IMPLEMENTATION OF THE CONSTITUTIONAL RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION IN KENYA

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DECLARATION

I declare that this research Thesis is my own original work and has not been presented for a degree in any University.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ATI	Access to Information
ATIA	Access to Information Act
CEO	Chief Executive Officer
CGA	County Governments Act
EAC	East Africa Community
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Co-ordination Act
EIR	Environmental Information Regulations
EISR	Environmental Information (Scotland) Regulations
EU	European Union
FOI	Freedom of Information
FOIA	Freedom of Information Act
GMOs	Genetically Modified Organisms
ICCPR	International Covenant on Civil and Political Rights
KEMSA	Kenya Medical Supply Agency
KNADS	Kenya National Archives and Documentation Services
LGA	Local Government Act
NCLR	National Council for Law Reporting
NEMA	National Environment Management Authority
NGOs	Non Governmental Organizations
OAS	Organisation of American States
OIA	Official Information Act
OSCE	Organization for Security and Co-operation in Europe
PAIA	Promotion of Access to Information Act
SADDC	Southern African Development and Economic Community
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UN	United Nations

ABSTRACT

This study presents findings regarding the implementation of the Constitutional right of access to environmental information in Kenya. The Constitution of Kenya 2010 provides for the right of every Kenyan citizen to access information held by the State and to information held by another person and required for the exercise or protection of a right or fundamental freedom. The problem presented in the study is whether the Constitutional provisions on the right are sufficient or legislation is required to implement the right. Further to this, the study inquires whether or not a general law on access to information is sufficient or a specific law on access to environmental information is also required. In addressing the problem the study deals with the following which forms the study's objective: examines Kenya's existing legislation on access to information in general and access to environmental information in particular ,compares how different countries have provided for access to information in their law and experience of these countries in implementing the right; examines international policies, principles, standards and best practices on access to information;, and analyses local and international judicial pronouncements on the right. A survey is conducted on the state of access to information in Kenya. The current Bill on access to information is analysed and critiqued. The findings of the study as a whole are that the Constitutional provisions on access to information are not enough. There is a lack of a general law on access to information in Kenya and the existing sectoral laws on information in Kenya are not sufficient. Some of the sectoral laws hinder or prohibit access to information. Legislation is therefore required to implement the Constitutional right. This would be in the form of a general statute on access to information. The study finds further that it is not necessary to make a specific law for access to environmental information. However, regulations on access to environmental information should be made under the general statute to give greater protection and access to environmental information. It is recommended by the study that the current Bill on access to information should be amended to make provisions for regulations on access to environmental information.

CHAPTER ONE

1.0 INTRODUCTION

This is the introductory Chapter to the thesis. The Chapter highlights the importance of information in general and environmental information in particular. It examines provisions of international instruments on freedom of information as well the provisions on access to information provided for in the Constitution of Kenya 2010. The study shows that the central importance of environmental information to the people of Kenya and their economy is largely dependent on the environment and environmental resources. The Kenyan state of the environment is prone to environmental vagaries such as pollution, waste management problems, and climate change. These vagaries affect the Kenyan people directly on a day to day basis. Access to environmental information is therefore necessary for the Kenyan people to be able to participate in decision making processes that affect their immediate environment in accordance with their Constitutional obligations provided for under Article 69 of the Constitution of Kenya 2010. Access to information and public participation in environmental decision making would in turn guarantee the realization of the right of every person to a clean and healthy environment. The problem presented in the study is whether the Constitutional provisions on the right are enough or legislation is required to implement the right. Further to this the study inquires whether or not a general law on access to information is enough or a specific law on access to environmental information is also required. The study deals with the following in addressing the problem: Kenya's laws on access to information are analysed and critiqued. It is found that the sectoral laws are not enough and cannot effectively implement the Constitutional right of access to information. In fact some of the sectoral laws hinder access to information and there is need therefore to amend them to align them with the Constitutional provisions and the intended law on access to information. This would be done for example through having provisions in the legislation that make the legislation override any law that is in conflict with the access to information law; Principles, policies and standards of freedom of information laws as well as legislation of various countries and their experience on implementation and enforcement of freedom of information laws provided valuable contribution to the research problem. The research employs various methodologies as stated in this Chapter and comes to the finding that besides the general law on access to information, environmental information regulations are

necessary to fully or substantially realize the right of access to environmental information. The research answers the question whether or not to have specific provisions or regulations on access to environmental information. The research finds that the regulations are necessary to provide for access to environmental information. The study recommends that the current Bill be amended to provide for environmental regulations to be made and enacted into law.

1.1 Contextual Background

Information is a critical resource[1] and is considered by many as a fifth factor of production after land, labour, capital and entrepreneurship. Countries that have adequate access to information have always had a big advantage over the rest.[2] Developed countries have been able to reach this level of development on account of their access to this critical resource.[3]

Access to environmental information is also considered as a necessary requirement for the public to participate in decision making processes that have a bearing on the environment. The need for access to environmental information was first discussed at the 1972 Stockholm Conference as a result of a consensus among Western nations that an informed public played an important role in environmental protection and enhancement.[4]

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[1]The International Commission of Jurists, *Freedom of Information Survey* (International Commission of Jurists: Nairobi, 2006) at pp. 1 & 7. The Commission affirms that the right to information is crucial to effective protection and respect for human rights, and that the right to know is a useful tool for fighting corruption and waste of public resources.

2 This right is well-known at the domestic and international levels. See, for instance, Tanzanian Constitution, section 5; section 59; Zambian Constitution, 1996, section 113(e); African (Banjul) Charter on Human and People's Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (entered into force 21 October 1986) (Banjul Charter) article 13; Convention on the Rights of Persons with Disabilities U.N. Doc. A/61/611 (6 December 2006), 660 U.N.T.S. 195 (entered into force 12 May 2006), article 29; International Covenant on Civil and Political Rights G.A. Res. 2200 (XXI) U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (entered into force 23 March 1976) ("ICCPR") articles 2(3) and 25; International Convention on the Elimination of All Forms of Racial Discrimination G.A. Res. 2106(XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, U.N. Doc.A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 January 1969), article 5(c); Universal Declaration of Human Rights U.N.G.A Res 217 A, GAOR, 3d Sess., 183 Plen. Mtg., art 22 UN Doc. A/810 (1948) ("UDHR"), articles 8 and 21.

[3]Currie. I and Johan Waal W., *The Bill of Rights Handbook* (Juta: Johannesburg, 2005) at 685.

[4]*See* Ball, S. & Bell, S., *On Environmental Law: The Law And Policy Relating To The Protection Of The Environment* 161-62 (Blackstone: UK, 1997) 4th Ed.

Twenty years later Heads of State and Government adopted the Rio Declaration on Environment and Development, 1992 at the United Nations Conference on the Environment and Development which is a statement of 27 principles upon which nations agreed to base their actions in dealing with environmental and development issues. Principle 10 of the Rio Declaration reinforces the need for and importance of public access to environmental information in achieving sustainable development. The endorsement of the Rio Declaration by the Heads of State and Government was as a result of the realization that environmental issues are best addressed with the participation or involvement of all concerned citizens. Principle 10 provides as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

To ensure meaningful citizen involvement in environmental governance, Principle 10 lists three fundamental access rights: access to environmental information, participation in environmental decision making and judicial and administrative proceedings. These rights are generally regarded as the main pillars of good environmental governance and the key procedural requirements to achieve better environmental justice.[5]

The right to freedom of information, and access to information, world over, is a fundamental human right. It is an ingredient of, and a principle that demonstrates participatory democracy.[6] In 1946 the United Nations General Assembly- UNGA resolved that access to information is a fundamental human right and the touchstone of all the freedoms recognized by the United Nations.[7]

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[5]Christoph Schwarte, *Access to Environmental Information in Uganda Forestry and Oil Production*, first published in 2008 by the Foundation for International Environmental Law and Development (FIELD) and the International Institute for Environment and Development (IIED). <http://www.field.org.uk/files/FIELD_Access_Uganda.pdf> Accessed 9th October 2012.

[6]ARTICLE 19, Global Campaign for Free Expression, 2004. ARTICLE 19 is a Human Rights Organization which defends and promotes freedom of expression and freedom of information worldwide. <http://www.article19.org/data/files/pdfs/analysis/paraguay-access-to-information-feb-2004.pdf> Accessed on 12th October 2012.

[7] United Nations General Assembly (1946), Resolution 59 (1), 65th Plenary Meeting, December 14.

Freedom of information as a right is defined in the Universal Declaration of Human Rights (UDHR), 1948 as including "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[8] Article 19 of the UDHR requires the consenting States to lift the veil of secrecy by creating an environment where information is freely received, shared and imparted. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), 1966[9] and Article 13 of the American Convention on Human Rights, 1969[10]are similarly worded.

According to a 2003 United Nations Development Programme (UNDP) report freedom of information is a human right that secures access to publicly held information and the corresponding duty on a public body to make information available to the public.[11] UNDP's position on access to information is as follows:[12]

(i) Implementation of the rights to freedom of expression and to access information is prerequisites for ensuring the voice and participation necessary for a democratic society.

(ii) The right of access to information and communication build on the internationally recognized rights of participation, transparency and accountability and together all these rights encompass the core principles of democratic governance.

(iii) The promotion and protection of both access to information itself and flows of information that exist between constituents, government, parliament, community groups, civil society organizations and the private sector are of equal importance.

(iv) It is essential to create and strengthen communication mechanisms that enable poor people to influence national and local government policy and practice.

[8] Universal Declaration of Human Rights, G.A. Res. 217A, Art. 19, U.N. GAOR, 3d Sess., 1st Plenary Meeting, U.N. Doc.A/810 (Dec. 10, 1948). Available at: <http://www.un.org/en/documents/udhr/index.shtml> Accessed on 10th October 2012.

[9]International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art.19(2), U.N. Doc. (Dec. 19, 1966, in force 23rd March 1976), 999 U.N.T.S. 171, 6 I.L.M. 368. Available at: <http://www2.ohchr.org/english/law/ccpr.htm> Accessed on 10th October 2012.

[10] American Convention on Human Rights (adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978), OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), Art. 13. Available at: <http://www.oas.org/dil/treaties_B-32_America _Convention_on_Human_Rights.htm> Accessed on 10th October 2012.

[11]UNDP Report, 2003.

[12]UNDP Practice Note: Access to Information, October 2003, p.3. Available at: <http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-information-practice-note/A2I_PN_English.pdf> Accessed on 12th October 2012

Freedom of information in the context of the environment relates to accessing, seeking, receiving, imparting and sharing of information that is required for the exercise of decision-making on the environment.[13]

Article 19(3) of ICCPR expands on the provisions of the UDHR by recognizing the restrictions that may be imposed on the exercise of the right of freedom of information. It provides that such restrictions must be lawful and necessary for "respect of the rights or reputation of theirs" and for "the protection of national security or public order, or of public health or morals".

Article 9 of the African Charter on Human and Peoples' Rights, 1981[14] provides for the right of every individual to receive information. All these international instruments re-affirm the provisions of the UHDR. Kenya is a State party to the UDHR and the ICCPR. The two instruments are binding on the Kenyan State.

Although the phrase "to seek, receive and impart information and ideas through any media and regardless of frontiers" conveys the meaning of the right of freedom of information these international instruments do not define or explain the meaning of the phrase. However, the UN Special Rapporteur on Freedom of Opinion and Expression explained the meaning of the phrase in the1998 Annual Report of the Special Rapporteur as:

> "the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems".[15]

In Kenya, the environment and environmental resources directly affect the economy as well as social and political arrangements. According to the Kenya State of the Environment and Outlook

[13] Section 2 of Kenya's Environmental Management and Coordination Act, No. 8 of 1999 defines the "environment" as "includes the physical factors of the surroundings of human beings including land, water, atmosphere, sound, oduor, taste, the biological factors of animals and plants and the social factors of aesthetic and includes both the natural and the built environment." The Environment and Land Court Act, 19 of 2011 defines the "environment" as "means the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities."

[14] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[15] Report of the Special Rapporteur, 'Promotion and protection of the right to freedom of opinion and expression', UN Doc. E/CN.4/1998/40, 28 January 1998, para 14.

2010 report[16] there is a correlation between socio-economic status, poverty and gender on the one hand and the environment on the other. Kenya relies heavily on agriculture and other natural resources for its development and the support of millions of its people who live in rural areas. The report notes that land, agriculture and livestock are vital for the realization of Vision 2030.[17] The report therefore calls for:

> raising participation of men and women as well as the marginalized in all economic, social and political decision making processes through education and improved access to basic healthcare and environmental resources which would lead to more sustainable management of the environment and ultimately, to the delivery of Vision 2030.[18]

The Kenya's National Climate Change Response Strategy 2010[19] notes that a "major concern in Kenya is the lack of adequate climate change information, knowledge and long-period data to researchers, planners, policy-makers and the general public on climate change impacts, adaptations and mitigations measures."[20] It recommends a number of measures that should be pursued to deal with the looming climate change catastrophe the key ones being: informing the public of climate change, its impacts and the necessary adaptation and mitigation measures to be taken; public awareness and education on climate change; and training of communities at local levels "to ensure that various communities are aware of climate change and can use climate data and information acquired through systematic observations."[21]

The research has shown that access to environmental information and education makes it possible for all stakeholders to participate, which is the obligation of Kenyans under Article 69 of their Constitution, in sustainable use of the environment. It is, therefore, imperative that every person in Kenya accesses environmental information to enable them participate fully in sustainable use of the environment and the realization of Vision 2030. For example, the State should publicize and make available timely and up to date information to Kenyans on climate

[16]Kenya State of the Environment and Outlook 2010.Supporting the Delivery of Vision 2030 Summary for Decision Makers. Kenya's National Environment Management Authority, 2011
[17]Supra, p. 23. Other natural resources such as forests and woodlands, mineral resources, water, fresh water, coastal and marine resources are important to the realization of Vision 2030.
[18]Kenya State of the Environment and Outlook 2010.Supporting the Delivery of Vision 2030 Summary for Decision Makers. Kenya's National Environment Management Authority, 2011, p. 9.
[19]National Climate Change Response Strategy 2010, Government of Kenya.
[20]Supra, p. 69.
[21] Supra, pp.69-70

change, forests, land use and physical planning, waste management, causes of drought, irrigation, hydroelectric and geothermal power, mineral and oil exploration, and other environmental information to enable them make meaningful environmental decisions on the same. Making environmental information readily available to the public is one way of implementing article 35 of the Constitution of Kenya 2010.

1.2 Statement of the Problem

The Constitution of Kenya 2010 provides for the right of access to information to Kenyan citizens. The information is that which is held by the State or information held by another person and required for the exercise or protection of a right or fundamental freedom.[22] The problem in the study is whether the Constitutional provisions on the right are sufficient or legislation is required to implement the right. Further to this, owing to the importance of public's access to environmental information in environmental management,[23] the study inquires whether or not a general law on access to information is sufficient or a specific law on access to environmental information is required in Kenya.

1.3 Research Hypothesis

The study adopts one research hypothesis which provides that how a freedom of information legislation in general and access to environmental information in particular provides for the right of access to information determines how the right is implemented. To this end a law that incorporates at the least the minimum international policies, legal principles, standards and best practices provisions on freedom of information gives a greater level of protection, implementation and enforcement of the right than the one without the provisions.

[22]Constitution of Kenya 2010, Article 35(1).

[23] The discussion on Principle 10 of the Rio Declaration on Environment and Development, the Kenya State of the Environment and Outlook 2010, the National Climate Change Response Strategy 2010, *Op. Cit.*, and Articles 42 and 69 of the Constitution of Kenya and other literature discussed in this study set out the importance of access to environmental and answers this aspect of the statement of the problem.

1.4 Research Questions

The main research question in this study is what substantive provisions are to be provided for in the Kenya's general law on access to information in general and in the regulations on environmental information in particular to make the legislation realize the constitutional right of access to environmental information.

The research therefore answers the following specific questions:

1 What is the state of law in Kenya with regard to access to information in general and to environmental information?
2 Have other countries provided for the right of access to environmental information in either their national Constitutions or statutes or enabling statutes and if so, what is the nature of the provisions?
3 Are there international benchmarks and best practices on access to (environmental) information law and if so, what is the nature of these practices?
4 Should Kenya have specific provisions on access to environmental information besides a general law on access to information?

1.5 Objectives and Rationale of the Study

The purpose of this study is to make a case for a general law on the right of access to information and regulations on the right of access to environmental information, and what the content, particularly the substantive provisions, of the envisaged legislation should be in order to realize the full enjoyment of the right provided for under Article 35 as read with Articles 42 and 72 of the Constitution of Kenya, 2010.

The study therefore intends to inform on how the provisions of the statute intended to implement the Constitutional right of access to information are to be crafted in order to realize the implementation and enforcement of the right.

The study looks at the following specific objectives:

1. To compare how different countries provided for this right in their constitutions and legislations and how they implemented the provisions. To this end a comparative study comprising of an analysis and a critique of the information laws of countries such the United Kingdom, South Africa and Uganda on their experiences, failures and successes of their information laws were identified by the research;
2. To examine judicial pronouncements on the right to access environmental information;
3. To examine key policy and legal principles that would underpin access to environmental information with a view of looking at the best international benchmarks and practices to come up with substantive legal provisions that will fully realize the constitutional right of access to environmental information.

1.6 Justifications of the Study

The rationale or philosophical underpinning of this research is that a statute should be able to fully or substantially realize that which it provides for. It is not enough to legislate for a right just because the Constitution requires that that be done. Care must be taken to ensure that the content of the legislation meets the purpose for which the law was enacted.

The study is intended to guide or inform the country on what the minimum content of access to environmental information legislation should have and formulate the same to ensure that Kenyans enjoy a clean and healthy environment.

1.7 Research Methodology

This study adopts various research methods. It involves qualitative research methods on case study, comparative analysis, data collection and review. The researcher undertakes an in-depth analysis of literature review of relevant secondary data sources such as policy papers, official documents, reports, journals, magazines, newspapers, periodicals and other published works. The aim is to collect relevant written information to address the central concerns of the right to access information in general and environmental information in particular of various countries and legal

regimes. The researcher also administers questionnaires to various respondents. Two sets of questionnaires are drawn; one for individuals and the other for institutional respondents. Face to face and telephone interviews are also administered. Questionnaires and interviews form primary data. Also the research benefits from information of various institutions that are contained on their respective websites.

In conducting the interviews, the sample size was limited to the general public and institutions within Nairobi County. The selection of Nairobi County owes to time constraints. However, the field research benefitted immensely from comparative analysis and literature review of relevant secondary data stated above. The research findings are largely capable of being generalized to the rest of the country because most of the institutional respondents have regional or local branches in the country. Their headquarters in Nairobi gave information that was representative of the whole respective organizations. The institutions and individual respondents are those listed in the Questionnaires in Appendix I and Appendix II. Most of the institutions were those whose functions were provision of environmental services or related services and those who provide information to the public generally. Examples are the National Environment Management Authority, the Ministry of Environment and Natural Resources, the Greenbelt Movement and the Water Resources Management Authority, the Ministry of Information and Communications, the Kenya Law Reform Commission, the Kenya Law Reports, the Commission on Implementation of the Constitution, among others. Institutions were sampled in relation to those that serve the general public in giving information. The research findings were coded and analyzed using the SPPS format.

1.8 Theoretical Framework

One of the greatest proponents of legal positivism was Bentham who proceeded from the preposition that nature had placed mankind under the governance of pleasure or pain.[24] This study was argued on Bentham's legal principle of Pleasure and Pain. The good or evil of an action should be measured by the quality of pain or pleasure resulting from it. Bentham defined utility as:

[24]Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: 1923), p. 2.

> That principle which approves or disapproves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.

