the provisions of the Act and its impact on the citizen's right to Access information. This will be done by delving into major thematic areas of the Right to Information and an assessment of whether the Act has sufficiently made provisions under these attributes. These thematic areas are the right of access, which interrogates the extent to which the act has gone in facilitating access to information; procedural guarantees, which analyzes the procedures put in place to facilitate access to information; the duty to publish; exceptions to the Right of information; appeals and promotional measures that have been included in the Act.

¹⁸² Article 35 of the Constitution of Kenya.

¹⁸³ Article 21(4) of the Constitution of Kenya.

¹⁸⁴ Ibid Sections 7 through 11.

¹⁸⁵ Ibid Section 6.

¹⁸⁶ Section 3 of the Commission on Administrative Justice Act No. 23 of 2011 Laws of Kenya.

¹⁸⁷ Ibid Section 11 (f) and Section 23 (3).

¹⁸⁸ Ibid Section 5.

¹⁸⁹ Smolla, Rodney, *Free Speech in an Open Society* (New York: Knopf, 1992), p. 319.

5.2 The right to access information.

This attribute is derived from the principle of maximum disclosure which forms the foundation of any right to information legislation. The principle requires the broadening of the scope of the right to information.¹⁹⁰ To this extent, the act has provided for this right to not only apply to information held by the state but also to that which is held by private persons provided that the information is required for the exercise or protection of any right or fundamental freedom.¹⁹¹ The act provides that it shall be guided by the principle of maximum disclosure and to be applied and interpreted in a manner that ensures maximum disclosure with limited exceptions.¹⁹² The main objective of the act is to give effect to provisions of the constitution that provides for access to information while the other objectives include conferring the oversight mandate and the duty to enforce upon the Commission on Administrative Justice.¹⁹³

In analyzing an access to information legislation, focus shall be on the scope of information to be disclosed, the limitations of the legislation and the institutions mandated to enforce the Act. The Act governs all records held by any public entity or private body performing public functions regardless of the form in which the information is stored, the source or the date of production.¹⁹⁴ This is in line with the state's duty under the African Charter on Human and Peoples Rights.¹⁹⁵

¹⁹⁰ Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation (London: 1999). Available at: <http://www.article19.org/pdfs/standards/righttoknow.pdf>.

¹⁹¹ Section 4 of the Access to Information Act 2016.

¹⁹² Subsection 4 states thus; "This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6."

¹⁹³ The Objectives of the Act, aside from giving effect to Article 35 of the Constitution of Kenya, include; creating a framework for public and private bodies to disclose and provide information upon request, to facilitate information access to protect persons who disclose information and for public awareness purposes.

¹⁹⁴ Section 2 of the Access to Information Act 2016.

¹⁹⁵ The inclusion of private entities is also reflected in Principle IV(2) of the African Charter on Human and People's Rights, which states that Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right". Given present trends to privatize more and more functions which were once considered to be public in nature, this is an important development for the right to information.

A public body is defined by the act to include any public office or entity performing a function within the commission, office, agency, or other body established under the constitution. On the other hand, a private body to which the act applies to is defined as any private entity or non-state actor that receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources) or is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.¹⁹⁶

The Act does not apply to information that could be obtained through other means and makes it discretionary for the entity involved to release or not.¹⁹⁷ Information is to be accessible considering the interests of persons with disabilities, the costs involved, the language to be used and the most effective method of communication used by the person making the request.¹⁹⁸ The act acknowledges the fact that depending on the mode in which the information is sought, there might be a need for the person making the request to incur costs for the information but the costs are supposed to be reasonable.¹⁹⁹

The next issue for analysis is who has the locus to make a request for information? The constitution only allows citizens to exercise the right to access information which position has been adopted by the Act. Although the constitution does not expressly define who a citizen is, the same was left to the interpretation and the High Court has interpreted it to mean

¹⁹⁶ Ibid

¹⁹⁷ Infra Section 6 (5)