Bentham argued that the definition of law depended on its purpose. He argued that the business of government was to promote the happiness of the society by furthering the enjoyment of pleasure and affording security against pain. He explained that "it is the greatest happiness of the greatest number that is the measure of right or wrong."[25]

He stated that the happiness of the society as a whole would be attained by four goals of subsistence, abundance, equality and security for the citizens. Bentham stated that "all the functions of law may be referred to under these four heads: to provide subsistence; to produce abundance; to favour equality; and to maintain security."[26]

The Rio Declaration on Environment and Development recognizes, under principle 10, the centrality and importance of citizen participation in environmental governance. To this end the principle places a duty on the United Nations (UN) member States to "facilitate and encourage public awareness and participation by making information widely available." The Declaration also recognizes that participation of the public in environmental issues can only be achieved if public authorities make environmental information available and accessible to the public, hence the requirement under principle 10 for UN member States to ensure public access to environmental information.

By this principle the member States are also committed to ensuring that they guarantee their citizens the "opportunity to participate in [environmental] decision-making processes." There is an element of direct or participatory democracy in this principle. When citizens participate in the environmental work it will maximize the pleasure in the society in terms of sustainable development. When environmental information is availed to the citizens in terms of their duties, omissions and commission that either leads to environmental degradation or environmental sustenance, then minimum pain if things like desertification will be experienced whereas maximum pleasure will be enhanced as there will be abundance.

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[25]Supra.
[26]Friedman, Milton. *Trade.*Hoover *Digest* 1997 (4).

Rudolph von Jhering (1818 – 1892) in his book "*Law as Means to an End*"[27] argued that the sole purpose of the law is not to protect individual liberty but to bring about equilibrium between the individual principle and the social principle. He argued that the law should be seen as "the realized partnership of the individual and the society". He saw the principal aim of this partnership as the accomplishment of a common cultural purpose. Therefore, there is need for proper legislation in the country on the right to environmental information so that the people can effectively take part in ensuring that the environment is effectively taken care of.

Democratic ideals are also recognized and given prominence by the Kenya's Constitution under Articles providing for devolution of governance. Some of the objects of the devolution of government listed under Article 174 of the Constitution are— to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; and to recognize the right of communities to manage their own affairs and to further their development.

Austin postulates law as a command to be in reference to the logical classification of legal propositions as "imperatives", that is, they are normative statements laying down rules to guide human conduct as distinguished from statement of facts.[28] He argued that law depended on authority. He stated that the person laying down the rule to be obeyed is claiming that he is legitimately entitled to do so and the subject obeying is acknowledging that legitimacy. The position is that of hierarchical subordination between the subject and the ruler. Austin was emphatic that law was separate from morals and because of lack of sanction; he regarded international law as not being law properly so called.

The right to environmental law should therefore have clauses on both the responsibility and sanction on the public and the government on realization of this right. Therefore, there is need to

[27]Jhering, Rudolf von, (1818-1892), *Law as a Means to an End*.

[28]Austin, John, 1832, *The Province of Jurisprudence Determined*, W. Rumble (ed.) (Cambridge: Cambridge University Press, 1995)

anchor the right of access to environmental information through a legislation and a policy framework.

Oliver Holmes once wrote that:

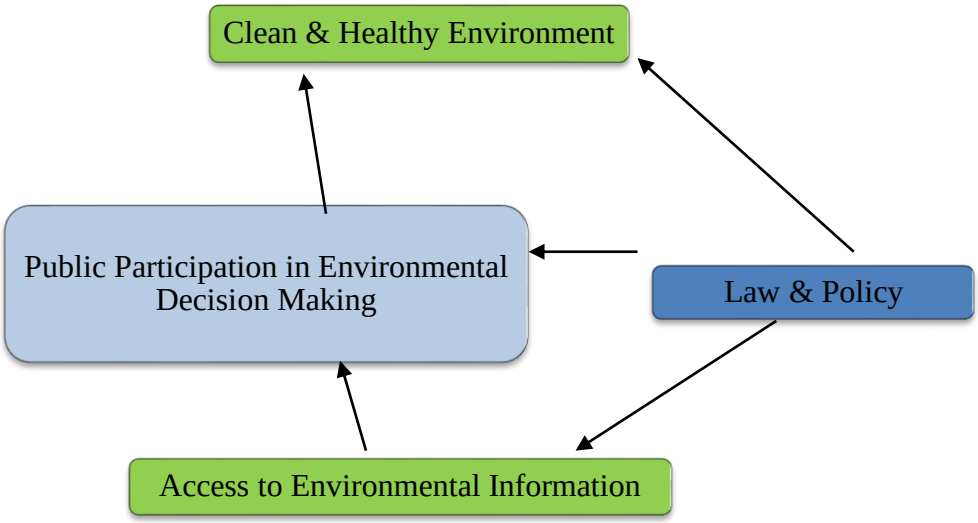
> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[29]

The research applies all the theories discussed above. Access to environmental information requires implementing legislation. The right should be recognized by a country's laws for it to be implemented. This view is supported by Austin's command theory. The manner the legislation is provided is critical to the realization of the right of access to environmental information. Implementation experiences are also relevant in shaping the content of the law, hence the application in this study of Oliver Holmes's theory. The democratic ideals/theories is relevant owing to the nature of the environment, the requirements under Article 42 of the Constitution on the right to a clean and healthy environment and Article 69 on the duties of the State and the public to participate and co-operate in environmental decision making processes. In support of Bentham's theory, environmental concerns require that every person should be involved in the management of the environment for the benefit and pleasure of all in terms of enjoyment of the right to a clean and healthy environment.

[29]Holmes, Oliver Wendell, Jr. (1881). *The Common Law*..I. Boston: Little, Brown and Company. <http://www.gutenberg.org/ebooks/2449> Accessed 30th March 2013.

1.9 Conceptual Framework

Figure 1- conceptual framework of the study



Source - drawn by the researcher

The conceptual framework of this study as represented by figure 1 above shows that access to environmental information is required for the public to exercise their right of participation in environmental decision-making.

The public is basically the actors in environmental management and in this study these are the government, non-governmental organizations, private individuals, institutions and companies (public and private) and the civil society, among other actors. The participation of the public in environmental management is necessary and an important requirement to realize the right to a clean and healthy environment for every person.

There is a causal relationship between the three; public participation in environmental management depends on and requires access to information; access to information helps the public engage in the all important exercise of environmental decision-making whose ultimate objective is to realize a clean and healthy environment for every person.

The diagram emphasizes the centrality of law and policy in the three relationships. All the three relationships (access to environmental information, public participation in environmental decision-making and a clean and healthy environment) are interdependent and they all require that they be anchored on a legal and policy framework the justification of which is demonstrated by the theoretical framework of this study. From the diagram access to environmental information is necessary to realize public participation in environmental decision-making and in realizing the right to a clean and healthy environment.

Principle 23 of the World Charter for Nature provides that:

> All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation

Principle 10 of the Rio Declaration on Environment and Development set out above illustrates the link between the right to environmental information, public participation in decision making and responsible environmental decision making.

Therefore, there is need to anchor the right of access to environmental information, the right of public participation in environmental decision-making and the right to a clean and healthy environment in a country's Constitution. A policy framework as well as a statutory framework is also required to implement and enforce the three rights.

Poor people in developing countries often rely heavily on their immediate environment for their livelihoods. They are most likely to be exposed to environmental risks and degradation but usually the worst represented in relevant decision making processes. Good natural resources management depends on participatory, transparent, open and accountable governance.

A basic requirement for the achievement of sustainable development is that citizens have the right and ability to influence decisions about the natural resources that sustain their communities.

Good environmental governance therefore ensures the effective participation of the public in the preparation and implementation of environmental policies, legal frameworks, plans and projects.

Environmental rights are "often related to the concept of instilling some form of legal identity in the environment".[30] The premise is that everyone has a right to information regarding the "unowned" environment.[31] The general public has an interest in all elements of the environment, which competes with other interests, including industrial operations.[32] Where there are such competing interests, access to information on the impacts of those interests allows decisions to be made taking into account all the relevant factors.

The recent trend towards greater public access to environmental information is the result of a consensus among Western nations that an informed public plays an important role in environmental protection and enhancement.[33]

Citizens Access to Information (ATI) is an essential step in ensuring transparency and accountability in government systems and processes. When a government is transparent, there is less chance for corruption and more room for accountability. That's why Freedom of Information Acts (FOIAs) is becoming standard good practice in the international arena.

Effective access to meaningful information is the first step in empowering citizens to exercise a degree of control over resources and institutions. The right to know is the basis for stakeholder involvement in environmental decision making processes that affect their lives, their community and the development and security of their country. As Kofi Annan, the former Secretary-General of the United Nations, observed:

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[30]Neil A.F. Popovic, *The Right to Participate in Decisions that Affect the Environment,* 10 PACE ENVTL. L. REV. 683, 708 (1993) (stating that "public participation in environmental decision-making requires . . . ready access to government-controlled information" on the environment).

[31]Gumisai Mutume, Finance: Corporations Merely Wrapping Themselves in U.N. Flag, Inter Press Service, July 21, 2000, LEXIS, World Library, Inpres File; United Nations Conference on Environment and Development, Adoption of Agreements on Environment and Development, Agenda item 21, at 7-17, U.N. Doc. A/Conf/151/5(1992).

[32]Supra.

[33]See Stuart Bell, Ball & Bell *On Environmental Law: The Law And Policy Relating To The Protection Of The Environment* 161-62 (4th Ed. 1997).

> The great democratizing power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today.

Lack of information may exacerbate adverse effects on people´s rights by preventing affected people from taking the necessary measures to mitigate adverse effects on their rights.

Access to information about environmental conditions and proposed activities that might affect conservation as well as human rights is a prerequisite to public participation in decision making and to monitoring governmental and private-sector activities.

1.10 Definition of Terms

The following key terms used in the study are defined – environment and environmental information. This was necessary since the terms were central to the research.

1.10.1 Environment

The Webster online dictionary defines "environment" as the sum total of all surroundings of a living organism, including the natural forces and other living things, which provide conditions for development and growth.[34] The dictionary also defines the environment as the complex of physical, chemical, and biotic factors (as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival.[35]

Shelton defines the environment as the natural world, as a whole or in particular geographical area, especially as affected by human activity.

The Environmental Management and Co-ordination Act which is the Kenyan framework law on environmental management defines environment as "includes the physical factors of the surroundings of human beings including land, water, atmosphere, sound, oduor, taste, the

[34] Webster dictionary <http://www.webster-dictionary.org/definition/Environment> Accessed on 10th May 2013.
[35] Supra.

biological factors of animals and plants and the social factors of aesthetic and includes both the natural and the built environment."[36]

The Environment and Land Court Act[37] which establishes the Land and Environment Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land defines environment as "means the totality of nature and natural resources, including the cultural heritage and infrastructure essential for socio-economic activities."[38]

According to the researcher the best definition of "environment" is captured in the Environment and Land Court Act because the definition brings within the environment as much matter or things as possible within it and will help in ensuring greater access to environmental information.

1.10.2 Environmental Information

Kiss defines the right to environmental information as the freedom to seek information or as the right to access or even receive information.[39] In turn, the State can either have the duty to abstain from interfering with efforts to obtain information or the obligation to disseminate all relevant information.[40]

Kenyan legislation does not provide for the definition of environmental information. The United Kingdom's Environmental Information Regulations 2004 (EIR) define environmental information as information on any of the following areas:[41]

(i) The state of elements of the environment – such air, water, soil, land, landscape and natural sites, flora and fauna, including cattle, crops, genetically modified organisms, wildlife and biological diversity – and it includes any interaction between them;

(ii) The state of human health and safety, conditions of human life, the food chain, cultural sites and built structures, which are, or are likely to be, affected by the state of the elements of the environment and the interaction between them;

[36] Act No. 8 of 1999, Section 2.
[37] Act No. 19 of 2011.
[38] Supra, Section 2.
[39]Kiss, A. (2003). *The Right to Conservation of the Environment,* IN: Picolotti, R.; Taillant, J. D (Eds.) Linking Human Rights and the Environment pp.31-46 (University of Arizona Press, USA).
[40]Supra.
[41]Environmental Information Regulations (UK) 2004, Regulation 2(1). The Regulations were made pursuant to Section 74 of the Freedom of Information Act (UK) 2000.

(iii) Any factor such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases affecting, or likely to affect, the state of the elements of environment or any interaction between them;
(iv) Measures and activities affecting, or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements;
(v) Emissions, discharges and other releases into the environment.

This definition provides a wide coverage of what would constitute or be considered as environmental information. This would help in promoting access to environmental information in the United Kingdom. They are good provisions that should be borrowed.

1.11 Chapter Breakdown

The thesis adopted the following chapter breakdown:

Chapter one is the introductory chapter to the thesis comprising of a general introduction to the research, statement of the research problem, objective of the study, rationale of the study, research questions, theoretical framework within which the research was carried out, methodology applied, limitations and assumptions of the study, time schedule, and chapter summary and breakdown. Basically, the chapter is a transformed research proposal of the thesis.

Chapter two provides a review of literature on access to information around the world. It interrogates the basis for requiring public bodies to provide access to information to the public. It highlights the setbacks that people encountered in various countries in seeking access to information held by public bodies and how the problem was addressed or should be addressed. It underscores the importance of how a freedom of information law should be provided for starting with the entrenchment of the right to information in the Constitution and making provisions on the implementation and enforcement aspect of the law through a statutory framework. Problems such as laws hindering access to information, governments' unwillingness to accede to information requests have been highlighted. The Kenya's situation on access to information is looked into and found that there is need to come up with legislation to implement the Kenyan citizen's right of access to information provided for under Article 35 of the Constitution of Kenya 2010. The literature reviewed would inform on how the law should be crafted.

Chapter three discusses the provisions of information laws in Kenya. The Constitution of Kenya 2010 provisions on the right of access to information and freedom of information are analysed. The limitation placed on the right of access to information as well as judicial pronouncements on the right are looked into. Other Constitutional provisions on information are also analysed and a question posed as to whether or not they enhance the realization of the right of access to information. A review is made of the existing sectoral laws in Kenya that provide for or touch on freedom of information and access to information. The devolved county government laws are also analyzed. The outstanding feature of the county government legislation, unlike most of the other sectoral laws, is that they were enacted after the promulgation of the Constitution of Kenya 2010. Whether or not the county legislation promote the realization of the constitutional right of access to information is also a pertinent issue for discussion. The review aims at finding out whether or not the sectoral laws could adequately provide for the implementation of the constitutional right of access to information in general and to environmental information in particular. Provisions on environmental information are also delved into. To this end the strengths and weaknesses of the sectoral laws are brought out in the study. The findings provide a basis as to whether or not there is need for the country to come up with a general legislation on access to information, and also whether or not there is need for specific provisions on access to environmental information to implement the constitutional right of access to information.

Chapter four provides a comparative study to the research. International policies, legal principles and best practices on access to information laws are examined with a view to answering the question whether or not the laws studied in the Chapter meet the requirements of these international standards. The standards will also help to answer the question how Kenya should provide for the right of access to information in their laws. An analysis of information laws of various countries such as the United Kingdom, South Africa and Uganda are provided. The bases of the choice of the three countries are set out in the chapter. A critical analysis of the strengths and weaknesses of the laws of these countries as well as their experiences in providing for the right of access to information is provided. Lessons learnt in the study are set out in Chapter. The lessons will inform Kenyans on the content of a freedom of information law. The Chapter also assists in answering the question whether or not special provisions on access to environmental information are necessary besides a general law on access to information. From the discourse it

is found that provisions should be in a general law on access to information providing regulations to be made for access to environmental information. Arguments for this finding are set out in the Chapter and also based on the findings made in Chapter Three on Kenya's legislation on access to information.

Chapter five provides research findings on access to environmental information in Kenya and the impact on content of access to environmental information law. Field research on access to environmental information in Kenya is conducted and the findings of the research analyzed and reported in this chapter. The main aim of the research is to find out whether or not members of the Kenyan public seek information, particularly environmental information, and if they do from whom, and whether or not the information is supplied, the manner and form in which the information is supplied and any setbacks encountered in seeking information. The public who are consumers of information and the information givers are important stakeholders and the research findings informs on what should be contained in the access to information law. Besides individual respondents, the survey covers nineteen organizations in total. The organizations range from government ministries, departments and agencies to non-governmental organizations dealing with environmental matters. The sample also comprises two leading media houses. The average number of employees in these organizations is 262.89 with a minimum of 4 and a maximum of 2000. The Freedom of Information Bill, 2012 is discussed as well with the sole aim of deducing whether or not the Bill is capable of promoting freedom of information in Kenya. To this end a critique and recommendations for amendments to the Bill is provided. The global standards and practices are also discussed and together with the Bill related to the research findings and recommendations made on the intended access to information law. The content of a freedom of environmental information law is discussed. To this end an enquiry is made as to whether or not a law on access to information providing for all types of information including environmental information is enough or whether or not there is need for specific regulations on environmental information besides the general law. A further enquiry is whether or not instead of specific regulations specific substantive provisions are to be provided for in the general law.

Chapter six sets out a conclusion and recommendations to the research. Areas for further research are also provided for in the chapter.

CHAPTER TWO

2.0 LITERATURE REVIEW

2.1Introduction

The Chapter provides a review of literature on access to information around the world. It interrogates the basis for requiring public bodies to provide access to information to the public. It highlights the setbacks that people have encountered in various countries in seeking access to information held by public bodies and how the problem has been addressed or should be addressed. It underscores the importance of how a freedom of information law should be provided for starting with the entrenchment of the right to information in the Constitution and making provisions on the implementation and enforcement aspect of the law through a statutory framework. Problems such as laws hindering access to information, governments' unwillingness to accede to information requests are highlighted. The Kenya's situation on access to information is looked into and a question posed as to whether or not there is need to come up with legislation to implement the Kenyan citizen's right of access to information provided for under Article 35 of the Constitution of Kenya 2010. The literature reviewed would inform on how the law should be crafted. The problematic area though is whether special provisions for access to environmental information should be provided for, a question dealt with in the subsequent Chapters.

2.2Literature Review

Hazell R, in *Commentary on Draft Freedom of Information Bill*(Cm 4355, May 1999) July 1999[1] compares the United Kingdom's Draft Freedom of Information Bill of 1999[2] (UK Draft FOI Bill) with other Westminster model FOI legislations, such as the Australia's Federal Freedom of Information Act, 1982 as amended by the FOI Amendment Acts in 1983, 1986 and 1991, and by the Privacy Act, 1988; Canada's Federal Access to Information Act, 1982 and Privacy Act 1982;

[1]Commentary by Professor Robert Hazell, available at: <http://www.ucl.ac.uk/spp/publications/unit-publications/48.pdf> Accessed on 27th October 2012.

[2]Before the FOI Bill, 1997 the UK had the Code of Practice on Access to Government Information, the Environmental Information Regulations 1992 and the Local Government (Access to Information) Act 1985. The UK now has the Freedom of Information Act, 2000 which came into force in 2005.

New Zealand's Official Information Act (OIA), 1982 as amended by OIA Amendment Acts in 1983, 1987, and Privacy Act, 1993 and Privacy Amendment Act, 1996 and Ireland's Freedom of Information Act, 1997. The author opines that these Westminster models provide a good international yardstick by which to measure the UK Draft FOI Bill.

The commentary highlights those aspects of the UK Draft FOI Bill which are more open as well as those which are more restrictive when judged by international yardstick. The author finds the UK Draft FOI Bill to be "a restrictive bill when judged by international Standards" whose main restrictive features are:

> The absence of a purpose clause as an aid to interpretation, and to support the Government's contention that 'the scales are weighed decisively in favour of openness'; the absence of a statutory duty to advise and assist requesters; exempt information is to be disclosed on a voluntary basis, not when the public interest requires it; unusually restrictive class exemptions for policy advice, information from investigations and commercial information; and the ability to add to the exemptions by order.

The UK Draft FOI Bill, 1997 contained no purpose or objectives of the Bill clause. The author is of the view that a purpose or objective clause is necessary in legislation as it is a useful aid to interpretation of the legislation[3] and "signal strongly the need for a change of political culture."