¹⁹⁸ Section 5 (2) of the Access to Information Act 2016

¹⁹⁹ See Section 4(3) *ibid*. the person requesting will make copies of the information provided at his own cost or a reasonable cost.

natural persons.²⁰⁰ While no subsequent amendments have been made to Article 35 of the Constitution, the word citizen has been defined broadly by the Act to mean any individual who is Kenyan, and any private entity that is controlled by one or more Kenyan citizens²⁰¹ as a result extending the protection of the right to Information to entities controlled by one or more Kenya citizens. Questions could arise towards the definition of control in that statement. Just how much control would suffice to warrant the application of this right? Although this broader definition could effectively include private corporations controlled by Kenyan citizens, Civil Society groups, Partnerships and other entities as long as they are controlled by one or more Kenyan Citizens.

5.3 Procedural Guarantees

In order to guarantee the right to information, there is a need for proactive disclosure by public entities and at the same time allow anyone to make a request to the public bodies for specific information subject to a clear set of exceptions.²⁰² To achieve this, there is a need to have clear procedures established to guide requests for information. There is a need to have independent review mechanism for the decisions made by the public entities. The emphasis on public bodies is because the government cannot purport to subject private entities to procedural measures of administration as legislation on the procedures of application or request of information will concern public bodies.

The procedures to facilitate access to information should be simple, expeditious and affordable. The act begins by designating the Chief Executive Officer of any public entity as the information access officer,²⁰³ with powers to delegate to any officer within the entity.²⁰⁴

²⁰⁰ Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company and 2 Others Petition No 278 of 2012 [2013] eKLR

²⁰¹ Section 2 of the Access to Information Act 2016

²⁰² Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, (London: 2001). Available at: <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.

²⁰³ An information access officer is defined in section 2 of the Act to mean any officer of a public entity or private body designated under section 7 as such for purposes of this Act

²⁰⁴ See Section 7 of the Act.

Any request for information has to be made in writing in English or Kiswahili with sufficient details and particulars to enable the officer understand what information is being requested. In the event that an applicant is unable to express themselves with clarity and the request acknowledged in a prescribed manner by the information officer.²⁰⁵ The public entities are free to prescribe their own standard forms provided the form is not made in a manner that delays requests or places undue burden upon the applicants and the entity cannot reject a request on the ground that the applicant has not used the prescribed form,²⁰⁶ or that the reasons given for the request are not merited.²⁰⁷

Once the request for information is received, the entity is required to respond to it as soon as possible and in any case within 21 days²⁰⁸ although actual provision of the information may be conditional upon payment of a fee. Where the request concerns the life or liberty of a person, the entity is required to respond within 48 hours²⁰⁹ and failure to respond within these timelines is deemed as a refusal of the request.²¹⁰ Where a request concerns information which is held by another public body, the information officer is mandated to transfer the request to that body not later than five days from the date of receipt of an application and inform the applicant immediately and not later than seven days from the date of receipt of the application.²¹¹

Once a request is accepted, the entity is to inform the applicant within 15 working days that the request has been accepted, the fees to be levied, along with the calculations upon which it is based, his or her right to challenge the assessed fee and the procedure of how to do this.²¹²

Where a request has been rejected, the applicant must be informed about the reasons for the

²⁰⁵ The public officer will then have to reduce the request into writing in prescribed form then avail a copy of the written request to the person making the request.

²⁰⁶ See Section 8 (4) of the Access to Information Act, 2016

²⁰⁷ Ibid Section 4(2)

²⁰⁸ Ibid Section 9 (1)

²⁰⁹ Ibid Section 9(2)

²¹⁰ Ibid Section 9(6)

²¹¹ Ibid Section 10

²¹² Ibid Section 11(1)

rejection and how to lodge an appeal against that decision.²¹³ The information requested should be provided at the place where it is kept, and for inspection, in the form in which it is held unless the applicant requests that it be made available in another form and, if it is practicable to do so, such information may be copied, reproduced or used for conversion to a sound transmission at the expense of the applicant.²¹⁴