The author opines that "the Government still does not fully understand the difference between open government and freedom of information"[4] and under the UK Draft FOI Bill the Government still decides what the public needs to know. The author also cites the lack of a statutory right to reasons for administrative decisions[5] and control over the disclosure of policy being vested in the Ministers[6] as some of the other weaknesses of the UK Draft FOI Bill. This is in contradiction with the Australia's, Ireland's and New Zealand's FOI legislations which require under the respective legislations that a person who requests for information is given reasons for

[3] The author cites Australia and New Zealand as examples where the purpose clause in their freedom of information laws "has helped officials when applying exemptions and enabled the appeal authorities to say to departments that in cases of doubt they should lean in favour of disclosure." See Section 3 of Australia's Federal Freedom of Information Act, 1982 and Sections 4 & 5 of New Zealand's Official Information Act, 1982.
[4]According to Prof. Hazell "open government means the Government publishing information largely for its own purposes: information that the Government thinks we need to know or might like to know. Freedom of information requires the Government to disclose information which we decide for ourselves we want to know [and] [t]he two may not coincide because many FOI requests are made in pursuit of private interests, and not the public interest."
[5]UK Draft Bill, 1999, Clause 6(3) (b).
[6]Supra, Clause 28.

the refusal and grounds in support of the refusal as well as the name and designation of the person dealing with the request; and information about the requester's rights to review and appeal.[7] Although the United Kingdom has the Freedom of Information Act 2000 which came into force in 2005, this commentary remains relevant to any country that wants to enact legislation on access to information; the commentary will help answer the research question on the content of a good access to environmental information law.

ARTICLE 19's Report *Access to Environmental Information in China: Evaluation of Local Compliance*[8] outlines the findings and analysis of the evaluation on environmental information disclosure, which was designed by two organizations: ARTICLE 19 and the Center for Legal Assistance to Pollution Victims and carried out by grassroots environmental organizations in seven cities across China. These organizations examined environmental information disclosure by local environmental protection bureaus and private companies in accordance with the Regulations of the People's Republic of China on Open Government Information and the Measures for Open Environmental Information (for Trial Implementation).

The objectives of the evaluation were "to understand and examine the situation regarding the disclosure of environmental information within the legal framework, raise awareness among civil society organizations of the right to information and enhance their capacity to exercise this right" so that "they can better contribute to the monitoring of environmental protection and participate in the decision making process of environmental governance."[9]

The Report is relevant to this study as it identifies implementation problems in China's environmental information legislations and makes recommendations geared towards ensuring greater access to and utilization of environmental information. The recommendations cited in the

[7]Australia's Federal Freedom of Information Act, 1982 Section 26, Ireland's Freedom of Information Act, 1997 Section 8, New Zealand's Official Information Act, 1982, Section 19.
[8]ARTICLE 19., Access to Environmental Information in China: Evaluation of Local Compliance (London, 2010) <http://www.article19.org/data/files/pdfs/reports/access-to-environmental-information-in-china-evaluation-of-local-compliance.pdf> Accessed 10th June 2013.
[9]Supra, p. 4.

Report can be applied to the Kenyan situation when it embarks on enacting legislation on access to environmental information. Some of the recommendations are as follows:[10]

i. The Ministry of Environmental Protection should establish a model mechanism for environmental information disclosure that can be adopted by all local environmental protection bureaus; and conduct appraisals on their compliance with Open Government Information Regulations measures.[11]
ii. The government should enhance the capacity of environmental officers through training them on environmental information. The training should cover proactive disclosure of environmental information, handling public information requests, and promotion of disclosure by enterprises. Such training could be conducted together with civil society organizations.
iii. Civil society organizations to fully utilize provisions on access to information via websites and government publications and make requests for information, in order to strengthen public demand for information disclosure and motivate information holders to collate and publish environmental information more effectively.

The Report illustrates that the existence of legislation on information is not enough. There is need for provision in the law for training of information officers on the law and on how to handle information requests. Civil society organizations would also play a role in ensuring that the right of access to information is implemented. This would be through conducting public education, collaborating with public bodies in the training, and monitoring public bodies' compliance with the legislation.

David Banisar in *Freedom of Information and Access to Government Records Around the world*, Privacy International, July 2002[12] examines freedom of information legislations in various countries[13] around the world. The manner in which the provisions (including and especially the exemption/claw back clauses) of these legislations have been crafted leads the author to conclude that the mere existence of an information Act does not always mean that access is possible". The author notes that in many of these countries "access and enforcement mechanisms are weak or unenforceable". The author does not however provide recommendations on what the laws should contain. Nevertheless the Article illustrates that freedom of information laws encounter implementation problems and that the problems should be dealt with.

[10]Supra, pp. 29, 31.
[11]These are environmental information regulations for China.
[12]Available at <http://www.ndi.org/files/freeinfo_010504.pdf> Accessed on 27th October 2012.
[13] Albania , Australia , Austria, Belgium , Belize , Bosnia And Herzegovina, Bulgaria, Canada, Colombia, Czech Republic, Denmark, Estonia , Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Mexico, Moldova, Netherlands, New Zealand, Norway And The Philippines.

These weaknesses and unenforceability of the information laws, according to Banisar, are manifested in Governments' resistance to release information or delaying to process information requests[14] or imposing unreasonable fees to discourage or prevent access;[15] courts undermining the intent of the law leading to citizens "giving up"; and independent bodies charged with the responsibility of processing information requests succumbing to political pressure[16] or the Government making them ineffective by starving them of funds.[17] An example is given of the South African Human Rights Commission (HRC) which administers the South African Promotion of Access to Information Act.[18] The Author states that according to the HRC's 2000-2001 Annual Report the HRC received little funding for any activities under the Act.[19] Banisar cites Zimbabwe as one of the countries where the access to information law actually legislates censorship rather than freedom of information.[20]Banisar shows that the right of access granted to the public in theory may not be effective in practice. Wu Changhua shares this view.[21]

Deogratias William Ringia and Stephen J. Porter assess in their policy paper "Access to Environmental Information in Tanzania"[22] the issues of access to environmental information in Tanzania from policy, legal, and practical perspectives.[23] They also review Tanzanian's international commitments with respect to access to environmental information. They note that the right of access to information to Tanzanian citizens is constitutionally underpinned and that by interpretation the right also ensures the right to access environmental information. They state in the paper that Tanzanian's rarely enjoy the right because the government does not inform the public and at times misleads people about decisions and projects that could potentially degrade

[14]Banisar D., *Freedom of Information and Access to Government Records Around the World Update, 2002*, (Harvard University, 2002). <www.privacyinternational.org/issues/foic/> Accessed 27th October, 2012, p. 61.
[15]Supra, p. 7.
[16]Supra, p. 21.
[17]Supra, p. 78.
[18] The Act is discussed in Chapter Four on Comparative Studies in this research.
[19]Supra - Banisar, p. 78.
[20]Supra, p. 7.
[21]Wu Changhua, *Improving the Legal and Policy Foundation for Public Access to Environmental Information in China*, Temple 24 TEMP.J. SCI. TECH. & ENVTL. L. 291, 296 (2005), p. 296. Available at: <http://www.temple.edu/lawschool/iilpp/EnvironmentalArticles/Wu.pdf> Accessed on 27th October 2012.
[22]Deogratias William Ringia and Stephen J. Porter, Access to Environmental Information in Tanzania, Lawyers' Environmental Action Team, 2001. <http://www.leat.or.tz/publications/access.to.information> Accessed on 16th April 2014.
[23]Supra, p. 1.

the environment, threaten livelihoods, and endanger health.[24] They further note that when "the public does learn of such acts through unofficial channels, inquiries often fall on deaf ears."[25] This makes the public often unaware of the possible hazards or potential benefits of many government decisions and projects. The lack of effective access to environmental and other information also makes Tanzania's citizens unable to participate in public policy-making processes to the extent necessary to achieve sustainable development.

They therefore suggest a raft of measures to address barriers to access information in general and environmental information in particular including the following:[26] repeal of laws used by the government to limit access to information, enact access to information legislation to implement constitutional provisions on access to information, and the government – the government should also encourage private institutions and the civil society – should conduct public education and inform the public of their right of access to information and participation in decision-making processes as well as demand environmental accountability from the government.

Kenya needs to learn from, and apply, the experiences of these countries as it embarks on crafting a statute for the right of access to [environmental] information in order to have a strong information law.

Rose Mwebaza in her paper "Improving Environmental Procedural Rights in Uganda" highlights the importance of access to information and other environmental procedural rights to sustainable development. She affirms that it is:[27]

> an indisputable fact in modern environmental discourse that sustainable development is fundamentally enhanced through the adoption of policies and laws that enhance the right to access to information, public participation and access to justice the three rights.

[24]Supra, p. 1.
[25]Supra, p. 1.
[26]Supra, p. 9.
[27] Rose Mwebaza, *Improving Environmental Procedural Rights in Uganda* IN Bonilla, M.C., Fernandez, EF., Jemaiel, S., *et. al. Environmental Law in Developing Countries: Selected Issues,* Vol. II (IUCN, Gland, Switzerland and Cabridge, UK, InWEnt, Berlin, Germany, 2004) p. 17.

Mwebaza notes that the three rights provide for a practical and realistic ways to promote multilateral environmental agreements and sustainable development at international, regional and national level.[28]She further states that environmental procedural rights are premised on the fact that compliance and enforcement of multilateral environmental agreements cannot be left to governments alone but require and benefit from civic participation.[29] She asserts that access to information is not an end in itself. According to Mwebaza in order to have an effective public participation essential to arrive at the desired outcome of environmental decision making and natural resource management[30] there must be full, comprehensive, accurate, affordable, accessible, timely, available, user-friendly and up-to-date information.[31]

Mwebaza's paper is important to this study as it not only recognizes that access to information is a procedural right but also highlights the importance of the right and how the right is to be implemented.

Laura Neuman and Carole Excell, while looking at '*Key Considerations in Reforming the Jamaica Access to Information Act*, IN *Access to Information: Building a Culture of Transparency*, Jamaica,, Carter Center, 2006[32] provide key considerations in reforming Jamaica's Access to information Act of 2002. One of the reforms suggested by the authors is for the Act to provide for "automatic publication"[33] which according to them will provide 'cost-saving for government"[34] and make "information more accessible for citizens."[35] They argue that automatic publication will make information readily available to the public with the consequence that there will be less public requests for information and hence "reducing costs for both the State and the requester, and making the law more convenient".[36] The authors also opine that increased publication of information will increase transparency in State governance.[37]

[28]Supra, p. 19.
[29]Supra, p. 19.
[30]Supra, p. 21.
[31]Supra, p. 21.
[32] Available at <http://www.cartercenter.org/documents/2364.pdf> Accessed on 26th October 2012 Neuman's and Excell's article is at pages 15-48.
[33]Supra, p. 17.
[34]Supra, p. 18.
[35]Supra, p. 19.
[36]Supra, p. 18.
[37]Supra, p. 18.

The above reform measure is a good lesson for Kenya; provisions for automatic publication is important since as seen from most of the literature reviewed in this study one of the major weaknesses in implementing access to information legislations is costs of supplying information to the requesters. Kenya may just as well suffer from the same problem. It can avoid this problem by providing for automatic publication of information which besides saving costs, will also ensure a culture of transparency in State governance and less litigation for refusals to supply information requested for.

The authors also found that the Act was subject to other Acts that inhibited access to information and this made government administrators and public officials reluctant to release information as they weighed the consequences of releasing information in the face of the inhibiting laws.[38] They therefore recommended that access to information law should have, according to modern practice, provisions making such laws "paramount over other acts that mention information, thus facilitating government administrators and alleviating conflicts of law". This is relevant to Kenya which has laws that prohibit civil servants from releasing information they may come across in the course of their work as civil servants.

In an ICJ- Report on the Consultative Workshop to Discuss the ICJ-Kenya Draft Freedom of Information Bill 2000[39] it was noted by the participants that freedom of information laws do enable citizens' access to information which would enable them make informed decisions.[40] They noted that in Kenya the attitude that prevailed in government and among civil servants was that information generated by government was not for public consumption. They did not therefore make such information available to the public. It was also observed that existing legislation did not make the information publicly available. The Report highlighted the

[38]Supra.
[39] Report on the Consultative Workshop to Discuss the ICJ-Kenya Draft Freedom of Information Bill 2000 Held at the Mount Kenya Safari Club, Nanyuki on the 29th September to the 2nd October 2005. <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/foi_workshop_report.pdf> Accessed on 20th May 2013, p. 1. Participants were drawn from members of various civil society organizations, media practitioners, academicians, ICJ-Kenya Council members, government officials and freedom of information experts from the commonwealth.
[40]Supra, p. 4.

importance of the right to information and the constitutional foundation of the right and principles of information legislation.

The Report called for the enactment of legislation in Kenya that set out a clear framework for putting in place systems of access to information and a culture of openness in governance.[41] It noted that restrictions could be placed on the right of access to information but that such restrictions must meet the three-part test necessary in a democratic society consistent with internationally accepted standards.[42] On the laws that hindered access to information in Kenya the Report recommended that the freedom of information law should make provisions that provide that any conflicting laws should give way to the information law.[43] The Report recommended further that a provision be made in the Kenyan Constitution rendering void laws that were consistent with the freedom of information law.[44]

ARTICLE 19 in making recommendations to the International Commission of Jurists (ICJ) – Kenya draft Freedom of Information Bill, 2005 through a memorandum recognized that freedom of information was a fundamental human right under international law.[45] The organization opined that freedom of information was a crucial right in its own regard as well as central to the function of democracy and the enforcement of other rights.[46] It highlighted the dangers that could arise in a country that lacked freedom of information laws. It stated that State authorities could control the flow of information, 'hiding' material that was damaging to the government and selectively releasing "good news'. That in such a climate corruption thrived and human rights violations could remain unchecked.[47]

[41]Supra, pp. 1, 2.
[42] ARTICLE 19 discusses the three-part test discussed later in this study.
[43]Report on the Consultative Workshop to Discuss the ICJ-Kenya Draft Freedom of Information Bill 2000, supra, p. 16.
[44]Supra., p. 16. The Report was made before the promulgation of the Constitution of Kenya 2010 which provides for the right of access to information under Article 35.
[45]ARTICLE 19., Memorandum on Kenya's Draft Freedom of Information Bill, 2005 (London, 2006).<http://www.article19.org/data/files/pdfs/analysis/kenya-foi.pdf> Accessed on 10th May 2013, p. 1.
[46]Sura, p. 1.
[47]Supra, p. 1.

The organization held the view that to be effective freedom of information laws should be based on a number of general principles.[48] It pointed out that the right was not absolute and that limitations could be placed on the right as regards disclosure of information. It noted, however, that any limitations to the right should meet a three-part test; that a public body must disclose any information it holds, if asked for, unless:[49]

1. The information concerns a legitimate protected interest listed in the law.
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.

Under the first test a freedom of information must contain an exhaustive list of all legitimate interests on which a refusal of disclosure is based. The organization sets out matters that should be in the list; law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effective and integrity of government decisions-making processes.

According to the organization the exceptions should however be narrowly drawn to avoid capturing information the disclosure of which would not harm the legitimate interests. The exceptions should therefore be based on the content rather than the type of document sought. It states that in certain circumstances limitations to disclosure should be time-limited. An example of this is illustrated in the memorandum thus: "the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides."[50] In such a scenario the non-disclosure would not be justified.

The second part of the test –"substantial harm" must also be met. It is not enough that it is established that the information sought falls within the scope of a legitimate aim listed in the legislation, it must be established and demonstrated by the public authority from whom the information is sought that the disclosure of the information would cause substantial harm to that legitimate aim. ARTICLE 19 opines that simply because the information sought falls within the scope of a listed legitimate aim does not mean that non-disclosure is justified as to do would

[48] The principles are discussed in Chapter Four on comparative studies. They include maximum disclosure, open government, and limited exceptions.
[49]ARTICLE 19, Supra, pp. 6, 7.
[50]Supra, p. 7.

create exceptions that would seriously undermine the free flow of information to the public. They opine that public authorities have no legitimate aim in withholding information disclosure of which would not cause harm to a legitimate interest.[51]

According to the third part of the test - harm outweighs public interest in disclosure - the public body must consider whether, even if disclosure of information sought would cause serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. ARTICLE 19 gives an example of information relating to national security. It states:

> "Disclosure of information exposing instances of bribery may concurrently undermine defence interests [of a State] and expose corrupt buying practices. The latter, however, may lead to eradicating corruption and therefore strengthen national security in the long-term. In such case, information should be disclosed notwithstanding that it may cause harm in the short term."[52]

ARTICLE 19 opines further that overall the three-part test is designed to prevent blanket exclusions and exemptions and hence avoid public bodies concealing information from the public.

In ANCL., Towards Promoting Access to Information in Kenya, April 2011. African Network of Constitutional Lawyers, Cape Town, South Africa)[53] in a research conducted by the African Network of Constitutional Lawyers – conducted after the promulgation of the Constitution of Kenya 2010 - it was found that Kenya's legal framework was not adequate to deal with issues surrounding access to information; the country lacked a comprehensive legislation to regulate Kenya's constitutional and international obligations on freedom of information. The Report recommended that legislation should be enacted by the country providing for implementation of the Constitutional right of access to information.[54] The Report recommended further that the drafting of the freedom of information law by Kenya should draw from the experience of other States that had passed freedom of information laws. This was necessary so that the country could

[51]Supra, pp 7, 8.
[52]Supra, p. 8.
[53]ANCL., Towards Promoting Access to Information in Kenya, April 2011. African Network of Constitutional Lawyers, Cape Town, South Africa.<http://www.right2info.org/resources/publications/publications/towards-promoting-access-to-information-in-kenya-2011> Accessed 4th March 2013.
[54]Supra, p. 25.

have a freedom of information law that was confirmed by reality on the ground and realize the State's obligation to provide information to its citizens.[55]

The Report observed that even though the Constitution provided for the right of access to information it was silent on the timeframe within which Parliament was to enact legislation that would implement the right of access to information.[56] This would lead to Parliament not prioritizing the enactment of the law.

2.3 Conclusion

The literature reviewed illustrate that access to information is a universal right. It is a right in its own (substantive) and at the same time it is considered as a right (procedural) necessary for the exercise of other rights such as the right to a clean and healthy environment. Governments of countries that do not have freedom of information laws have frustrated their citizens from seeking or receiving information from the State. The right to information must be provided for in the law. It is good practice to have a constitutional foundation for the right and implement the right through a statute providing for detail of implementation and enforcement. That notwithstanding laws which hinder access to information should be addressed. This can be done by making a provision in the Constitution rendering such laws void. Another way would be to make in the freedom of information law a provision that would render inapplicable provisions of any law that are in conflict with the provisions of the information law. The study illustrates further that besides these problems other problems of implementation and enforcement of freedom of information laws abound. The implementation problems would be, for example, where public officers or information officers are not trained on the information legislation, uninformed public on the right to information, absence of a robust civil society to engage public bodies in ensuring that they discharge their mandate under the law, lack of funds to bodies charged with the administration and monitoring enforcement of information law, delays in processing information requests, and absence or lack of effective internal review and appeals mechanisms to address decisions made by public bodies on disclosure of information.

[55]Supra, p. 26.
[56]Supra, p. 26. Article 35 provides for the right of access to information to Kenyan citizens. The Fifth Schedule provides for a timeframe within which laws to implement certain rights should be enacted. The Fifth Schedule does not provide for the right of access to information.

Sometimes, the law may actually provide for censor instead of what it purports to provide for like in the Zimbabwean case.

These problems point to the fact that the crafting of a law on access to information would determine in the first instance whether the law would meet its objects of providing information to the public. The problems encountered by the countries discussed in the review should therefore be taken into consideration as the country embarks on journey of making a law on access to information to implement the provisions of Article 35 of the Constitution of Kenya 2010. Principles, policies and best practices[57] on access to information espoused under international law should therefore be adopted in the crafting of the information law.

Some of the critical provisions that should be taken very good care of in drafting them are on exceptions to disclosure. The exceptions should meet the three-part test so that the overall objective is maximum disclosure of information.

The review of literature found few materials on access to environmental information. The literature dealt largely with freedom of information in general. Environmental information was treated like any other information and was to be sought under the general law governing access. The United Kingdom (including Scotland) was the only country that provided for the right of access to environmental information under specific regulations and made provisions in regulations that override[58] any law or rule that was in conflict with the regulations on environmental information. This therefore is an interesting area for research that requires to be looked into in the ensuing Chapters. Some of the questions that will be answered later in the research is whether or not a general law on access to information in Kenya would be adequate without the necessity for having special provisions on environmental information, and how environmental provisions would be provided for.[59]

[57]Discussed in Chapter Four on comparative study.
[58]See Chapter Four.

CHAPTER THREE

3.1 KENYA'S LEGISLATION ON FREEDOM OF INFORMATION

3.2 Introduction

The enactment of a special law on the right of freedom of information has been an ongoing process in Kenya. The process started with the draft Access to Information Bill, 2000 which was developed in 1999 by the International Commission of Jurists in Kenya. This was followed by a draft Freedom of Information Bill, 2005 developed by the Kenya Government. In 2007 a draft Freedom of Information Bill, 2007 was introduced in Parliament as a private member's Bill. The Bill was defeated at the First Reading. In 2008 the Government drafted the Freedom of Information Bill, 2008. The Bill was never introduced in Parliament. In the meantime the clamour for the enactment of a freedom of information law was overtaken by the establishment of the Constitution of Kenya Review Commission which was charged with the responsibility of spearheading the review of the then Constitution of Kenya. Owing to the importance of the right of access to information and the need to constitutionally underpin the right of access to information, attention shifted to ensuring that the right was secured in the proposed Constitution of Kenya. From the Constitution of Kenya review process a final draft Constitution of Kenya dated 6th May 2010 seeking to repeal the former Constitution of Kenya was published and ratified through a referendum held on 4th August 2010 and came into force on 27th August 2010. The Constitution of Kenya 2010 provides for the right of access to information.[1] At the moment Kenya has a Freedom of Information Bill which was drafted in 2012. Many laws were passed by Parliament in 2012 and in 2013 but the Bill is yet to be transformed into a law. This raises questions as to the commitment of the Kenyan government to enact a law on freedom of information. The situation is not helped either by the Constitution of Kenya 2010; the Fifth Schedule of the Constitution provides for a time frame within which certain rights provided for in the Constitution should be legislated for but is silent on the right of access to information. The

[1]Constitution of Kenya, Article 35(1).

literature reviewed provides reasons for governments' reluctance to provide information. In such instances there is need for civil society organizations[2] and the citizens to engage the government in ensuring that the law is passed.

This Chapter examines Kenya's legislation providing for freedom of information and access to information in Kenya. Articles 33, 34 and 35 of the Constitution of Kenya 2010 are instructive. These provisions will be examined and brought out in the chapter as to whether or not the provisions are subject to any limitations. The constitutional requirement for constitutional offices and independent offices to publish information on their operations will be brought out and a link made between the requirement and Article 35(1) of the Constitution of Kenya. A critique of judicial decisions from the Kenyan courts interpreting the Constitutional right of access to information and the limitations on the right will be brought out.

That notwithstanding, the Chapter interrogates the question whether or not there are other laws on access to information or freedom of information in Kenya; whether or not there is a general law on access to information; how the laws provide for the right; whether the laws are adequate; whether the laws inhibit or promote the realization of the right of access to information in general and environmental information in particular and freedom of information. County legislation are also examined to see how they provide for access to general information and environmental information. The chapter provides recommendations for either reform or for a law on access to information depending on the research findings. The findings answer the question whether Kenya requires a specific general law on access to information and some specific regulations on access to environmental information. To this end the provisions of the Official Secrets Act[3], the Public Archives and Documentation Service, the National Council for Law Reporting Act, 1994 the Media Act, the County Governments Act, 2012, the Urban Areas and Cities Act, 2011, the Media Act, 2007, the Environmental Management and Co-ordination Act, 1999, among other Acts are examined and critiqued.

[2]See Chapter Two of this study where the importance of civil society organizations in championing for access to information has been highlighted.
[3] Chapter 187, Laws of Kenya.

The general procedures and practices on how the public in Kenya seeks information from Government departments are explored. Lessons learnt have informed the conclusions drawn in the chapter.

3.2.1 The Constitution of Kenya 2010

In Kenya the right of access to information is anchored in the Constitution of Kenya under the Bill of rights. Article 35(1) of the constitution guarantees every citizen the right of access to information held by the State; and to information held by "another person" and required for the exercise or protection of any right or fundamental freedom.

The interpretation of "person" under Article 260 is "includes a company, association or other body of persons whether incorporated or unincorporated." It follows that the phrase "another person" includes a juristic as well as a natural person. Therefore by Article 35(1) a citizen has a right to seek information from a public authority, State officer, public officer or public company. In the case of a private individual, private company, partnerships, societies and other private bodies, the citizen has to show that the information sought is required for the exercise or protection of any right or fundamental freedom. Article 260 of the Constitution defines the term 'State' as "the collectivity of offices, organs and other entities, comprising the government of the Republic of Kenya."

The implication of Article 35(1) is that a citizen does not have to give reasons for seeking information from the State. In case where he seeks information from a private entity or another person and the request is denied and files suit in court to compel the person to provide him with the information he has the onus of showing that the information sought is required for the exercise or protection of a particular right or fundamental freedom.

The right is limited to citizens only. Even companies incorporated in Kenya or State corporations do not fall within the meaning of a citizen. This has been given judicial interpretation by Kenyan courts.

The Kenyan High Court has had occasion to interpret the provisions of Article 35 of the Constitution.

In *Famy Care Limited vs. Public Procurement Administrative Review Board & Another* [2012] e KLR the dispute arose from an open international tender that had been floated by the Government of Kenya through the Kenya Medical Supply Agency (KEMSA) for supply of family planning commodities. Famy Care Limited (the "Petitioner") participated in the said tender but was unsuccessful in its bid.

Being aggrieved by the tendering process, the petitioner curiously[4] filed a petition before the High Court challenging the procuring process and alleging that certain fundamental rights and freedoms had been breached. Subsequently, the Petitioner filed two applications seeking the enforcement of Article 35 of the Constitution of Kenya. As against Kenya Medical Supply Agency, the petitioner sought the minutes of the evaluation and technical reports of the tender,[5] while from Pharmacy and Poisons Board it sought disclosure of any correspondence between it and any of other party concerning a certain drug in the context of the tender in order to enable it prosecute the petition.

When the matter came up for hearing, the respondents, in particular KEMSA, raised a preliminary objection that the Petitioner was not entitled to seek enforcement of Article 35 on the ground that it was a foreign company incorporated in India. The court in a ruling given on 2nd May 2012 upheld the preliminary objection and dismissed the two applications.

In *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others* [2013] e KLR[6] the Petitioner, Nairobi Law Monthly Company Limited, a limited liability company registered in Kenya and publisher of the *Nairobi Law Monthly* magazine, a publication on topical legal issues sought information from the 1st Respondent, the Kenya Electricity

[4]The procedure for challenging the procurement process is laid out in the Public Procurement and Disposal Act. Any aggrieved person is entitled to apply to the PPRB. In case the person is dissatisfied with the decisions of the PPRB, a Judicial Review application is preferred against the Award to the High Court.
[5]It is vital to note that under the PPDA 2005, the Procuring entity is not allowed to disclose reports or minutes of its tender evaluation committees to any participating entity.
[6] Judgment of the High Court (Mumbi Ngugi, J.) delivered on 13th May 2013.

Generating Company Limited which was a public company registered in Kenya regarding certain contracts entered into by the 1st Respondent and other companies for the purpose of drilling geothermal wells in Kenya. The Petitioner claimed it wanted the information for purposes of publishing the information in their magazine. The 1st Respondent declined to accede to the request for the information. The Petitioner filed a suit in the High Court and wanted the court to order the respondent to furnish it with the information. The Petitioner claimed that its right provided for under Articles 33 and 34 of the Kenyan Constitution had been violated as a consequence of the Respondent's refusal to supply it with the information. The Petitioner also sought information from other parties in the suit.

In both cases the High Court interpreted the meaning of citizen and whether an incorporated company was a citizen and therefore entitled to be supplied information under Article 35. In the *Famy Care Ltd* case the judge applied the provisions of Chapter 3 (Articles 12 to 18) of the Constitution of Kenya 2010 on citizenship[7] and found that a citizen under the meaning of Article 35 is a natural person and excludes a juridical (as a juridical person is neither born nor married as contemplated by Articles 12-18) or natural person who is not a citizen as defined under Chapter 3 of the Constitution.

Therefore the provisions of Article 35 could only be enforced by a natural person who is a Kenyan citizen. The Court in the *Nairobi Law Monthly Co Ltd* case agreed with the *Famy Care* decision and stated that the decision was in accord with the US Supreme Court decision in *Pembina Consolidated Silver Mining and Milling Company versus Pennsylvania 125 U.S 181; 8 S Ct. 737; 31 L. Ed. 650; 1888 U.S. LEXIS 1926* and the decision of the Supreme Court of India in *State Trading Corporation of India versus Commercial Tax Officer 1963 AIR 1811* interpreting the provisions of the Constitution of the United States and the Constitution of India on citizenship respectively which are similar to the Kenyan Constitutional provisions on citizenship. The two foreign courts were of the view that incorporated companies or bodies are clothed with nationality, and not citizenship, of the country in which they are registered.

[7] The provisions of Chapter Three of the Constitution recognize only two instances on how citizenship may be acquired in Kenya: either by birth or marriage.

The Article 35(1) provisions are not in conformity with international law and international covenants ratified by Kenya on access to information. Under the covenants[8] the right of access to information is a right of everyone regardless of nationality, citizenship or race.[9] These Covenants, the ICCPR and the UDHR form part of the law of Kenya by virtue of Article 2(6) of the Kenyan Constitution. The provisions of the Article 35(1) restricting access to information to citizens should be amended to align them with the Kenya's obligations under international law as set out in the covenants.

The Court in the *Nairobi Law Monthly Co Ltd* case also had occasion to interpret the meaning of "State" used under Article 35. Relying on the provisions of Article 260 on the definition of "State" and provisions of several statutes the Court found that even a company or body in which the State has a controlling interest (the State holds more than fifty per cent of the company's or body's shareholding) is a State entity and bound by the provisions of Article 35(1) (a) to provide information to citizens.

This expansive definition of "State" is good for the country as it widens the scope of bodies to be covered by the provisions of Article 35(1) and consequently give greater protection to the right.

The Court also considered Article 35 (1) (b) which provides for the right of a citizen to access information "held by another person and required for the exercise or protection of any right or fundamental freedom". The Court held that the information sought in an application for disclosure of information must be such as is required for the protection or exercise of another fundamental right. It was not enough for the applicant to merely state that he wanted the information for the protection of his right or fundamental freedom. An applicant had to state what the right was that he wished to exercise or protect, what the information was which was required and how that information would assist him in exercising or protecting that right. If the

[8]International Covenant on Civil and Political Rights, Articles 2 & 19(2), Principle IV (2) of the African Declaration.
[9]Lidberg, Johan, "Keeping the Bastards Honest: The Promise and Practice of Freedom of Information," (Ph.D. Murdoch University, 2006), 40.

requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied.[10]

The Petitioner in the *Nairobi Law Monthly Co Ltd* case sought reliance on the South Africa's Gauteng High Court decision in *M & G Limited and Others v 2010 FIFA World Cup Organizing Committee South Africa Limited and Another (2011 (5) SA 163 (GSJ))* where the nexus between national values and principles of governance and the constitutional right of access to information[11] was made and wanted the Court to also so hold that the right to information gave effect to the national values and principles of governance contained in Article 10 of the Constitution, and in particular, good governance, integrity, transparency and accountability. The Court did not make a finding on this argument. This researcher is of the view that the Petitioner's view is correct.[12]

The two decisions of the Kenyan High Court illustrate that the right of access to information provided for under Article 35(1) of the Constitution is not absolute; it is subject to limitations. The right is limited to citizens and citizenship applies to natural persons only. Also, where information is sought from a private person the information must be one that is required for the protection of a right or fundamental freedom. If the information is denied and the applicant seeks to enforce the right then the applicant must meet the criteria set out in the *Nairobi Law Monthly* case.

The limitations provided above are those that are contained in Article 35 providing for the right of access to information. Other limitations to the right are also provided for in other provisions of the Constitution.

[10] The Court relied on the decisions of the Constitutional Court of South Africa in *Shabalala and 5 Others v Attorney General of the Transvaal and the Commissioner of South African Police* CCT/23/94 [1995] and in Cape *Metropolitan Council v Metro Inspection Services Western Cape CC and Others* (10/99) [2001] ZASCA 56; and on the decision of the South African Court of Appeal in Unitas Hospital v *Van Wyk and Another* (231/05) [2006] ZASCA 34.

[11] The South African Constitution like the Kenyan one has provisions on national values and principles. See also Article 32 of the African Constitution on the right of access to information.

[12] The view is in line with reasons for accessing information and publication of information held by the State. See various authors such as Toby Mendel cited by the researcher and ARTICLE 19 on freedom of information generally.

Article 24 recognizes that any right or fundamental freedom in the Bill of rights may be limited but the limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." The limitation must take into account factors such as (the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The limitation must be through legislation and shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. The burden of proof lies on the person seeking to justify the limitation.

The entrenchment of the right in the Bill of rights means that legislation restricting access to information is a limitation on the right and on application to court would be declared by the court as unconstitutional and invalid unless the limitation is justifiable in terms of the limitation provisions under Article 24.[13]

The State is obliged by Article 35(3) of the Constitution to publish and publicize any important information affecting the nation. The Constitution does not provide what important information is. This calls for legislation or policies and guidelines to provide for what important information is. That notwithstanding, the researcher holds the view that the publication and making information public by the State will be one of the ways that will promote and give effect to the right of access to information. Citizens will generally seek from the State information that the State has not published or publicized.

Already, the Constitution contains certain provisions that give effect to Article 35(3) by requiring constitutional commissions and independent offices to publish information. Examples of the commissions are the National Land Commission and the Public Service Commission. The independent offices are the Auditor-General and the Controller of Budget.[14] The Constitution

[13] See Currie I. and Waal J., *The Bill of Rights Handbook* (Juta: Johannesburg, 2005) at 685.
[14] Constitution of Kenya 2010 Article 248(2) & (3) lists constitutional commissions and independent offices. The constitutional commissions are established by Articles 59, 67, 88, 127, 171, 215, 230, 233, 237 & 243 independent offices are established under Articles 228 & 229.

requires each commission and independent office to submit annual reports to the President and Parliament. They may also be required at any time by the President or the Parliament to submit a report on a particular issue.[15] The Constitution also requires that the reports be published and publicised.[16] These are important provisions as the reporting mechanism ensures that these bodies disclose their activities and operations to the public. The provisions give effect to Article 35 of the Constitution on access to information; the operation of these constitutional provisions will enable the State to comply with its obligations under Article 35(1) and at the same time the Kenyan citizens will access the information they require from these bodies without necessarily having to go to court to compel production of information.

The National Land Commission plays a critical role in land matters which directly affect the environment. One of the functions of the commission is to conduct research related to land and land use of natural resources, and make recommendations to appropriate authorities.[17] Being one of the constitutional commissions the reporting mechanism will enable the public to access information relating to land and the environment. This will in turn enable the public to discharge their constitutional obligation of cooperating with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources and promote the right of every person to a clean and healthy environment.[18]

The net effect of these provisions requiring the commissions and independent offices to publish information on their operations is that it provides an opportunity for the Kenyan public to access information from these State bodies without having to request for the information, and at a minimal or no cost. This promotes the protection and realization of freedom of information and access to information in Kenya.

The former Constitution of Kenya did not provide explicitly for the right of access to information. However, the Constitution contained provisions that governed freedom of expression. Section 79(1) of the former Constitution granted every person in Kenya the freedom

[15] Supra, Article 254(1) & (2).
[16] Supra, Article 254(3).
[17] National Land Commission Act No. 5 of 2012, Section 5(1) (d).
[18] Constitution of Kenya, Articles 42 and 69(2).

to "hold information" as well as "receive ideas and information" "without interference"[19] from the State or non-State agencies. Even so, this right was not absolute. The right was limited but such limitation had to be provided for by law and the State had to demonstrate that the limitation was reasonably required (a) in the interests of defence, public safety, public morality or public health; (b) for protecting the reputations, rights, freedoms of others concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or technical operation of telephony, telegraph, posts, wireless broadcasting or television; or that the law in question (c) imposes restrictions upon public officers or upon persons in the service of a local government authority.[20] The State bore the burden of proof to demonstrate that its national safety, health or security was threatened before it could seek to limit an individual's right to receive and transmit information. This provisions have been retained in similar terms under Article 33 (1) (a) of the Constitution of Kenya 2010.

The restrictions or limitations that were provided for under Section 79 were in line with the provisions of Article 19(3) of the International Covenant on Civil and Political Rights which recognizes that restrictions may be imposed by State parties on the exercise of the right of freedom of information. Article 19(3) provides that such restrictions must be lawful and necessary for "respect of the rights or reputation of theirs" and for "the protection of national security or public order, or of public health or morals".

3.2.2 The Public Archives and Documentation Service Act, Cap. 19

This Act creates the Kenya National Archives and Documentation Services (KNADS) and makes provisions for the preservation of public archives and public records.[21] KNADS is mandated to preserve and provide custody of all records in any kind of media.[22] Its mission is to offer consultative records management services to the public, as well as private records in any media

[19]Constitution of Kenya (Repealed), Section 79(1).
[20] Constitution of Kenya (Repealed), Section 79(2).
[21] According to the preamble of this statute, it was designed to provide for the preservation of public archives and public records".
[22] Source: Presentation by Francis G Mwangi, Senior Archivist, KNADS, during the Preservation, Conservation and Restoration of Audio-Visual Media Conference, Nairobi-Kenya (4th Dec 2008)

or format as part of the national documentary heritage; and ensure timely accessibility of records to users.[23]

Public archives which have been in existence for a period of not less than thirty years may be made available for public inspection. The KNADS director is under a duty to make available to members of the public for inspection or obtain copies of public archives.[24] The records at KNADS are basically hard copies at a fee for production of the copies. The records cover both public and private documents. There is need for the Act to be amended to provide for the archiving of electronic documents as well for greater access and for other attendant benefits that accrue from the keeping and use of electronic documents.

The Government body or public officer from which the archive document originated may waive the requirement of thirty years before disclosure and allow the documents to be accessed by the public before the expiry of the thirty years. A government body or public officer from which the document originated may also prohibit public's access to the archive document notwithstanding that the document has been kept for more than thirty years.[25] This provisions do not however limit any right of inspection of any public archives or any category thereof to which members of the public had access before their transfer to the national archives nor do they preclude the Director from permitting any person authorized by him in writing to have access to any public archives or any category which are specified in such written authorization, save to the extent provided by any such written law or subject to the terms and conditions on which such public archives were obtained.[26]

The Act provides for offences and penalties in relation to willful destruction or disposal of public records in a manner that is not consistent with the provisions of the Act.[27]

[23]Presentation by Francis G Mwangi, Senior Archivist, KNADS, during the Preservation, Conservation and Restoration of Audio-Visual Media Conference, Nairobi-Kenya (4th Dec 2008)
[24]Public Archives and Documentation Service Act Section 6(1).
[25]Supra, Sections 4 & 6(2).
[26]Supra, Section 4.
[27]Supra, Section 8.

The public Archives and Documentation (Public Access to Public Archive) Order, 2002 made pursuant to Section 6(3) of the Act prescribes for classified records on security in the custody of the Kenya National Archives and Documentation Service. According to the Order these classified records shall not be made available for public inspection until the expiry of fifty five years, or such further periods as may be specified in subsequent Order.[28]

The Act does not expressly recognize any right of the citizen to access a public archive. It merely provides that public archives that have been in existence for not less than 30 years "may" be disclosed to the public though the Director is given the power to refuse the disclosure of such records. Moreover, public archives which have been in existence for a shorter period may be disclosed with the authority of the Director. The emphasis under the Act is on archiving as opposed to access to public records. No reasons are required to be given by the Director for refusal to disclose information contained in public records. The Act does not provide for an avenue for challenging the decision of the Director where a requestor of public information is aggrieved by the Director's decision. This leaves an aggrieved applicant no option but to go to Court through a constitutional petition or a judicial review application.