5.4 Duty to publish.

In order to ensure effective access to information, public entities are mandated to publish²¹⁵ and disseminate important information without requests.²¹⁶ Although the scope of this obligation is dependent on the availability of the resources, the amount of information covered should increase over time as technology makes it easier to publish and disseminate the information.²¹⁷ The act mandates the public entities to publish all the relevant information relating to general operations, services offered, the procedures and forms, subsidy programs, contracts entered into,²¹⁸ reports made and opportunities for participation.²¹⁹ This information can be made available for inspection either by publishing the information online or by supplying copies to the applicant²²⁰ and any decision taken against an individual or entity is supposed to be made in writing and reasons given to them.²²¹

²¹³ Ibid Section 9 (4) (d)

²¹⁴ Ibid Section 11 (3)

²¹⁵ The Declaration of Principles on Freedom of Expression in Africa, 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

²¹⁶ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44

²¹⁷ Council of Europe Recommendation R (2002)2 the Committee of Ministers to Member States on access to official documents, 21 February 2002.

²¹⁸ Particular referred to above include the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference, the contract sum, the name of the service provider, contractor or individual to whom the contract has been granted and the periods within which the contract shall be completed.

²¹⁹ Section 2 of the Access to Information Act, 2016.

²²⁰ Ibid Section 5 (3)

²²¹ See Section 5 (1) (d) of the Access to Information Act, 2016

5.5 Scope of Exceptions.

Exceptions should be narrow and limited to harm and public interests.²²² In analyzing the scope of exceptions, regard must be placed on fact that broad exceptions undermines effective access to information legislations.²²³ On the other hand, secrecy is justified in the event that disclosure of the information causes greater harm to the general public interest.²²⁴ Access to information cannot be limited except by express provisions of the law and only to the extent that the limitation is reasonable in a democratic society.²²⁵ The right can only be limited first, when the disclosure will undermine national security, secondly, if it impedes the due process of law; thirdly, if it endangers the safety, health or life of any person; fourth, if it involves the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has been made; sixth if it will s prejudice commercial interests, including intellectual property rights, of that entity or third party; Seventh, if it shall cause substantial harm to the ability of the government to manage the economy of the country; eighth, if it undermines a public or private entity's ability to give adequate and judicious consideration to a matter; ninth if it shall damage a public entity's position in actual or contemplated legal proceedings or lastly if it infringes upon professional confidentiality as recognized in law or by the rules of a registered association or a profession.²²⁶ But where the public interest in disclosure outweighs the harm to protected interests, then the act mandates the entity to disclose the information.²²⁷

²²² Article 19, The Public's Right To Know: Principles on Freedom of Information Legislation, (London: 2001). Available at: <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.

²²³ *infra*

²²⁴ Mendel Toby, Freedom of Information: A Comparative Legal Survey, UNESCO, Rev. Second Edition (2008) at 43

²²⁵ Article 24 of the Constitution

²²⁶ See Section 6(4) of The Access to Information Act, 2016

²²⁷ *ibid*

5.6 Appeals.

Requests for information should be processed rapidly and fairly and an independent review of any refusals should be provided.²²⁸ The act empowers the commission with oversight and enforcement mandate.²²⁹ To achieve this, the commission is supposed to investigate on its own motion or upon receipt of a complaint regarding a violation of the act,²³⁰ thereafter, to hear and determine the complaint,²³¹ and finally make a decision in one way or the other disposing off the complaint.²³²

Any person is allowed to apply for review of the decision of any public entity relating to access to information provided it is done in writing within thirty days from the date they were notified of the decision but any time in the event the review is done on the commission's own motion.²³³

The commission is empowered to issue summonses requiring the attendance of any person, to produce any document or records, question any person with regard to the subject matter and require information within that persons knowledge be disclosed.²³⁴ If satisfied that the act was infringed, the commission may order the release of information held including an order that the applicant be compensated.²³⁵ Any party aggrieved by the decision of the commission can appeal to the high court within twenty-one days,²³⁶ upon giving a written notice to all the parties.²³⁷ The act fails to provide for an internal appeal process as it gives the public entities a chance to review their own decisions on merit before being subjected to external processes

²²⁸Supra Article 19, The Public's Right To Know: Principles on Freedom of Information Legislation, (London: 2001). Available at: <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.