Another challenge is how timely and relevant the information that is disclosed after a period of thirty years of its creation is to the public. There is need to amend the Act to align it with Article 35 of the Constitution and statutes such as the Urban Areas and Cities Act, No. 13 of 2011 which require public officials to provide timely information to the public so that they are able to participate in the making of decisions that affect them.[29] The amendments should ensure that the Act meets the Article 24 criteria on limitation to the right of access to information.

3.2.3 The Official Secrets Act, Cap. 187

The main purpose of the Act is the preservation of State secrets and State security.[30] The Act provides for the protection of certain security installations from trespass; to restrict the improper

[28] Made by the Director vide Legal Notice No. 65 of 24th April 2002.
[29] The Act is discussed later in this Chapter.
[30] Official Secrets Act (Kenya) Chapter 187, Laws of Kenya, Long title.

use of the uniforms of the disciplined forces and identity tools of government authorities and to allow government wiretaps on communication systems in certain circumstances.[31]

The Act binds public officers not to divulge certain categories of information without authorization from their respective accounting officers.[32] The Act prohibits access, publication or dissemination of information that is prejudicial to the safety or interests of the State.[33] This Act does not define or provide what safety or interests of the State are thereby leaving room for arbitrary action by government officials. What the Act does is to hinder the publication or the disclosure of information by public officers.[34] It has been opined that in the area of environmental governance the Act may prevent certain projects to be subjected to public consultation and hinder public participation in environmental impact assessments in such projects.[35]

The Kenyan courts are yet to interpret the Constitutional validity of the Act's provisions that hinder access to information. The researcher is of the view that the Kenyan High Court if faced with such a situation will have to examine the Act's provisions vis-à-vis Article 35 provisions on access to information and Article 24 the limitations Article. This researcher is of the view that as long as the Act continues to be on the Kenyan statute books, the enjoyment of the Constitutional right to access information in Kenya will be hindered. It is imperative therefore that the Act is amended to align it with the Constitutional provisions providing for the right. Any limitations to

[31] See part II of the Official Secrets Act (Kenya); other countries have similar provisions. See, for example, Section 4A (2) of the Official Secrets Ordinance (Tanzania); sections 3-9 of the State Security Act (Zambia).
[32]Official Secrets Act (Kenya).
[33]Supra, Section 3 of the Act.
[34]ICJ-Kenya. Constitutional Foundation of the Right to Information. Wako Draft and the Freedom of Information Bill. A paper presented by Lucas Wako – in the Report on the Consultative Workshop to Discuss the ICJ-Kenya Draft Freedom of Information Bill, 2000 held at the Mt. Kenya Safari Club on the 29th September to 2nd October 2005, p. 13. http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/foi_workshop_report.pdf Accessed 10th May 2013.
[35] Institute for Law and Governance, Centre for Advanced Studies in Environmental Law and Policy, and the National Environment Management Authority. Report of the East African Regional Judicial Colloquium on Environmental Law and Access to Justice, p. 13. Colloquium held between 10th to 15th April 2007 at Sarova Whitesands Beach Resort, Mombasa, Kenya. World Bank Procedures in Promoting Environmental Protection in its Financial Projects – A paper presented by Nightingale Rukuba-Ngaiza. http://www.ilegkenya.org/images/publications/pdf/0.7230240013279275 15ILEG%20-%20EA%20JUDICIAL%20COLLOQUIUM%20ON%20ENVIRONMENTAL%20LAW%202007%20REPORT.pdf Accessed on 10th May 2013.

the right under the Act should meet the threshold provided for under Article 24 of the Constitution.

3.2.4 The Media Act, 2007

The Media Act seeks to "promote and protect freedom and independence of the media."[36] The media is required under the Act to act in "a free and independent manner and style" and "in a fair, accurate and unbiased manner" in "informing the public on issues of public interest and importance."

The Act establishes the Media Council[37] which is charged with functions of, among others, promoting and protecting the freedom and independence of the media.[38] The Media Council is required to be wholly independent from Government or any body in its operations.[39]

The Act came into force[40] before the promulgation of the Constitution of Kenya 2010. The Constitution provides for freedom of the media.[41] The Constitution guarantees the freedom and independence of the media.[42] The State is required not to "exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium."[43] The State is also not required to "penalize any person for any opinion or view or the content of any broadcast, publication or dissemination."[44] Broadcasting and other electronic media are required to be independent of control by the government, political interference or commercial interests.[45]

The Media Bill 2013 now pending before the Kenyan Parliament is intended to fully align the Media Act with the constitutional provision on freedom of the media as provided for under

[36]Section 4 (b) of the Media Act, 2007.
[37]Supra, Section 3.
[38]Supra, Section 4.
[39]Supra, Section 5.
[40] The commencement date of the Act is 1st October, 2007.
[41]Constitution of Kenya 2010, Article 34.
[42]Supra, Article 34(1).
[43]Supra, Article 34(2) (a).
[44]Supra, Article 34(2) (b).
[45]Supra, Article 34(3) (b).

Article 34 of the Constitution. The Bill is intended to strengthen the provisions on the Media Council and also provide for independence of media bodies from commercial interests.[46]

These provisions of the Constitution and the current Media Act, 2007 are intended to guarantee and promote the free flow of information in either print or electronic media or other types of media that is devoid of government, political or commercial interests or any other interference. This will promote accurate and fair dissemination and reporting of information to the public by media organizations and journalists. The provisions give effect also to the Kenya's constitutional right of freedom of expression which includes freedom to seek, receive or impart information or ideas,[47] and the right of access to information.[48]

3.2.5 The Environmental Management and Co-ordination Act, No. 8 of 1999

The Environmental Management and Co-ordination Act, No. 8 of 1999 (EMCA) is the principal Act that provides for the establishment of an appropriate legal and institutional framework for the management of the environment.[49] Prior to the promulgation of the Constitution of Kenya 2010 this Act was the only legislation that provided for the right of every person in Kenya to a clean and healthy environment.[50] EMCA provides for certain types of information that the National Environment Management Authority (NEMA) which is the authority that administers EMCA should make available for inspection by the public. The Act provides that the register of experts authorized by NEMA to conduct or prepare Environmental Impact Assessment studies (EIAs), the register of all EIA licences, a register of all effluent discharge licences, a register of all emission licences and a register of all radio-active substances imported into Kenya should be maintained by NEMA and shall be public documents and may be inspected at a fee.[51]

[46] Although the Media Act, 2007 requires that the media shall be independent of control by government, political party, or nominating party under Section 5, it does not provide for independence of the media from commercial interests as required by the Constitution of Kenya 2010.
[47] Constitution of Kenya 2010, Article 33(1)
[48] Supra, Article 35(1).
[49] The Long title of the Act.
[50] Section 3 of the Environmental Management and Co-ordination Act, No. 8 of 1999. The right is now provided for in the Bill of rights under Article 42 of the Constitution of Kenya 2010.
[51] See Sections 58(5), 67(30, 77, 85 and 104(i) of the Environmental Management and Coordination Act, 1999, Government Printer, Nairobi.

Under EMCA when NEMA receives an EIA study report from a project proponent, NEMA is obligated to publish a notice in the Gazette and in a newspaper circulating in the area or proposed area of the project. The Act has specified the type of information that should be contained in the notice, that is:[52]

(a) A summary description of the project;
(b) The place where the project is to be carried out;
(c) The place where the EIA study, evaluation or review report may be inspected; and
(d) A time limit not exceeding sixty days for the submission of oral or written comments on the EIA study, evaluation or review report.

The purpose of the notice is to provide a platform for the public to make comments on proposed projects and state whether or not they oppose the projects.

The researcher draws certain lessons from the provisions:[53] (i) the provisions create an implied right of access to certain environmental information (the Act was passed prior to the promulgation of the Constitution 2010 which has express right of access to information); (ii) the Act makes provision for the public to access environmental information though limited to inspection of environmental impact assessment study, evaluation or review report and inspection of registers (iii) the provisions make it possible for the public to know certain activities that affect or may affect the environment negatively and this enables them to exercise their procedural rights of, for example, seeking administrative or judicial redress for the exercise or protection of their right to a clean and healthy environment espoused under Section 3 of EMCA (and now provided for under Article 42 of the Constitution of Kenya 2010).

Owing to what the Act provides for, the management of the environment; ecosystems and biological diversity, and the fact that Kenya's economy is heavily dependent on agriculture, and the fact that it is the right and duty of every person under the Act (Section 3) to have a clean and healthy environment, the researcher's view is that the Act should have had robust provisions and

[52]Section 59(1) of the Environmental Management and Coordination Act, 1999, Government Printer, Nairobi.
[53] See Sections 58(5), 59(1), 67(30, 77, 85 and 104(i) of the Environmental Management and Coordination Act, 1999, Government Printer, Nairobi.

central to the Act on access to relevant and timely environmental information as well as make it mandatory for the public at the relevant local and national levels to participate in decision making processes that affect or touch on the environment.

3.2.6 The Land Registration Act, No. 3 of 2012

This Act grants any person who requires an official search in respect of any parcel, an entitlement to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.[54] The Schedules to the Act provides application forms for personal search and postal search or official search.[55] The applicant is required to state the purpose of the search. The application must be accompanied with the prescribed fee under the Schedules to the Act. The Act allows persons making searches to take brief notes in pencil but they are prohibited from taking copies. The searches provide information to the applicant on the ownership and use of the land parcel.

3.2.7 National Council for Law Reporting Act, 1994

This Act provides for the establishment of the National Council for Law Reporting (NCLR) which is mandated to publish Kenya Law Reports and connected purposes. The Kenya Law Reports is the official law reports of Kenya which may be cited in proceedings in all the courts of Kenya. Every judge of the superior court of record is required by the Act to as soon as practicable after delivery of judgment, ruling or an opinion cause to be furnished to the Editor of the NCLR a certified copy thereof and the Editor is required to prepare and publish the same.[56]Judgments and rulings of the superior courts of record are published in the Kenya Law Reports. The NCLR also provides electronic format accessed on the www.kenyalaw.org of the judgments and rulings as well as legislation, Kenya Parliament Hansard, courts cause lists, and other legal information It has made the work of practicing advocates, lawyers, law dons, judicial

[54]Section 34 of the Land Registration Act, No. 3 of 2012.
[55] A personal search is where an applicant presents himself before the land registry/registrar and requests to peruse the particular land parcel file. No guarantee is given as to the contents of the register in personal searches. In postal or official searches the applicant requires the Land Registrar to peruse the land parcel file and issue a certificate of official search. The land registrar guarantees the information contained in the register.
[56] See the Preamble and Sections 3, 19 and 21 of the National Council for Law Reporting Act, 1994.

officers and law students easier by making legal information readily accessible. The Kenya Law Reports are available on the NCLR's website[57] at no cost. Hard copy publications are available at a cost.

The public is able to access the legal information at www.kenyalaw.org. Despite the access there are a number of challenges, for example, not every person is able to access the internet and connect to the website due to costs involved, computer illiteracy, or non-availability of internet in certain places in Kenya; the technical jargon in the legal publications may not be understood by people without legal training and the wider public. The former challenge can be alleviated by the Government through putting in place mechanisms providing for computer training at no cost as well as provision of internet services to all parts of Kenya at free, subsidized or affordable costs.

3.2.8 The County Governments Act, 2012

Before the creation of the County Governments there was the local government which was governed by the Local Government Act[58] (now repealed) (LGA). The LGA contained a few provisions on access to information. Any ratepayer or voter of the area of the local authority could inspect free of charge as well as make copies or an extract at the prescribed fee of the minutes of the local authority.[59] Proposed by-laws and by-laws were also open to public inspection at the offices of the particular local authority at no cost. Copies of the documents could be obtained at the prescribed fee.[60] Meetings of a council were required by the Act to be open to the public and to duly accredited representatives of any newspaper. This was, however, subject to the limits of available accommodation. Proceedings of any committee and a committee of the whole council were not open to the public unless the council resolved to admit the public or the press.[61] The Chairman of a local authority could from time to time summon at such place and time as he determined public meetings of the inhabitants of the area of jurisdiction of the local authority for the discussion of any local governance matter affecting the inhabitants which

[57] See their website: kenyalaw.org. All the information published by the NCLR is on this website.
[58] Chapter 265, Laws of Kenya.
[59]Section 82 of the Local Government Act, Cap. 265
[60]Supra, Sections 203(2) and 207.
[61]Supra, Sections 84(1) and (2).

he considered to be of public importance.[62] The local government system has been replaced by the devolved system of governance.

Unlike the LGA, the County Governments Act, 2012 (CGA) which provides a legal framework for devolved governments has robust provisions on access to information and participation of local people in county governments and national government.

The CGA is intended to give effect to constitutional provisions on devolved governance. The Act provides for the county governments' powers, functions and responsibilities in the delivery of services to the people of Kenya.[63]

Of critical note is the requirement for citizen's participation in county governance and access to information held by counties. This is because of the central importance of county governments in the local peoples' lives within the respective counties as recognized by the Constitution; County governments are required to be based on democratic principles[64] and as stated under Article 174 of the Constitution the objects of devolved governance include - (a) to promote democratic and accountable exercise of power; (b) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; (c) to recognize the rights of communities to arrange their own affairs and to further development to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; (d) to ensure equitable sharing of national and local resources throughout Kenya; (e) to enhance checks and balances and separation of powers.

The CGA provides for public participation in the conduct of the activities of the county assembly as required under Article 196 of the Constitution. Article 196 requires county assemblies to conduct their business in an open manner and hold their sittings and those of their committees in public and facilitate public participation and involvement in the legislative and other business of

[62]Supra, Section 86(1).
[63]See Articles 174, 175 and 176 of the Constitution of Kenya 2010 and the preamble to, and Section 3 of, the County Governments Act, 2012
[64]Supra, Article 175.

the assemblies and its committees. The Constitution also requires a county assembly not to exclude the public or the media from any of its sittings unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so. Article 199(1) requires county legislation to be published to take effect.

The Fourth Schedule to the Constitution sets out the functions of county governments. Of specific interest to this study are those that relate to the environment such as – agriculture, county health services including cemeteries, crematoria, refuse and waste management, control of air pollution, noise pollution, other public nuisances, county parks, beaches and recreation facilities, animal control and welfare, county planning and development including electricity and gas reticulation and energy regulation, implementation of specific national governance policies on natural resources and environmental conservation including soil and water conservation and forestry, storm water management system in built-up areas, water and sanitation services, firefighting services, disaster management, ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

The CGA provides for citizen participation in the development of policies and plans and delivery of services and in governance at the local levels.[65] The CGA also provides for principles of citizen participation in counties and one of them is timely access to information, data, documents, and other information relevant or related to policy formulation and implementation.[66] A county government is required to use the media to among other things specified in the Act undertake advocacy on core development issues such as agriculture and sustainable environment and promotion of the freedom of the media.[67]

Section 103 of the CGA provides for objects of county planning and those that relate to the environment directly are:-

[65]Sections 49-53 of the County Governments Act, 2012.
[66]Supra, Section 87.
[67]Supra, Section 94.

(a) To facilitate the development of a well balanced system of settlements and ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions across a county;
(b) Maintain a viable system of green and open spaces for a functioning eco-system;
(c) Work towards the achievement of a tree cover of at least ten per cent of the land area of Kenya.

A county is also required under the CGA to develop spatial plans reviewable every five years. The plans must have - clear clarifications on the anticipated sustainable development outcomes of the spatial plan; indicate the areas designed for conservation and recreation; contain a strategic assessment of the environmental impact of the spatial development framework.[68] Public participation in the county planning processes shall be mandatory and be facilitated through, among others, provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including-[69]

(i) Clear strategic environmental assessments;
(ii) Clear environmental impact assessment reports;
(iii) Expected development outcomes; and
(iv) Development options and their cost implications.

Each county is required to develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.[70] The Act requires that public services in a county shall be equitably delivered in a manner that accords to, inter alia as specified in the Act, financial and environmental sustainability.[71]

The Act provides that every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other State organ in accordance with Article 35 of the Constitution.[72] To facilitate access to information the Act requires every

[68]Supra, Section 110.
[69]Supra, Section 115(1).
[70]Supra, Section 115(2).
[71]Supra, Section 117(2).
[72] Supra, Section 96(1).

county and its agencies to designate an office for that purpose[73] and subject to national legislation governing access to information, to enact legislation that will ensure access to information.[74] Such legislation may impose reasonable fees or charges for accessing information held by the county government. These provisions besides requiring county legislation for access to information provide by implication that a national legislation shall be enacted for access to information.

The Act also requires county governments to establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county, which may include-[75]

(d) Television stations;
(e) Information communication technology centres;
(f) Websites;
(g) Community radio stations;
(h) Public meetings; and
(i) Traditional media.

These provisions are quite significant in the implementation of the Kenyans right of access to environmental information. The provisions will promote the Kenyan citizen's right of access to environmental information and encourage the participation of Kenyans in decision-making activities that affect the environment at county levels. This is because the information required to be supplied by the county government is either largely environmental or is on environment related activities.

3.2.9 The Urban Areas and Cities Act, No. 13 of 2011

The Urban Areas and Cities Act[76] provides for among other objects public participation by residents in the governance of urban areas and cities.[77] The Act is an important piece of

[73]Supra, Section 96(2).
[74]Supra, Section 96(3).
[75]Supra, Section 95.
[76] No. 13 of 2011, Laws of Kenya.
[77]Supra, Section 3(c).

legislation in the devolved governance and especially with respect to public participation in the affairs of urban areas and cities. Under the Act the management of a city, municipality or town is administered by a board or town committee on behalf of a County Government.[78]

The Act requires members of the boards or town committees to foster community participation; a city or urban area is obligated to develop a system of governance that encourages participation by residents in its affairs, create appropriate conditions for participation and build the capacity of the residents to enable them participate in the affairs of the city or urban area. The Act empowers city or urban residents to participate in decision-making of the city or urban area by making oral or written representations or complaints to the board or town committee. The boards and town committees are under a duty to make prompt responses to the residents' communications and inform the residents of the decisions they make that affect the rights, property and reasonable expectations.[79] A comprehensive database and information system of the administration should also be maintained by the city, urban area or town and make the information available for inspection by the public.[80]

The Act is important with respect to environmental or environmental related information; the decisions made by the boards and town committees will be about or touch on the environment and environment related information or activities. Through this Act the public have a means of accessing environmental information as well as participating in decision-making activities that affect the environment.[81]

3.3 Procedures for Accessing Information

There is no statute in Kenya which is specifically dedicated to providing a framework and mechanisms for provision of access to all forms of information.[82] However, as discussed here

[78]Supra, Section 12.
[79] See the 2nd Schedule to the Act, and Sections 20, 21, 22, and 39, supra.
[80]Supra, Section 20(1).
[8181] See the First Schedule to the Act, supra. The Cities and Urban areas will make decisions on environmental matters such as planning and development control, water and sanitation, abattoirs, air pollution, storm drainage and solid waste management, among others specified in the Schedule.
[82]Section 3 of the National Council for Law Reporting Act, No. 11 of 1994 provides for the preparation and publication in the Kenya Law Reports containing judgments and rulings of the superior courts of record. The

certain statutes do have provisions on access to information or how Government officials should handle information received or held by them. Besides the sectoral laws (discussed later in this Chapter) by which they operate Government Ministries, commissions and departments as well as the Judiciary have policies and guidelines on access by the public of certain information held by them.

Government Ministries, departments, state corporations, the judiciary, Parliament and independent commissions have put up websites on which they provide information to the public on their functions and activities.[83] Processing information requests from the public through the traditional forms such providing hard copies of documents and by telephone are still practiced by the Government.