²²⁹ Section 20(1)

²³⁰ Section 21

²³¹ Ibid

²³² Ibid

²³³ Ibid Section 14

²³⁴ Ibid Section 23(1) and (2)

²³⁵ Ibid Section 23(3)

²³⁶ Ibid Section 23(3)

²³⁷ Ibid

which is expensive and involving to the applicants..²³⁸ This gives the public entity the opportunity to review its own decisions once it finds that there are no concrete reasons to deny access to information and also helps resolve the dispute faster.²³⁹

5.7 Sanctions and Protections.

This attribute concerns the positive and negative reinforcement measures taken to enforce the Right to Information. Sanctions are negative reinforcement mechanisms that are intended to punish persons who willfully obstruct access to information by destroying records or inhibiting the work of the oversight body. On the other hand, the law has put in place protections referred to as positive reinforcements for person who disclose information in good faith pursuant to the duty to publish and those that disclose information on wrongdoing also referred to as whistleblowers.²⁴⁰ The act creates offences and sanctions.²⁴¹ First it is an offence to interfere with the work of the Commission by either concealing, withholding or misrepresenting information, failure to respond to a request for information, charging fees exceeding the required sum, failing to make available the names of information officers all form part of a regime of sanctions which attract a jail term or fine or both. Secondly it is an offence for an Information officer to refuse to assist a requester who is unable to write to reduce the oral request to writing in the prescribed form and provide a copy to the applicant.²⁴² Thirdly, it's an offence for the officer to refuse a request for information, failing to respond to a request within the prescribed time and failing to take reasonable steps to make information available in a form that is readable, viewable or heard by the applicant.²⁴³

²³⁸infra

²³⁹ Mendel Toby, Freedom of Information: A Comparative Legal Survey, UNESCO, Rev. Second Edition (2008) at 38

²⁴⁰ Principle 9 of the ARTICLE 19 Principles engenders this notion of protection of whistleblowers. It states "Individuals who release information on wrongdoing –whistleblowers- must be protected." Similarly Principle IV(2) of the African Declaration states: "No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society."

²⁴¹ For a detailed look of the offences created See sections 16, 18 and 28 of the Access to Information Act, 2016

²⁴² Section 8(2) Access to information Act 2016.

²⁴³ See Section 28 (3)

Such an officer if found guilty could be fined Fifty thousand shillings or face imprisonment for not more than 3 months or both.²⁴⁴

The law protects persons who discloses information or authorizes such disclosure in good faith in reliance with the Act.²⁴⁵ Further protections are contained under Section 16. The protections therein are purely founded on public interest such that the disclosure was done with a view of public interests. However, it is not clear whether disclosure of information on wrongdoing is permitted as individuals cannot be expected to balance the competing interests as whistleblowers may disclose information that is exempted from disclosure to pursue some selfish interests as opposed to the public interest. This notwithstanding, if whistleblowers disclose information on wrongdoing it is only fit to protect them from liability since, despite other motivations or otherwise ill will, the eccentric point of their disclosure, though not preordained, culminated into something of public interest.²⁴⁶

5.8 Promotional Measures.

These are measures aimed at curbing the culture of secrecy and create awareness of the right to access information. Although almost related with the duty to publish, these are measures that prescribe for timelines for the dissemination of information to the public by the entities. While ensuring they publish all relevant information, the public entities are supposed to ensure that records that can be computerized are available electronically within 3 years since the Act came into force.²⁴⁷ Each public entity is supposed to submit a report to the commission on the 30th day of June every year. This report shall include the number of requests for information received, the number of determinations made allowing or disallowing the requests and the main grounds for such determinations, the average number of days taken to process the requests, the total amount of fees collected and the number of

²⁴⁴ *ibid*

²⁴⁵ See Section 28(9)

²⁴⁶ Mendel Toby, *Freedom of Information: A Comparative Legal Survey*, UNESCO, Rev. Second Edition (2008) at 153

²⁴⁷ See Section 17

staff devoted to processing the requests and the total amount expended by the entity to process the requests.²⁴⁸

The commission is supposed to report annually to parliament, submit special reports to cabinet secretaries on any matter relating to its functions.²⁴⁹ The annual reports shall include the overall assessment by the commission of the performance of the government and its entities in relation to access to information.²⁵⁰ These reports shall be submitted to Parliament by the Cabinet Secretary within two months of receipt and at the same time submit a report on the steps which the Government has taken in implementing recommendations made in the Commission's reports.²⁵¹ The Commission is mandated to develop and facilitate public education awareness, develop programs on access to information and protection of personal data, work with public entities to promote the right to access information and finally work with other regulatory bodies on promotion and compliance with data protection measures in terms of legislation.²⁵² Lastly, the cabinet secretary is empowered to come up with regulations to better implement the objectives of the act.

5.9 Lessons from Uganda, South Africa and United Kingdom.

This section draws lessons from three jurisdictions being, Uganda South Africa and United Kingdom. The three have different legal regimes on access to information and each provides unique perspectives from which we can draw lessons from.

In general, Uganda provides for access to not only information but also records held by public bodies, South Africa guarantees the right to access information held by both the State and private entities provided the information is sought in exercise or protection of any

²⁴⁸ See Section 27

²⁴⁹ See Section 26(1)

²⁵⁰ See Section 26(2)

²⁵¹ See Section 26(4)

²⁵² See Section 21 (1)(c) and (d)

right,²⁵³ while United Kingdom even without a Constitutional protection of the right to access to information manages to facilitate access of information solely through legislation.²⁵⁴ All the three jurisdictions have a relatively older Information legislation which have since seen the good and the ugly of the implementation process. With the Kenyan Access to Information Act only at its cradle, we can draw important lessons from these already experienced jurisdictions.

The jurisdictions have been chosen carefully and strategically to try and bring out the best in regional, economic and legal standing. Uganda was chosen for its proximity to Kenya and therefore shares a nearly similar cultural and regional atmosphere as Kenya. South Africa makes the list since it is a strong economic pillar in Africa and reflects democratic ideals that we can learn from and it has more of a pan African feel to it. United Kingdom is the mother of common law, the legal system that Kenya depends on and most Kenyan laws have an English descent so it would make sense to compare any of our new law to those of the United Kingdom. Further a study indicates that implementation was more effective in United Kingdom, stronger in terms of both its internal institutional capacity and its governance environment.²⁵⁵

Uganda was considered majorly because it borders Kenya and falls within the East African Community.²⁵⁶ Its 1995 Constitution provides for the right to information and is supplemented by the Access to Information Act passed in 2005. Uganda's case is interesting for reasons that whereas it has robust provisions granting and facilitating the right to

²⁵³ Article 32(2) and Schedule 6, item 23 of the 1996 Constitution of South Africa

²⁵⁴ Mendel Toby, *Freedom of Information: A Comparative Legal Survey*, UNESCO, Rev. Second Edition (2008) at 198

²⁵⁵ Dokeniya, Anupama. 2013. "Implementing Right to Information: Lessons from Country Experiences." World Bank, Washington, DC.

²⁵⁶ Gaia Larsen, Carole Excell and Peter G. Veit, *'Uganda's Access to Information Regulations: Another Bump in the Road to Transparency'* June 30, 2011

information,²⁵⁷ the same is not utilized for reasons that the public is either not aware of its existence or just ignorant of the same.²⁵⁸ Implementation-wise, the Ugandan regime is hampered by slow establishment and training of the administrative entities tasked with processing access to information requests and the lack of an appeals mechanism when an access to information request is denied.²⁵⁹