In Kenyan courts, one can access court files of pending or concluded files by filling a court file perusal form and upon payment of perusal charges. The applicant is required to state the capacity in which he makes the application, whether as an advocate or litigant or otherwise. One must also provide the case number, the date when the file was last in court or the date when the case is scheduled to come up in court, or whether the case is concluded. This is for purposes of identifying and retrieving the court file. Without this information one will not be able to access the court file. One is allowed to make notes from the court file or make copies of documents in the court file upon payment of copying charges. One is not allowed to make copies of the judicial officer's handwritten notes. No reasons are provided for the prohibition. From the researcher's experience some files are kept in a strong room (the court file is kept under key and lock and only one clerical officer is allowed to file and retrieve court files from the strong room) owing to the sensitivity of the matter or where the file had 'disappeared' in the past. In the past an applicant had to indicate that the file was in the strong room. Nowadays some courts have computerised court file searches and all the applicant needs to do is to key in the case number in

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National Council for Law Reporting which is the body that administers the Act publishes the Kenya Law Reports in hard copy in electronic form which is put up on their website at www.kenyalaw.org. Legislation, international treaties, Kenya Parliament Hansard, courts cause lists, and other selected legal information are put up on their website for public access.

[83]See www.kenyalaw.org, www.nema.go.ke, www.parliament.go.ke, www.judiciary.go.ke, www.environment.go.ke, and www.information.

[83] See the following websites: the www.kenyalaw.org, www.nema.gogo.ke, for example.

the computer (located at the court's premises) and the computer will provide a printout of where to find the court file.

Websites:- Ministries, State corporations, public and private companies, nongovernmental organisations, and some business partnerships have put up websites in order for the public to access or know their operations as well as access their products and services.

3.4 Conclusion

The Constitution of Kenya provides for the right of access to information to Kenyan citizens. The right is not absolute. It is subject to limitations provided for in the Article 35 itself. The person seeking information from the State must not only be a natural person but also a Kenyan citizen. This is an interpretation given by the Kenyan courts. As regards citizen's access to information held by private persons the information must be one that is required for the exercise or protection of any right or fundamental freedom. The Kenyan courts have held that an applicant seeking remedies from the court claiming that his right to access to private information must show that he requires the information for the exercise or protection of a right or fundamental freedom; he must show the right or fundamental freedom that he wants exercised or protected, the information he wants, and how that information will assist him to exercise or protect the particular right or fundamental freedom. Other limitations on the right are as provided for under Article 24 of the Constitution. Limitations to the right must be contained in legislation and must meet the constitutional threshold stated under the Article 24. The threshold or criteria under Article 24 are intended to ensure that limitations on the right are not arbitrary or unreasonable but only those that are necessary and meet the constitutional threshold so as not to negate or derogate from the right of access to information. This provides a safeguard to the right of access to information. The requirement for the Kenyan State to publish and publicize any important information affecting the nation as provided for under Article 35(3) also leads to the realization of the citizen's right of access to information. However, Article 35(1) should be amended to provide access to information to any person regardless of citizenship in line with the county's obligations under the international law and international conventions cited.

Article 35 is also given effect by other Constitutional provisions such as provisions requiring constitutional offices and independent offices to publish annual reports to the Kenyan people on their operations. On environmental information, the National Land Commission, for example, will publish environmental or environmental related information thereby giving effect to the Kenyan citizen's right of access to environmental information. Article 34 on freedom of the media will also assist in the protection and promotion of access to information (the information will be from any source, not just the state) as the Article guarantees freedom of the media and free flow of information that is free from interference by the Governance or any other person. The Media Act, 2007 may help in the implementation of the provisions of Article 34 but needs to be amended to fully align it with Article 34 provisions, a move that is being undertaken by the Kenyan Parliament.

The sectoral laws discussed provide for access to information, though in a limited way. There is no general law on access to information. The existing sectoral laws do not adequately provide for access to information at a level that would be said they would sufficiently implement the constitutional right of access to information. In fact some of the laws inhibit access to information. The researcher recommends that the laws be amended as provided above to align them with the Constitutional provisions on access to information. In the area of environmental information the Urban Areas and Cities Act, 2011 and the County Governments Act, 2012 have provisions that will promote and enhance the publication and production of timely and upto date environmental information to the Kenyan people to enable them exercise their rights respecting public participation in environmental management and in other decision-making processes at the county levels. The provisions of the Environmental Management and Co-ordination Act, 1999on public access to environmental information and participation in environmental impact assessments are weak and require amendments.

The County Governments Act and the Urban Areas and Cities Act have better provisions on access to information and particularly access to environmental information. This would be due to the fact that the provisions of these Acts having been enacted after the promulgation of the Constitution of Kenya 2010 have had the benefit of drawing from the Constitutional provisions

on access to information, freedom of information, the national principles and values of governance and the principles of devolution.[84]

That notwithstanding, the sectoral laws provide for the respective areas administered by the laws and there is no linkage between them. A framework law or general law is required providing for the right of access to information. The existing laws on information should operate in tandem with and in conformity with the general law and Constitutional provisions on access to information.

As a consequence a general law on access to information as well as provisions on access to environmental information[85] should be enacted in order to realise fully or substantially the provisions of Article 35 on access to information by Kenyan citizens.

[84] See the discussion on the County Governments Act, 2012 and the Urban Areas and Cities Act, 2011 in this Chapter.

[85]The comparative study in Chapter Four will make findings as to whether or not specific provisions on access to environmental information are required, and how they should be provided for; whether by statute or by regulations under the general law.

CHAPTER FOUR

4.0 INTERNATIONAL BEST PRACTICES ON THE RIGHT OF ACCESS TO INFORMATION AND A COMPARATIVE STUDY AND ANALYSIS OF INFORMATION LAWS OF VARIOUS JURISDICTIONS

4.1 Introduction

In these Chapter principles, standards and best practices on access to information laws are highlighted. Legal regimes of three countries on access to information are examined; the basis for choosing the three is stated. The Chapter further answers the questions whether or not the right to access information is absolute, if it has limitations what is the nature and purpose of the limitations. It also provides for what the content of a freedom of information law should be. It also answers the question whether there is need for special provisions on access to environmental information or not.

4.2 International Best Practices on the Right of Access to Information

There are a number of standards, principles and best practices that should underpin right to information laws. The standards are drawn from international law (customary international, treaties, international declarations and statements, and decisions of international courts and tribunals) as well as national constitutions and national laws on the right to information of various countries in Africa, Asia, the European Union and the United States. This research shows that there is a common denominator in all the literature as to what these standards and best practices are. Consequently, only a number of the literature discussed in this Chapter, most of them leading literature in the area, are sufficient and will bring out the salient standards and best practices which any national law on the right to information worthy the name anywhere in the world should have and be practiced by States.

In 1999 ARTICLE 19 published nine principles on the right to know.[1] The principles were drawn from a number of international documents and judgments of international courts and tribunals. Examples of the documents are: the Aarhus Convention,[2] the Declaration of Principles on Freedom of Expression in Africa (the African Declaration),[3]Report of the Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression,[4] the 2002 Recommendation of the Committee of Ministers of the Council of Europe,[5] the 2004 Joint Declaration of the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression[6] (the Joint Declaration), the Communiqué Meeting of Commonwealth Law Ministers,[7] and the Inter-American Declaration of Principles on Freedom of Expression.[8] Other important documents are, for example, ARTICLE 19's A Model of Freedom of Information Law[9] and the Model Law for African Union Member States on Access to Information.[10] International instruments which pioneered in the area of information dealt with the right to "seek" and to "receive" information which found its way in many national Constitutions.[11]

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[1]ARTICLE 19.,*The Public's Right to Know: Principles on Freedom of Information Legislation* (London: 1999). Available at <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> Accessed on 15th June 2013.

[2]Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. UN.Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001. <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> Accessed 4th March 2013.

[3] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at <http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html> Accessed on 15th June 2013.

[4]UN.Doc.E/CN.4/2000/63, 18 January 2000, para. 44.

[5] Council of Europe, *Recommendation 2000(2) of the Committee of Ministers to Member States on Access to Official Documents* [printed online] (Strasbourg: Directorate General on Human Rights 2003). Available at <http://www.coe.int/T/E/Human_rights/rec(2002)2_eng.pdf> Accessed on 15th June 2013.

[6]Avaialble at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1>.Accessed on 15th June 2013.

[7]<http://www.thecommonwealth.org/press/34293/31555/34582/34773/meeting_of_commonwealth_law_ministers_port_of_spai.htm> Accessed on 15th June 2013.

[8]Available at <http://www.cidh.oas.org/declaration.htm> Accessed on 15th June 2013. The principles were adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000

[9] (London: 2001). <http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-OGI-Article19-July2001-English.pdf> Accessed on 18th June 2013.

[10]Adopted by the African Commission on Human and Peoples' Rights during its Extra-Ordinary Session that ended on the 25th February 2013.

[11]See discussion on the Universal Declaration of Human Rights, 1948. <http://www.un.org/en/documents/udhr/index.shtml#atop> (Accessed 10th March 2013), the International Covenant on Civil and Political Rights GA Res. 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> Accessed on 10th March 2013 and other international instruments, Chapter One, supra.

The principles are as follows:

4.2.1 Principle 1: The Principle of Maximum Disclosure

This is the key underlying principle governing the right to information and flows directly from international guarantees of the right to information. The principle encapsulates the core meaning of the right to information and is stated as one of the objectives in a number of national laws on the right to information.[12] Under international law, access to information is a right of everyone[13] regardless of nationality, citizenship or race and as such there is a general presumption of disclosure of information held by public bodies.[14] The State therefore should not only guarantee the right of access to information but should also take active steps to ensure that the right is implemented and enforced.

The principle establishes a presumption in favour of disclosure of information; all information held by public bodies should be subject to disclosure unless there is an overriding risk of harm to a legitimate public or private interest. The principle requires that the definition of "information" and "public bodies" should be given a wide scope. The definition given to "information" should be wide in terms of the range of information and include all records held by public bodies regardless of the form in which it is stored. The principle also requires that the definition of public bodies should include all branches and levels of governance including local government, elected bodies, statutory bodies, nationalized industries, public corporations, any institution funded by the public and private bodies or individuals if such information is required for the exercise or protection of a right.[15]

The Aarhus Convention[16] which is the first legally binding international instrument on the right to information requires the European Union member States to take legal measures to implement

[12] See Chapter One, supra.
[13]Lidberg, Johan, "Keeping the Bastards Honest: The Promise and Practice of Freedom of Information," (Ph.D. Murdoch University, 2006), 40.
[14] See also the International Covenant on Civil and Political Rights, Article 2(2).
[15] See Principle IV (2) of the African Declaration. Note 3, ibid. See also Council of Europe Recommendation, note 5Supra.
[16]Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. UN.Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment

its provisions on access to environmental information.[17] The Convention sets out standards on the right to information and requires member States to adopt broad definitions of "environmental information" and "public authority", to subject exceptions to a public interest test and to establish an independent body with the power to review any refusal to disclose information.[18]

Some international instruments, for example, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity requires State parties to provide the public access to information on living modified organisms that may be imported.[19] The African Draft Model Law on Safety in Biotechnology[20] contains similar provisions. Principle 10 of the Rio Declaration[21] discussed in Chapter One of this research establishes the link between sustainable development and access to environmental information. The principle reinforces the principle of public access to environmental information in achieving sustainable development. The principle recognizes that public awareness and participation in environmental governance can only occur if States make environmental information widely available to the public.

4.2.2 Principle 2: Obligation to Publish

Public bodies are required under this principle to publish key information to guarantee effective access to information. Public bodies are called upon to proactively publish information.[22]Publication makes it possible for the public to access information without having to apply for the information. This saves on time and costs that would have been incurred for making applications for provision of information. In this way greater access to information by the public is achieved.

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for Europe" process, 25 June 1998, entered into force 30 October 2001. <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> Accessed 4th March 2013.

[17]Supra, Article 3(1).

[18]Supra, Articles 1-9.

[19]Article 25 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Available at <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> Accessed on 19th June 2013.

[20]Available at <http://www.africaunion.org/root/au/AUC/Departments/HRST/biosafety/DOC/level2/OAUModelLawSafetyBiotechnology.pdf> Accessed on 19th June 2013.

[21]Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> Accessed on 12th October 2012. The Rio Declaration was adopted by United Nations member States assembled in Rio in 1992. See Chapter One discussion on Principle 10 of the Rio Declaration.

[22] Principle IV (2) of the African Declaration supports this view. Note 3, supra.

4.2.3 Principle 3: Promotion of Open Government

According to ARTICLE 19, features of this principle are:[23]

(i) Public bodies should actively promote a culture of openness in governance. States should actively address the culture of secrecy which is still in many Governments. In Kenya laws that hinder access to information should be revisited and amended to align them with this requirement.[24]

(ii) The Government should train public officials on the right to information laws and enlighten the officials that openness in governance is an obligation as well as a fundamental human right.

(iii) Public officials should assist requestors in making their requests. If a request is submitted to the wrong public body, officials should transfer the request to the appropriate body.

(iv) The Government should educate the public on access to information laws;

(v) The Government should allocate the necessary resources and attention to ensure proper implementation of the right to information laws.

(vi) The Government should set up a body charged with the administration of the right to information laws including the setting of standards and enforcement of standards for record maintenance. The body should be independent and have enough resources to be able to discharge its functions provided for under the right to information laws.

(vii) Sanctions ranging from administrative, civil to criminal should be provided for infringement of the right to information. Incentives should be given to those who perform well in providing access to information, and poor performers should be exposed.

(viii) Ensure legislative oversight of progress through submission to the Legislature by the body that administers the information law and public bodies of annual reports on the performance of public bodies in implementing the right to information.

(ix) Good record management systems should be put in place.[25]

The essential ingredients of this principle as set out are intended to ensure that the right of access to information is implemented and enforced. A law on access to information must have implementation and enforcement provisions which incorporate these ingredients.

4.2.4 Principle 4: Limited Scope of Exceptions

Under this principle exceptions to disclosure of information must be limited and narrowly drawn and conform to international standards for restricting freedom of expression. A list of information that is not subject to disclosure should be set out in the right to information law and the "harm" and the "public interest" tests should be applied when determining whether or not the

[23] See also the Recommendation of the Committee of Ministers of the Council of Europe, Principle X, note 5, Ibid.
[24]See Chapter Three's discussion on the Official Secrets Act and the Kenya National Archives and Documentation Service Act; how the Acts have hindered access to information in Kenya.
[25] See Principle 4 of the Joint Declaration, *Op. Cit.*

information falling under the excepted information can be disclosed. Information must be released when the public interest outweighs any harm in releasing it. There is a strong presumption that information about threats to the environment, health, or human rights, and information revealing corruption, should be released, given the high public interest in such information.

The research findings showed that organizations would not disclose to the public certain information in their possession. Several grounds were advanced as discussed above. Of note is that the organizations did not have regulations or rules that would guide them in classifying information and determine whether the information requested was subject of disclosure or not. They did not provide information as to whether or not the non-disclosure was backed by any law and this may lead to a situation where the organizations exercise absolute discretion in determining whether to disclose information or not. This situation would be alleviated if a law on access to information were to be enacted providing for specific limited exceptions to disclosure that are consistent with this global principle.

Some international instruments and decisions of international courts[26] recognize that member states may place limitations on the right to access information but such limitations must be explicitly put in the law and be as are necessary in a democratic society and be proportionate to the aim of protecting, among other measures specified in the instruments:

(i) National security, defence and international relations;
(ii) Public safety;
(iii) The prevention, investigation and prosecution of criminal activities;
(iv) Privacy and other legitimate private interests;
(v) Commercial and other public or private economic interests;
(vi) The equality of parties concerning court proceedings.

[26] See the decision of the Inter-American Court of Human Rights in *Claude Reyes and et al. v. Chile*, 19 September 2006, Series C No. 151 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf>. Accessed on 10th October 2012, where the Court interpreted provisions on the right to "seek" and "receive" "information" provided for under Article 13 of the American Convention on Human Rights <http://www.hrcr.org/docs/American_Convention/oashr.html> Article 13's provisions are similar to the provisions of Article 19 of the UDHR, 1948 and Article 19 of the ICCPR, 1966 – See the limitations on the right under Article 19(3) of the ICCPR and discussion in Chapter One, supra.

The European Court of Human Rights has had occasion to interpret and apply Article 10 of the American Convention on Human Rights providing for limitations on the right of freedom of information. In *Thorgeirson vs. Iceland*[27] the Court held that freedom of expression as was enshrined in Article 10 was subject to a number of exceptions which, however, were as a mandatory requirement to be narrowly interpreted and necessity for any restrictions be convincingly established. In an earlier decision in *Lingens v. Austria*[28] the Court held that the restrictions must be necessary to ensure protection of the aim. The Court interpreted the word "necessary" as meaning that there must be a pressing social need for the restriction and that the reasons given by the State parties to justify the restriction must be relevant and sufficient and the restriction must be carefully designed so as to undermine the right as little as possible. Where the aim may be protected by a less intrusive means, that approach must be preferred.

The above aims have found their way in a number of national Constitutions and right to information laws.[29] ARTICLE 19 provides a three-part test for the exceptions to disclosure of information, namely:[30]

(i) The information must relate to a legitimate aim listed in the law;
(ii) Disclosure must threaten to cause substantial harm to that aim; and
(iii) The harm to the aim must be greater than the public interest in having the information.

The principle of limited scope of exceptions, the provisions of the international covenants and the judicial pronouncements illustrate that the right of access to information is subject to limitations or exceptions as may be provided for by law which should meet the criteria restrictions specified above so as not to negate or derogate from the right of access to information.

The Constitution of Kenya already has the criteria[31] to be met by a law that limits the right of access to information. However, this principle, the judicial decisions of the international courts

[27] 25 June 1992, Application No. 13778/88, para. 63. Avaialble at <http://www.humanrights.is/media/frettir/Torgeir_Torgeirson_gegn_Islandi.pdf> Accessed on 19th June 2013.
[28] 8 July 1986, Application No. 9815/82, 8 EHRR 407 paras.39-40.Available at <http://echr.ketse.com/doc/9815.82-en-19860708/view/>Accessed on 19th June 2013.
[29] See Chapters Three and as later discussed in this Chapter.
[30] See also Article 4 of the Aarhus Convention, note 2 and Principle IV (2) of the Recommendation of the Committee of Ministers of the Council of Europe, note 5, supra.

and tribunals and the ICPPR provisions, for example, will help in informing on how the limitations should be provided for.

4.2.5 Principle 5: Process to Facilitate Access

Under this principle requests for information should be processed rapidly and fairly and independent review of any refusals should be provided for. The key features of this principle are that the information law should contain:

(i) Clear procedures for processing requests for information;
(ii) Systems for independent review of internal decisions by public bodies;
(iii) Strict time lines for the processing of information requests and notices to be given for refusal to provide access to information containing substantive reasons for the refusal, and informing the requester of mechanisms that are available to him for challenging the refusal;
(iv) Simple (the only requirements should be to supply a name, address and description of the information sought), rapid, and low-cost or no-cost procedures for accessing information;
(v) Applicants should not be required to provide reasons for requesting information[32];
(vi) Applicants for information should be given the information in the form they want; inspection of the record or copying and in the language they prefer;
(vii) Procedures for challenging the decision – internal reviews as well as independent appeals bodies including the courts;
(viii) The onus of proving that the information requested is excepted information should fall on the public body claiming the exception.

4.2.6 Principle 6: Costs

Costs should not be excessive as to deter information application requests. The cost should not be greater than the reproduction of documents.

The procedures for access as set out in principle 5 above and costs for accessing information are important in any freedom of information law. Simple procedures that are easily understood by applicants and low costs in getting information from information holders will facilitate access to

[31]Article 24. See Chapter Three.
[32]*Claude Reyes* case, Op. Cit.

information. The language used in the forms must be that which is understood by the applicants. Provisions should be made in the law for people who cannot read or write, and for those whose only language of communication is vernacular. Provision for interpreters should be provided for in the law. Oral applications should be encouraged. The main objective is for the law to facilitate access to information.

4.2.7 Principle 7: Open Meeting

Meetings of public bodies should be open to the public since the right of access to information should include access to oral information as well. This means that public bodies should allow the public to attend their meetings. This would be one of the ways of accessing information. This would require provisions in the Statutes requiring the public bodies to make provisions for open meetings and participation of the public in the meetings.

4.2.8 Principle 8: Disclosure Takes Precedence

This principle requires that laws which are inconsistent with the principle of maximum disclosure should be amended or repealed. Legislation on the right of access to information should therefore contain provisions that make the provisions of the legislation take precedence over any other laws, policies or practices that hinder access to information. This principle is subject to the principle of limited scope of exceptions and to the provisions of Article 24 of the Constitution that sets out the criteria that any law must meet when limiting or restricting the right of access to information.