As regards South Africa, there is similarly a right to information in the 1996 Constitution and expounded on in their Promotion of Access to Information Act 2000.²⁶⁰ The major challenge facing the implementation of the South African access to information regime is the lack of an administrative appeal mechanism.²⁶¹ This means that should an access to information request be denied, the same can only be challenged through Court, which more often than not, is usually clogged with other cases.²⁶² It is also limited to information contained in government records thus any un-recorded information cannot be sought under the Act.²⁶³

The United Kingdom on the other hand has a very robust Access to information regime which unlike the previous two countries, is not borne of a Constitutional right but rather a statute, the Freedom of Information Act of 2005.²⁶⁴ The successes of the Freedom of information Act can be attributed to the vigor of the citizenry in utilizing its provisions but it also goes without mention that there is a well-chartered process of appeal.²⁶⁵ It provides three

²⁵⁷ Report by World Bank, *Implementing Right to Information: A Case Study of Uganda*, 2013 Available at <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/resources/285741-1343934891414/87874889-1344020463266/UgandaApril2013.pdf>

²⁵⁸ A Shadow Report on Citizens Right of Access to Information in Uganda, 2012 at 8 Available at www.africafoicentre.org/index.php/reports-publications/165-shadow-report-on-the-state-of-rti-in-uganda.pdf

²⁵⁹ Kakuru, Kenneth, Access to Information in Uganda, commenting on an article titled “Access to Information in Uganda, An Examination of Recent Developments”, by R. Ikoja- Odongo & Dick Kawooya published in *The East African Journal of Peace and Human Rights* Vol. 12 (2) 2006.

²⁶⁰ Mckinley, Dale, *The State of Access to Information in South Africa*, 2004

²⁶¹ Human Rights Commission. (2003). Discussion Document: Indaba on the *Promotion of Access to Information Act*. Presented at PAIA Indaba held at the Parktonian Hotel, Johannesburg, 22-23 May

²⁶² Constitutional Court of South Africa, Certification of the Constitution of the Republic of South Africa, 1996, Judgment of 6 September 1996, Case CCT 23/96, para. 85; Constitutional Court of South Africa, Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, Judgment of 4 December 1996, Case CCT 37/96.

²⁶³ Dr. Odote, Collins, *Access to Information Law in Kenya: Rationale and Policy Framework*, for Kenyan Section of the International Commission of Jurists (ICJ Kenya), 2015

²⁶⁴ Gundersen, K, *Freedom of Information, Unlocking Democracy: 20 years of Charter 88’* *Politicos* December 2008 at 232

²⁶⁵ Constitutional Affairs Committee, *Freedom of Information - One Year On*, seventh report, Session 2005-06, HC 991

stages of appeal being: firstly, within the body that has denied an access to information request; secondly, to an Information Commissioner and lastly to an Information Tribunal.²⁶⁶

5.10 Findings.

First, the Act contains a relatively broad construction of the theoretical affirmation on access to information, subjecting public and private entities to it and enshrining the duty to publish information. Secondly, the act lays down basic procedural mechanism through which a citizen seeking information can apply, specified who bears the role of an accounting officer and is thus responsible for handling access to information requests, and time limits for handling such requests to root out un-warranted delay. This is a crucial safeguard against uncertainty in the enforcement of the right to access information. manner of enforcement of the right of access to information.

Thirdly, the act provides an exhaustive list of legitimate bases upon which requests for information may be denied. However, it has also provided an appeals mechanism first by writing to the Commissioner, supplemented by a raft of offences intended to discourage unwanted practices that limit the right to access to information. The conclusion that can be drawn from this is that these provisions reduce the exercise of discretion in refusing to grant information upon request and thereby promoting the release of information following requests for information.

This is further supported by the provision that requires disclosure of things that would ordinarily fall under exceptions based on reason of greater public interest lying with disclosure. Therefore, it can be concluded that the Act has comprehensive promotional measures aimed towards proper implementation of the Act.

²⁶⁶ Mendel, Toby. 2008. Freedom of Information: A Comparative Legal Survey. 2nd Edition. Revised and Updated. Paris: UNESCO. At 126

CHAPTER SIX: FINDINGS, RECOMMENDATIONS & CONCLUSION.

6.1 Introduction.

This section begins by drawing the research findings, makes recommendations on the findings and concludes the paper.

6.2 Research Findings.

This study set out to examine why Kenyans still face challenges in accessing information held by public bodies and private bodies executing public functions despite the passage of the Access to Information Act 2016. The research topics hypothesis was that the Access to Information Act, 2016 as framed was not sufficiently comprehensive to guarantee the exercise of the right to information and consequently needed amendments to remedy the same.

Chapter two undertook a historical analysis to underscore the study revealed that Kenya has had a long and tumultuous journey till the enactment of an Access to Information Act. This is because pre-2010 Constitution, the prevailing Governments operated on an unofficial code of secrecy. It took the effort of civil society organizations like the International Commission of Jurists Kenya Chapter to push draft bills that however failed on the floor of Parliament. It was however following the 2007 post-election violence that the commissions of inquiry into the same recommended the need to have a pro-disclosure policy in government. This led to constitutionalizing of the right to Information in 2010 under article 35 and consequently, and Access to Information Act in 2016.

Chapter three's main concern was to lay down the provisions of the Act. In doing so, this project went through the major provisions of the Act. Briefly, the major groupings of the Act are the Introductory part concerned with the objects and purposes of the Act as well as definitions. Part II concerns itself with restating the right of access to information, the

obligation of disclosure and as it applies to both public and private entities, and limitations of the right. Part III sets out the institutional framework that is to support the implementation of the Access to information Act. Part IV concerns the appeals process and more specifically, review of decisions of the information access officers within public entities by the Commission being the Commission of Administrative Justice. The section also analyzed other sections of the Act providing for miscellaneous provisions.

Chapter four undertook the analysis of select judgments in order to demonstrate the challenges faced by citizens in their effort to access information. From each of the cases reviewed, this paper derives the following findings. First, there is tension between the state's obligation to allow access to information and the extent to which it should exercise that obligation. Secondly, there is tension between the circumstances under which the allow access to information and who can be allowed access. Thirdly, there is tension between the state's obligation to allow for access to information and the circumstances under which the court can issue an order compelling the issuance of the information. Fourthly, there is tension as to what constitutes reasonable disclosure of information and the grounds for refusal to disclose. Fifthly, there is a tension between the constitutional right to access to information and the extent to which the same is considered limited under various legislations.

Chapter five thereafter undertook a comprehensive analysis of the Kenyan Access to Information Act 2016. This was done by considering the Act under three major thematic areas of concern as highlighted above. As regards the thematic area of concern that is the right of access to information, the findings were that the Act is very comprehensive in granting a right of access. This is through provisions that give citizens the right to request information from public and private bodies, and by removing the possibility of qualified disclosure in that a request for information cannot be denied on the basis of the reasons a person seeks the information for either actually or as perceived by the entity holding the

information. The major limitation of the right of access is that the right only lies for citizens and as such legal persons and foreign entities and people are exempted from enjoying the right. The second area of concern was the limitations the Act places on requesting information. This particular analysis was undertaken on the backdrop of what regional courts of human rights have decided to be acceptable limitations of the right in a democratic society. The analysis concluded that this section is in line with international principle with the exception that the ‘harm’ and ‘national interests’ exceptions are poorly explained in the Act hence leaving room for misuse. This is however remedied by the fact that the Act provides an overriding principle for honoring requests for information on the basis of ‘public interest’.

The third area of concern was the appeals process. Here, the concern was not only in the mechanisms guaranteeing a systematic review of decisions after an information request is made but also concern was on the ability of an independent body to consider the request itself and either affirm the decision appealed from or make a contrary decision. The findings were that the structures are there but for the fact that there is lack of an internal appeal mechanism before the independent commission is seized of the matter. The study also concluded that the Commission has been sufficiently empowered as an appellate body and its scope of powers by and large ensure sufficient consideration and response to complaints based on appeals of decisions on information requests.