4.2.9 Principle 9: Protection of Whistleblowers

Under international law individuals who release information on wrongdoing (whistleblowers) must be protected.[33] Such information includes information on corruption, criminal activities and maladministration in government. Information about threats to the environment, health, or

[33] See Section 47 of ARTICLE 19's Model Freedom of Information Law. See also ARTICLE 19. Memorandum on Kenya's Draft Freedom of Information Bill, 2005 (London, 2006). Available at <http://www.article19.org/data/files/pdfs/analysis/kenya-foi.pdf> Accessed on 10th May 2013.

human rights must also be disclosed. Guy Dehn[34] argues that whistle blowing is one of the necessary measures for a robust disclosure system since whistle blowing measures "have a healthy deterrent effect and also can come into play before damage is done". They also "enhance public accountability". Dehn therefore calls for whistle blowing legislation around the world. It has been said that the inclusion of strong whistleblower protection provisions in freedom of information laws is important for the reason that it sends "a message to the public that the government is serious about opening up to legitimate scrutiny."[35] In short international standards and best practices require legislation on the right of access to information should provide for protection of whistle blowers.

4.3 Comparative Study and Analysis of Information Laws of Various Jurisdictions

> *"A passive and ignorant citizenry will never create a sustainable world."*
> Andrew Gaines (1924-2004)

The research provides a comparative analysis of access to information laws of three countries: the United Kingdom, South Africa and Uganda. Justifications for the choice of these countries are provided for in the analysis.

4.3.1 Access to Information in the United Kingdom

Access to information in the United Kingdom (UK) is governed by an Act of Parliament. Unlike the trend around the world where countries pass one general statute to deal with all classes of information, the UK enacted specific regulations to regulate access to environmental information. One of the research questions is whether or not Kenya should have specific provisions on access to environmental information besides the required law on access to information. If the answer to the question will be in the affirmative then how the specific

[34] Guy Dehn, *Whistleblowing Protection: Accompanying Access to Information in Assuring Transparency*. IN *ACCESS TO INFORMATION: BUILDING A CULTURE OF TRANSPARENCY. CARTER CENTRE* (JAMAICA, 2006) p. 129 (137 of 160). Much of the paper was based on *Whistleblowing Around the World: Law, Culture and Practice*, Ed. Calland, R. and Dehn, G., ODAC and PCaW in partnership with the British Council S. Africa, 2004.

[35] Commonwealth Human Rights Initiative (2004) Detailed Analysis of the Indian Freedom of Information Act, 2002 and Recommendations for Amendments, p. 26. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/news/india_foi_act_analysis_for_mps.pdf> Accessed on 10th May 2013.

provisions should be provided for will also be interrogated; whether they should form part of the general law or in a separate statute, or as detailed regulations prescribed under the general law. This makes the UK's statutory regime on access to information worthy study.

Access to information in the United Kingdom is principally governed by the Freedom of Information Act 2000 and the Environmental Regulations 2004.

4.3.2 Freedom of information Act 2000

The Freedom of information Act 2000 is the UK Act of Parliament that provides for a general right of access by every person to information held by public authorities or by persons providing services for them.[36] By this provision the access is to any person be it a natural or juridical person and whether the person seeking access is a citizen or non citizen. This is unlike the Kenyan situation where access to information held by the State is restricted to citizens.[37]

On receipt of a freedom of information claim a public authority has two corresponding duties. First, a duty to inform a member of the public whether or not it holds the information requested,[38]and second if it does hold that information, to communicate it to the person making that request.[39] The communication should be within a period of twenty working days from the date of receipt of the application.[40] The request for information must be in writing[41]and accompanied by the relevant fee.[42] The public body to which the application is made is under a duty to supply the information requested in writing[43] if it holds the information. Reasons for refusal to accede to information request must be communicated to the applicant by[44] the public authority. Besides the requirement to provide information public authorities are required to publish information on their operations.[45] The requirement to give reasons for refusal to supply

[36]Freedom of Information Act 2000, Preamble and Section 1(1).
[37]Constitution of Kenya 2010, Section 35(1).
[38]Freedom of Information At 2000, Section 1(1)(a).
[39]Supra, Section 1(1)(b).
[40]Supra, Section 10.
[41]Supra, Section 8.
[42]Supra, Section 9.
[43]Supra, Section 1.
[44]Supra, Section 17(1).
[45]Supra, Section 19.

information is a safeguard against arbitrary refusals and will promote greater access to information. Where there are no good reasons as provided for under the Act to refuse disclosure the information must be disclosed. Publication requirement makes it possible for people to access information without necessarily applying for it. All these are consistent with the international principles of maximum disclosure and open governance.

There are numerous exemptions. Some of these are absolute bars to disclosure; some are qualified. Where the bar to disclosure is qualified the public authority has to decide whether in the circumstances of the particular case the public interest in disclosing the relevant information outweighs the public interest in maintaining the exemption.[46] Some of the exemptions to disclosure are: the information applied for is accessible to the applicant by other means, for example, it is published by the public authority under its publication scheme, or the information is intended for future publication;[47] the information sought relates to State security, the security bodies of the State,[48]defence of the Government,[49] national security,[50] or that the release of the information would prejudice international relations between the UK and any other country[51] or economic interests of the UK,[52] or be prejudicial to commercial interests of any person, for example, information on trade secrets.[53].These exemptions illustrate that the right is not absolute.

The Act provides for a complaints and appeals mechanism. An applicant aggrieved with the decision of a public authority on a request for information must first exhaust the internal complaints mechanism before making an application to the Information Commissioner for review by the Commissioner of the public authority's decision.[54] Any party dissatisfied with the decision of the Commission has a right of appeal to the Tribunal.[55] A final right of appeal to the

[46] Abbot, J. and Marohasy, J., 2010. Accessing environmental information relating to climate change: A case study under UK freedom of information legislation, Environmental, Law and Management, *22*(1), pp. 3-12.
[47]Freedom of Information Act 2000, Sections 21.
[48]Supra, Sections 23.
[49]Supra, Section 26.
[50]Supra, Section 24.
[51]Supra, Section 27.
[52]Supra, Section 29.
[53]Supra, Section 45(2).
[54]Supra, Section 50.
[55]Supra, Section 57.

High Court from the decision of the Tribunal is provided for on points of law only.[56] Access to this administrative and judicial remedies facilitate access to information in line with the international principle that the process of seeking information should facilitate access.

Guides which are in print and electronic form and posted on the internet and public authorities websites and which should be revised from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases are issued both under the FOIA and the Environmental Information Regulations 2004 (EIR) to provide guidance to public authorities on the implementation of the provisions of freedom of information. The Guide on public interest test identifies several generic points (though considered not exhaustive) to take into account when considering the public interest test.[57] These are:

(i) Furthering the understanding of and participation in the public debate of issues of the day.
(ii) Promoting accountability and transparency of public authorities and decisions taken by them.
(iii) Promoting accountability and transparency of public authorities in the spending of public money.
(iv) Allowing individuals and companies understand decisions made by public authorities.
(v) Bringing to light information affecting public health and public safety.

The guides are consistent with the international principle of open governance which requires a freedom of information law to provide for education of public officers, information officers and the public on the information law.

Three features of the UK Freedom of Information Act deserve special mention, as they differ from the position in many other countries.[58]

i. Requests by individuals for access to their own personal information are dealt with outside the Act. They are dealt with under the Data Protection Act 1998.

ii. Requests for information about matters concerning the environment are dealt with by the Environmental Information Regulations 2004.

[56]Supra, Section 59.
[57] See The FOI Guidance on Public Interest Test: Awareness Guidance. Available at <http://www.ico.org.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_public_interest_test.pdf> Accessed on 10th May 2013.
[58] Burt, E., Taylor, J., 2009. *Freedom of Information and Scottish Local Government: Continuity, Change and Capabilities in the Management of Information*, Local Government Studies, 35(2), pp. 181-196.

iii. A procedure for third parties to challenge a decision by a public authority to disclose information is not provided for. For instance, if a commercial organization provides information to a public authority, and the authority discloses that information in response to an FOI Act request, the commercial organization has no right of appeal against that decision. There is little that can be done to remedy the situation once disclosure has been complied it. However, the exemption provisions guide public officers in ensuring that third party information subject to the exemptions is not disclosed.

4.3.3 Environmental Information Regulations 2004

The Environmental Information Regulations 2004 (EIR) is a United Kingdom (UK) Statutory Instrument (SI 2004 No. 3391) that provides a statutory right of access to environmental information held by UK public authorities. The regulations came into force on 1st January 2005[59] along with the Freedom of Information Act 2000. The Regulations cover most parts of the United Kingdom with the exception of Scotland, which is covered by the Environmental Information Regulations (Scotland) 2004 (EISR).[60] The EIR were made pursuant to Section 74 of the UK's FOIA 2000 which empowers the Secretary of State to make regulations under the Act for the purpose of implementing the information provisions of the Aarhus Convention.[61] This is with regard to the UK's commitments under the European Communities Act 1972, the Aarhus Convention and the European Union (EU) Directive 2003/4 EC (d).[62] The outstanding provisions of Section 74 is that they empower the Secretary of State to make regulations providing that any obligation imposed by the regulations in relation to disclosure of information is to have effect notwithstanding any enactment or rule of law. Pursuant to these provisions, the EIR provides that any enactment or rule of law that would prevent disclosure of information in accordance with the EIR shall not apply.[63] By this provision therefore in the case of inconsistency or conflict between the provisions of the regulations and the FOIA provisions or any other law the provisions of the regulations would prevail over the other provisions to the extent of the inconsistency. The provision is intended to promote greater realization of the right of access to environmental information. The EU Directive provides that:

[59]Environmental Information Regulations 2004a

[61]Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. UN.Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001. <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> Accessed 4th March 2013.
[62]Environmental Information Regulations 2004, Regulation 2.
[63]Supra, Regulation 5(6).

> Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision making and, eventually, to a better environment.

Informed by the EU Directive the aims of the EIR are to:

i. Facilitate the disclosure of information under the EIR by setting out good administrative practice that it is desirable for public authorities to follow when handling requests for information including, where appropriate, the transfer of a request to a different authority;
ii. To set out good practice in proactive dissemination of environmental information;
iii. To protect the interests of applicants by setting out standards of advice and assistance that should be followed as a matter of good practice.[64] This is in line with the requirements of the provisions of Article 2 of the Aarhus Convention;
iv. To ensure that third party rights are considered and that authorities consider the implications for access to environmental information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party;
v. To encourage, as matter of good practice, the development of effective review and appeal procedures of decisions taken under the EIR.

Most provisions of the EIR are similar to those of the FOIA. The salient provisions of the EIR that are not in the FOIA are analysed. Regulation 2 is the definition section of EIR. The definition of environmental information under the EIR is wide in scope.[65] The wide definition is intended to give greater access to any information that is environment related and would promote to a large extent the realization of the right of access to environmental information.

The Regulations apply to public authorities. A public authority has been given a wide meaning under the Regulations; Government departments, any body or person that carries out functions of public administration and has public responsibilities relating to the environment, or any person or body that exercises functions of a public nature relating to the environment or provides public services relating to the environment is considered a public authority and therefore covered by the Act.

[64]Supra, Regulation 9(1) requires a public authority to provide advice and assistance to applicants seeking information held by the public authority.
[65] The definition of environmental information is stated in Chapter One.

Regulation 3 provides what is considered as environmental information held by a public body which is environmental information that is in possession of and has been produced and received by the public authority, information held by another person on behalf of the authority. Regulation 4 requires public authorities to make available to the public by electronic means which are easily accessible and to take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination of information to the public.

Regulation 12 of the EIR sets out various exceptions allowing public authorities to refuse to disclose environmental information. However, all the exceptions in the EIR are subject to a public interest test; disclosure should only be refused if the public interest in maintaining the exception outweighs the public interest in disclosing the information. There is no requirement for a public authority to withhold information which would fall within an exception. The exceptions are not mandatory and a public authority may choose to release the information anyway. The main aim of the EIR is to provide greater access to environmental information than has been possible previously. Regulation 12(2) directs public authorities to apply a presumption in favour of disclosure. This is in line with the international principle of maximum disclosure.

Regulation 12(5) lists the exceptions relevant to where disclosure would have an adverse effect. This test of harm is stronger than that in the Freedom of Information Act 2000, in which some exemptions apply if the information 'would, or would be likely to, prejudice'. Therefore, to engage a 12(5) exception in the EIR the authority must be able to show with certainty the harm that releasing the information in question would cause. It would not be sufficient for an authority to claim that releasing the information might result in an adverse effect. These exceptions include:

i. International relations, defence, national security and public safety. Subject to the public interest test, if the disclosure of information would adversely affect any of these matters, it is exempt from disclosure.

ii. The course of justice, the ability of a person to obtain a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

iii. Matters of Intellectual property rights. Whereas the exception discussed below relating to the confidentiality of commercial or industrial information provides protection information whose disclosure would adversely affect the commercial interests of a third party, the exception relating to intellectual property will also protect the interests of the public authority itself.

iv. The confidentiality of the proceedings of a public authority where such confidentiality is provided by law. The proceedings in question may be those of the public authority receiving the request or any other public authority.

v. The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Again confidentiality may be provided either by explicit statutory restrictions on disclosure or by the common law.

vi. The interests of the supplier of the information are paramount. The cases envisaged are those where the information was supplied on a voluntary basis in the expectation that it would not be disclosed to a third party and where the supplier has not consented to disclosure.

If it is possible to separate information that may be released from information that must be withheld (falling within the exception classifications in Regulation 12), authorities are required to provide the information that is capable of being segregated if the information is not excepted. This is a good provision since in access to information laws there should be a presumption in favour of disclosure and not non-disclosure and exceptions should be interpreted in a restrictive and narrow manner lest the purposes of the statute are frustrated through wide and unlimited exceptions.

The EIR promotes greater access to environmental information than if the information would have been sought under the FOIA. For instance the range of bodies covered by the EIR is wider to allow for consistency with the EC Directive, and includes public utilities and certain public private partnerships and private companies, such as those in the water, waste, transport and energy sectors.[66]

The most outstanding feature of EIR is the override provisions under Regulation 5(6) by which any law or rule that would prevent the disclosure of information in accordance with the EIR shall not apply to environmental information. This provision enables information officers to disclose information without fear of reprisals or without having to look at other statutory provisions that prohibit or hinder disclosure of information held by government such as the Official Secrets Act. The provision alleviates the problem of public officers having to fear that they would run afoul of Statutes that prohibit disclosure of information and therefore Regulation 5(6) is important in

[66] Mike Feintuck and Mike Varney, *Media Regulation, Public Interest and the Law* (United Kingdom: Edinburgh University Press, 2006), 4.0. See also the UK Code of Practice – Environmental Regulations 2004, 2005.

promoting maximum disclosure of environmental information in accordance with EIR provisions.

4.3.4 Access to Information in South Africa

Just like in Kenya the right of access to information in South Africa is constitutionally underpinned; it is distinct and independent and enjoys the same constitutional status like the other constitutionally underpinned fundamental rights. The South African Constitution requires enabling legislation to give effect to the Constitutional right of access to information and also gives a timeframe within which Parliament is required to enact legislation for the implementation of the right. South Africa is a young democracy in Africa but has somewhat led the way in Africa in Constitutionalism and democratic governance. Just like the Kenyan Constitution the South African Constitution extends access to information held by private bodies.

The control of information and enforced secrecy was at the heart of the anti-democratic character of the apartheid system precisely because public access to information is the life-blood of any meaningful democratic participation.[67] Arising from the apartheid era in which the white minority government suppressed access to information – on social, economic and security grounds - in an effort to stifle opposition to its policies of racial supremacy, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance and a fundamental principle of a new democratic dispensation and helped to define the scope and content of the right.[68]

The 1996 Constitution of the Republic of South Africa establishes for every person the right of access to any information held by the State.[69] Unlike the Kenyan and Ugandan Constitutions

[67]Truth and Reconciliation Committee of South Africa.(1998a), Report. Vol. 2, Chapter 2, Cape Town: paras. 10-19. Quoted Dale T. McKinley, The State of Access to Information in South Africa, p. 3. Paper Prepared for the Centre for the Study of Violence and Reconciliation, .Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/McKinley%20-%20FOI%20in%20South%20Africa.pdf> Accessed on 15th March 2013.

[68]Dimba M. &Calland R., Freedom of Information Law in South Africa: A Country Study, p. 40. Available at <www.freedominfo.org> Accessed on 15th March 2013.

[69]Constitution of the Republic of South Africa, No 108 of 1996, Section 32 (1) (a).

which restrict the right to citizens the South African Constitution extends the right to everyone.[70] This would lead to greater access to information. The South African Constitution just like the 2010 Kenyan Constitution extends access to privately held information in certain circumstances; it establishes for every person the right of access to any information that is held by another person and that is required for the exercise or protection of any rights.[71] Just like in the Kenyan Constitution, the South African Constitution recognizes that the right may be limited by law and goes ahead to provide for the criteria that must be met by the law that limits the right.[72] The South African Constitution requires national legislation to be enacted to give effect to the right.[73] Arising from this constitutional imperative the South African Parliament enacted the Promotion of Access to Information Act (No. 2 of 2000).[74]

4.3.5 The South African Promotion of Access to Information Act, No. 2 of 2000

The Promotion of Access to Information Act, No. 2 of 2000 (PAIA) is the South Africa's principle legal instrument defining and delineating the scope and content of the right to access information, establishing mechanisms and procedures for enforcement as well as providing limitation of the right. It has been widely lauded both in South Africa and abroad as a progressive piece of legislation, and by international legislative standards, it is considered as a fairly radical law or "the golden standard."[75]

PAIA aims to create a framework to allow people to access the information held by government and private bodies in compliance with the Constitutional requirements of access to information under Section 32 of the South African Constitution; set out how people will be able to access records; determine the grounds on which access to information can be refused; set out how

[70] The word used under Article 32(1) is everyone and not citizen. It follows that any person regardless of citizenship is entitled to access information in accordance with Article 35(1).
[71] Supra, Section 32 (1) (b).
[71]Supra.
[72] Supra, Article 36 limitation on provisions in the Bill of Rights, similar Article 24 of the Constitution of Kenya 2010.
[73] Supra, Section 32(2).
[74]Republic of South Africa (2000) Promotion of Access to Information Act 2 of 2000. Pretoria: Government Printer.
[75] Dale T. McKinley, The State of Access to Information in South Africa. Paper Prepared for the Centre for the Study of Violence and Reconciliation .Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/McKinley%20-%20FOI%20in%20South%20Africa.pdf> Accessed on 15th March 2013.

citizens could lodge an appeal against any decision to deny access to information; and state institutions charged with implementation of certain aspects of the Act.

The PAIA has to a large extent been crafted based on the best practices and international bench marks. The following provisions of the Act stand out:

The Act is enacted to give effect to the Constitutional right of access to information provided for under Section 32 of the 1996 South African Constitution.

Section 1 of the Act is the definition Section. The Section is important in any statute as it tries to forestall the problem of interpretation of the provisions of the Act. Interpretation of words used in the Act delineates the scope of the words and gives the context in which the words are used. Of note in Section 1 of the Act is the definition given to a person, private body, public body, record and request for access. A person is defined to mean a natural person or a juristic person. A private body is defined to mean a natural person who carries or has carried on any trade, business or profession, but only in such capacity, or a partnership which carries on or has carried on any trade, business or profession.

The objects of the Act include the need to promote transparency, accountability and effective governance of all public and private bodies; to establish a voluntary and mandatory mechanisms or procedures to give effect to the right. Public bodies are included in the definition of "requester" and may request information from private bodies.

The Act sets out an expansive list of duties and responsibilities of public and private information holders, a key feature of which is the requirement to publish manuals containing a comprehensive detail of how to access information (Ss. 14, 51); provides categories of records that are automatically available – (Ss. 15, 52); the Human Rights Commission is required to play a major role in assessing, monitoring and implementing various aspects of the legislation (Ss. 83, 84).