The fourth area of concern was promotional measures the Act has in place to encourage disclosure. The findings were that the Act uses a raft of provisions to facilitate and encourage a culture of disclosure. These measures include; the obligations on public bodies to keep records, the obligation of public entities to submit annual reports to the Commission on information requests received and how they were handled and turned out, obligations of the Commission to make annual reports to Parliament on the status of implementation and usage of the Access to Information Act, and the power of the Commission to make regulations to

facilitate better implementation of the Act. Further, the Act also promotes disclosure by protecting whistleblowers who disclose information on the basis of public interest. The fifth area of concern was the sanctions the Act puts in place to discourage practices that are not geared towards disclosure of information. The Act thus imposes punishments and prescribes sentences inter alia for negligence of information officers in handling information requests, interference with the work of the commission, destruction or alteration of records and provision of false or malicious information. Whereas these sentences promote disclosure, the Act also makes a counter-disclosure penalty by sanctioning disclosure of exempted information. These are done with lessons being drawn from Uganda, South Africa and the United Kingdom.

Chapter six sought to draw the research findings, make recommendations on how the Access to Information Act can be improved to facilitate better access to justice by Kenyans and conclude the paper.

6.3 Recommendations.

6.3.1 Short term recommendations.

These are recommendations that needs to be implemented immediately to ensure proper implementation of the act.

First, there is need to create awareness. Lack of awareness plays a major role in the failure of implementation as people are not aware of the existence of the right and the means to assert it.

Second, there is need to provide penalties for delays in responding to information requests which leads to laxity in handling of the same. The penalties will act as negative reinforcement mechanisms to incentivize information officers to handle requests diligently. The importance

of this is as seen in the United Kingdom regime where lack of penalties for delays leads to laxity of handling information requests

Third, to ensure speedy responses, the commissioner needs to be empowered to compel faster production of information or review of decisions. This is important as there may be instances where the information is needed to protect a right or secure a right from potential infringement and thus sticking to timelines in statute may lead to delays. Therefore, the commissioner in the Act needs powers to compel a public entity to release information faster where there is unreasonable delay in releasing the same. It is important to note that this may be a stand-alone requirement or a complimentary of the requirement to have time limits for processes without time limits such as reviews.

Fourth, there is need for the government and its agencies to provide all the relevant general information regarding their mandate and duties to be published on their respective websites for easy access by citizens to prevent the requests for information in the first instance as the requests shall be limited only to specific information which could have been classified for one reason or another by the respective agencies.

6.3.2 Long term recommendations

These are recommendations that do not require immediate implementation but could be progressively realized.

First, there is need for an internal appeal mechanism for information request decisions within the public entities from whom information has been requested. The reason for this is to allow the public entity to review the decision without necessarily having the same decision subjected to review by an external entity which may be clogged by review requests from multiple entities. This is highlighted when one considers the lessons from South African regime with that of the United Kingdom which has internal mechanisms of appeal.

Second, there is need for increased staffing and training on access to information, handling of information requests and the limitations of access to information. This is in light of the fact that training and awareness has been emphasized on the general public because public entities are the ones handling these requests and need more specialized training on the same. The effect of this is seen in the lessons from South African where a deficiency in trained personnel on the technicalities of their Promotion of Access to Information Act hampers the effective usage of the same. This will enable the public entities better handle information requests and lead to more rational, sound and acceptable decisions being given on information requests.

Third, there needs to be timelines within which decisions are to be reviewed. Throughout the Act, whereas there are stipulated timelines for handling information requests, there are no timelines for review of decisions. From the lessons derived from the United Kingdom, lack of timelines regulating the review of decisions is one of the main factors hindering the successful implementation of the Freedom of information Act. Similarly, in Kenya there is need to have timelines for the review of decisions and subsequent release of information should an applicant successfully challenge the release of information by a public entity.

6.4 Conclusion.

In conclusion, this study has laid emphasis on the appeals process, and the institutionalization of the responsibility to implement the act and has revealed areas of concern that would help improve the implementation of the Act to promote of Access of Information in Kenya. In summary, this paper concludes that institutional and legislative reform is paramount to proper access to information in Kenya.

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