Under the Act, any person can demand records from government bodies without showing a reason. State bodies currently have 30 days to respond (reduced from 60 days before March 2003 and 90 days before March 2002).[76]

The Act also includes a unique provision (as required in the Constitution) that allows individuals and government bodies to access records held by private bodies when the record is "necessary for the exercise or protection" of people's rights.

The Act does not apply to records of the Cabinet and its committees, judicial functions of courts and tribunals, and individual members of Parliament and provincial legislatures.

There are a number of mandatory and discretionary exemptions for records of both public and private bodies. Most of the exemptions require some demonstration that the release of the information would cause harm. The exemptions include personal privacy, commercial information, confidential information, safety of persons and property, law-enforcement proceedings, legal privilege, defense, security and international relations, economic interests, and the internal operations of public bodies. Many of the exemptions must be balanced against a public-interest test that require disclosure if the information show a serious contravention or failure to comply with the law or an imminent and serious public safety or environmental risk.

Appeals mechanism against a decision of an information officer or public body is set out under Sections 74 to 82 of the Act. The requester is required to first use the internal appeals procedure provided for under Sections 74 to 77 of PAIA and the requester can only go to Court as provided for under Sections 78 to 82 of the Act once he has exhausted internal appeals procedure.

By the provisions of Section 83 of the Act the South African Human Rights Commission is required to compile and make available a guide on how to use the Act; submit reports to the National Assembly on implementation of the Act; monitor the implementation of the Act; train information officers of public bodies; promote timely and effective dissemination of accurate

[76]South African Promotion of Access to Information Act 2 of 2000, *Op. Cit.*

information by public bodies about their activities; develop and conduct educational programmes to advance the understanding of the public of how to exercise their rights under the Act.

The Act makes it an offence for any person to destroy damage or alter a record, conceal a record, or make a false record with intent to deny a right of access under the Act. Upon conviction, a penalty of either a fine or imprisonment for a period not exceeding two years is provided for under the Act (Section 90).

Under the Act it is mandatory for the information officer to protect the record of the following information: information concerning the privacy of a third party who is a natural person including a deceased person (Section 34(1); commercial information of third parties such as trade secrets (Section 36(1)); certain confidential information of third parties whose disclosure would constitute a breach of a duty of confidentiality owed to a third party in terms of an agreement or if the disclosure thereof could jeopardize future supply of the information from the same source or other sources (Section 37(1)(a) & (b)); if the release could endanger the life or safety of an individual or prejudice or impair the security of property (Section 38(1)(a) & (b)); if the record is privileged from production in legal proceedings (Section 40); if the information could prejudice the defense, security and international relations of the Republic (Section 41(1)(a) & (b)); if the release of the information could materially jeopardize economic interests and financial welfare of the Republic and commercial activities of public bodies (Section 42(1) (b)); and other matters cited under Sections 43(1) & (2), 44 (1) & (2) and 45. These provisions notwithstanding under Section 46 the information officer of a public body must grant a request for access to records exempted from disclosure under these provisions if:-

(a) the disclosure will reveal evidence of-
(i) a substantial contravention of, or failure to comply with, the law or;
(ii) an imminent and serious public safety or environmental risk;
(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision.

Section 46 presents difficulties in enforcing disclosure of information relating to the environment. There is an assumption under the Section that a requester already knows the content of the information he seeks and that he knows that the information he seeks is of

imminent and serious public safety or environmental risk, and therefore requests for the information pursuant to Section 46. The Act does not provide for who should determine whether or not the information sought falls under Section 46 and therefore subject of mandatory disclosure. This problem can, however, be alleviated if public and private bodies publish manuals and guides detailing information in their possession or control as required by PAIA. Of significance is the recognition by the Act of the importance of environmental information which apparently stems from the South African's Constitutional provisions on the environment (Sections 24 and 152).

Unlike the UK Freedom of Information Act 2000[77] the PAIA does not make provisions providing for the prescription of environmental information regulations. Therefore, a request for environmental information is dealt with under the PAIA.

Despite its robust provisions PAIA has encountered implementation problems. Some of them are:

1. It has been stated that the South African government has not given enough funding to the Human Rights Commission (HRC), a body that administers the Act, for any activities under the Act.[78] This means that HRC would be able to, for example, train information officers and conduct public education on the provisions of PAIA and monitor and enforce compliance of the Act. This illustrates that the making of information law is just the first step and more needs to be done by the government and the public to ensure that the law works.

2. Five years later from 2002 it was found the country did not have PAIA manuals which are basic guides underpinning PAIA implementation and facilitates the handling of information requests from citizens. As a consequence citizens did not know what information was held by government departments and what information was automatically available to them. Citizens were thus unable to participate in a meaningful.

3. Lack of departmental systems to manage information – majority of information five years after the enactment of the Act were in manual files. There were no systems for managing requests hence unable to account for the manner requests were dealt with and to respond to requesters.[79]

4. Citizens were not adequately informed of the internal appeal procedures and therefore they were unable to utilize these procedures.[80]

[77]Supra, Section 74.
[78]Banisar D., *Freedom of Information and Access to Government Records Around the World Update, 2002*, (Harvard University, 2002), p. 7. <www.privacyinternational.org/issues/foic/> Accessed 27th October 2012.
[79]Supra, p. 9.
[80]Supra, p. 9.

Overall the researcher finds that even though the South African legal framework on access to information is robust, a lot needs to be done in terms of implementation of the law. The researcher has identified lessons for Kenya from the South African experience, discussed later in the study under the sub heading 'Critique and Lessons for Kenya and Conclusion'.

4.3.6 Access to Information in Uganda

The researcher chose Uganda for a number of reasons; Uganda is Kenya's geographical neighbor and a member of the East African Community to which Kenya is also a member which is moving towards economic and political integration. Uganda's people like Kenya's rely heavily on natural resources for their livelihoods and therefore most likely to be exposed to environmental risks and degradation but usually the worst represented in relevant decision-making processes. How these two countries deal with information particularly environmental information is critical.

In Uganda just like in Kenya and South Africa the right of access to information is anchored in the Constitution under the Bill of Rights.[81] Unlike the latter two countries the Ugandan Constitution does not provide for access to information held by private persons. Unlike the Kenyan Constitution, the Ugandan Constitution expressly requires that Parliament makes legislation to provide for the right and the procedures for obtaining access to information.[82] Every citizen has a right to access information in the possession of the State or any other organ or agency of the State – the right is however limited –information requested cannot be released where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.[83] Like in Kenya the right is restricted to citizens only. Pursuant to Article 41(2) provisions, Parliament of Uganda enacted the Access to Information Act, 2005 (ATIA) which sets out the scope of citizen rights and the obligations of information officers in all public bodies with respect to access to information.

[81]Constitution of the Republic of Uganda as amended by the Constitution (Amendment), Act 11/2005, and the Constitution (Amendment) (No. 1) Act, 21/2005.Article 41(1).
[82]Supra, Article 41(2).
[83]Supra, Article 41(1).

The ATIA has provisions similar to those contained in the South African Promotion of Access to Information Act (PAIA) save to the extent that the former does not provide for access to information held by private persons in line with the Ugandan Constitution.

The similarities include: procedure for obtaining information, making complaints against a refusal to release information, no requirement to provide reasons for request of information, and protection of confidential information.

A general public interest test is applied to all exemptions. Information should be disclosed or released where the information would reveal either a substantial infringement of the law or a serious threat to public health and safety and on balance the public interest in the disclosure of the information is greater than the possible harm caused by the disclosure of the information.[84] Just like PAIA there is a requirement on public bodies to print manuals detailing among other things their structure and functions, procedure for access requests, records of information they hold and description of any arrangement allowing citizens' input in policy formulation or government performance, publish categories of records automatically available without access requests.[85]

Like the PAIA the ATIA does not provide for the making of regulations to provide for access to environmental information. Access to such information would be under the ATIA.

Just like the South African PAIA, Uganda's ATIA has had its share of implementation problems. Some of them are (based on a number of studies and reports[86]): the Government's reluctance to release information owing to a culture of secrecy supported by archaic and inconsistent laws such as the Official Secrets Act of 1964, bureaucratic hurdles, delays and excuses and lack of responsiveness in releasing information; the directorate charged with implementation of the Act was underfunded thereby unable to discharge its functions under the Act; judicial system problems such as a lack of technical expertise, delays in handling appeals on request complaints,

[84]Uganda's Access to Information Act, 2005, Section 34.
[85]Supra, Section 8.
[86]Schwarte C. (Ed.) FIELD Access to Environmental Information in Uganda, 2008.<http://www.accessinitiative.org/sites/default/files/FIELD_Access_Uganda.pdf> Accessed on 7th April 2013.

political influence in the judicial process and prohibitive litigation costs; lack of awareness by the public, civil servants and Non Governmental Organizations (NGOs) and journalists of the existence of odds the right of access under the ATIA, 2005 coupled with a lack of capacity among staff of public bodies to publicize and promote citizens' access.

The Act has been criticized that it merely focuses on "allowing access to official records" in contrast with say the United Kingdom Freedom of Information Act, 2002 which requires authorities to "communicate" information to requesters as well as "digest or summarize the information";[87] lack of resources, infrastructure and institutional capacity for disseminating information to a wide range of stakeholders as well as a lack of the basic technical equipment and communications systems such as internet connections and websites; and a lack of proper collaboration and participation between civil society and government.

Some of the exemptions provided for in the Act exceed those provided for under Article 41(1) of the Constitution and they may be said to be inconsistent with Article 41(1). Overall, the report notes that the ATIA has failed to achieve its purposes.

Besides the ATIA, 2005 Uganda has ATI Regulations 2011 which implement the ATIA, 2005. The Regulations set out procedures for citizens to request government-held information and for the government to respond to the requests. Pet Veit, Natalya Lozovaya and Catherine Easton in their paper "Improving Freedom of Information in Uganda"[88] investigated how the ATIA and the Regulations worked. They discovered that government officials demanded information requesters to give reasons why they wanted the information even though the ATIA and the Regulations did not require that reasons be given for requests. They also found that requests were often met with outright refusals and failure to respond to the requests. At times government officials would threaten to arrest or arrest information requesters. From these revelations, the writers observe that the passing of access to information laws is not enough, it is the first step in the process to ensuring freedom of information. They note that implementation of information

[87]Freedom of Information Act [UK], 2002 Section 1 para.1 (b) and Section 11 para.1(c).
[88]Pet Veit, Natalya Lozovaya and Catherine Easton, Improving Freedom of Information in Uganda. May 31, 2013<http://www.wri.org/blog/improving-freedom-information-uganda> Accessed on 16th April 2014.

law is complex and therefore governments must be politically and financially committed to making their freedom of information laws work for their citizens. They further recommend that policy-makers must possess the know-how to engage citizens and build the infrastructure for greater governance transparency.

The Ugandan Whistleblowers Act, 2010 also promotes access to information and is considered as a critical milestone in the "country's efforts to stem corruption and embrace transparency and accountability."[89] The Act aims at protecting individuals who in the public interest disclose information on irregular, illegal or corrupt practices in government or private bodies.[90] A whistleblower is defined in the Act as a person who on behalf of government or non-governmental institution makes a disclosure about an impropriety to an authorized officer.[91] It establishes procedures for Ugandan citizens to report on corruption or improper conduct, internally or to external government bodies. The Act prohibits victimization[92] against those who make the disclosures in good faith[93] and also waives criminal and civil penalties for disclosing secret information.[94] It provides for criminal sanctions against anyone who harasses a whistleblower.[95] The Act provides financially reward of up to five percent of the money recovered for whistleblowers who disclose information that leads to recovery of money as a result of the disclosure.[96]

The Ugandan experience demonstrates that there is need to come up with other laws that support and work in tandem with access to information laws for greater access to information. Further, government officials or private institutions will not release to the public information on corrupt, illegal or unlawful practices where they are implicated. Consequently, there is need to come up with a legal platform that provides an environment where employees of government or private institutions disclose the malpractices.

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[89]ARTICLE 19 Uganda: ARTICLE 19 Lauds Whistleblowers Bill, Press Release, 8th March 2010. <http://www.article19.org/data/files/pdfs/press/uganda-article-19-lauds-whistleblowers-bill.pdf> Accessed 17th April 2014.
[90] Whistleblowers Act, 2010, preamble.
[91] Supra, Section 1.
[92]Supra, preamble, Section 9(2).
[93] Supra, Section 2(2).
[94] Supra, Section 10.
[95] Supra, Section 16.
[96] Supra, Section 19.

4.4 Critique and Lessons for Kenya and Conclusion

The lessons learnt are as follows:

1. Exemption provisions in the FOIA 2000 and the EIR such as non-disclosure of commercially confidential information or incomplete data, or that that the information relates to security or defence of the nation may be ripe for abuse. For instance it may be quite difficult to question that information is not confidential if the provider has said that it is. Similarly "incomplete information" exception could be used by a public authority to avoid disclosure by labeling documents "drafts" for instance as a device to avoid disclosure.

2. Overall, the EIR 2004 provides wider access to environmental information which would otherwise have been denied access under the FOIA 2000 on account of the many exceptions and narrow coverage of information under the FOIA 2000. This owes to the central importance and significance of environmental information in the sense that proper management and conservation of the environment as well as sustainable development can only be achieved if the public have unhindered and unlimited access to timely and relevant environmental information to enable them exercise their right of direct participation in decision-making concerning the environment. The UK freedom of information law illustrates also that a country may have a general law on freedom or access to information and make special regulations for access to other information owing to the unique status of the information, such as environmental information.

3. Kenya's freedom of information legislation should provide for the following: a specialized body should be established for purposes of monitoring and evaluating public bodies' compliance with the provisions of the Act. The body should provide training to public officials on access to information laws and their roles in providing information to the citizens; conduct public education and awareness campaigns on access to information; be independent in its operations and finances to be able to carry out its mandate effectively without fear or favour; organizations should be required to have efficient information-keeping systems complete with manuals on what information is in their possession and how

the same can be accessed by the public – compliance timeline for this requirement should be provided for in the legislation; provisions on proactive disclosure by public bodies; reporting mechanisms on how public bodies are complying with their duties under the legislation; public and private bodies to designate information officials who will be responsible for handling and processing information requests in accordance with the provisions of the legislation.

4. From the discourse it has been seen that access to information is not an event but a process that requires "long term commitments."[97] It starts with the recognition of the right either through a Constitution or Statute and providing for a statutory framework for the regulation of access to information. It is not enough to enact an enabling legislation. There is a further requirement that the enabling legislation should actually ensure that the right is realized.

5. The UK legislation on access to information illustrates that besides the general law on access to information, a provision should be made in the general law providing for regulations to be made for access to environmental information. The regulations should override any law or rule that would prevent disclosure in accordance with the provisions of the regulations. The main purpose is to offer greater access to environmental information owing to the importance of environmental information in the day to day decision-making processes.

6. The FOI laws of the countries studied above have had a number of challenges be it the manner the provisions of their respective statutes were framed, the provisions being inconsistent or not complying fully with Constitutional provisions on the right, procedural hurdles in accessing information, lack of political will to implement the Acts, lack of funds or specialized bodies and designated officers in public bodies to implement the Acts, lack of awareness as well as training among public officials and the public on the provisions of the Acts, access to information costs, the problems of interpretation of the Acts, too many

[97]House of Commons Constitutional Affairs Committee, "Freedom of Information Act, 2000 – Progress Towards Implementation", Vol. 1, Nov. 30, 2004, quoting Lord Falconer of Thornton, Speech to Campaign for Freedom of Information, March 1, 2004.Available at the Department of Constitutional Affairs. <www.dca.gov.uk/foi/bkgrndact.httop> Accessed 30th March 2013.

exemption clauses negating access and Constitutional provisions on access, political interference and a culture of secrecy and resistance to transparency and accountability in government, among others.

7. Where there is a strong civil society involvement governments and information holders' failure to comply is more often noticed and challenged.

8. Through continued use of the law and monitoring implementation problems may be highlighted and the government obligated to assign greater emphasis and resources to resolve obstacles.[98]

9. Principles for good record making and records management should be included in the information legislation.

10. Lead agencies involved in the implementation of the information laws should be given sufficient powers and resources to implement the law.

11. The government and lead agencies should engage public servants early and strategically in establishing and implementing the law. This will be through continued training on the provisions of the law and on how to handle information requests.

12. There is need for staff guidelines, manuals and implementation plans on access to information.

13. Good record keeping is a must for access to information. This will require that information holders embrace best practices on storing information and also keep a register of information requests and evidence of how the request have been dealt with. The registers and evidence may be used for scrutiny by independent bodies such as Parliament and the body that monitors and oversees the implementation of the information law.

The study demonstrates that implementation and enforcement of FOI laws depend to a large extent on how the provisions of the Act are crafted and provided. The best practices, key policy and legal principles underpinning access to information laws, lessons learnt from other countries who have enacted freedom of information legislation should be taken into account in order to

[98] Laura Neuman and Richard Calland, *Making the Access to Information Law Work, IN THE RIGHT TO KNOW.,* Ann Florin (Ed), (Columbia University Press, 2007), p. 6.

come up with access to information laws that promote and facilitate access to information. Further, it must be realized implementation of access to information laws is a complex process that calls for the government to be committed politically and financially to making sure that the laws work for their citizens.

CHAPTER FIVE

5.0 RESEARCH FINDINGS ON ACCESS TO ENVIRONMENTAL INFORMATON IN KENYA AND IMPACT ON CONTENT OF ACCESS TO ENVIRONMENTAL INFORMATION LAW

5.1 Introduction

This Chapter discusses findings from field research conducted by the researcher. An examination of the Kenyan Freedom of Information Bill, 2012 and how the research findings impact on the Bill is provided. Key elements of the Bill related to the study are also discussed with a view to find out how the requirements of access to environmental information can be provided for in the Bill. Being a 2012 Bill its heading would be amended by Parliament when being considered. Therefore the research will use the phrase "the intended freedom of information law."

5.2 Research Findings

The researcher conducted field research in relation to access to information in general and environmental information in particular. The field research was administered by way of questionnaires, as well as by face to face interviews and telephone calls. Individual respondents were:

1. Officers from government institutions in their private capacities
2. Individuals from Non-governmental institutions in their private capacities
3. Individuals from private organizations in their private capacities
4. University Lecturers
5. University and middle level college students
6. Individuals on the street, particularly in Nairobi.

A random selection of individual respondents was done.

Institutional respondents included the following:

1. The National Environment Management Authority (NEMA)
2. The Office of the Attorney General & Department of Justice
3. The Ministry of Lands, Housing and Urban Development
4. The National Council for Law Reporting
5. The University of Nairobi's School of Law
6. The Commission on Implementation of the Constitution
7. The Commission on Administrative Justice
8. The Kenya Law Reform Commission
9. The Kenya Forests Service
10. The Kenya Parliament
11. Kituo Cha Sheria
12. The Ministry of Information and Communications
13. The Ministry of Environment and Natural Resources
14. The Water Resources Management Authority
15. The Athi Water Services Board
16. The Green Belt Movement
17. Media Houses and other institutions.

The research findings are based on respondents based in Nairobi. In conducting the interview, the sample size was limited to the general public and institutions within Nairobi County. The selection of Nairobi County owes to time constraints. However, the field research benefitted from comparative analysis and literature review of relevant secondary data such as policy papers, official documents, reports, journals, magazines, newspapers, periodicals and published works. The research findings are capable of generalization to the rest of the country because most of the institutional respondents have regional or local branches in various parts of the country and the information they gave was not limited to their offices based in Nairobi.

The purpose of the field research on individual respondents was to collect data and analyse how individuals/citizens in Kenya access information in general and environmental information in particular, from whom they seek information, why they need the information and any procedural

hurdles encountered in seeking the information. For institutional respondents the research aimed at finding out the nature of information in their possession/custody/control, the information storage systems, whether or not the public could access the information, the form or mode of access, whether or not some information in their possession/custody was or was not subject to disclosure, whether or not applicants for information met the costs for production of information, what framework the organization had for providing access to information to the public and individual persons.

The interviews were intended to contribute to informing the research on what should be contained in the Kenyan legislation on access to information in general and environmental information in particular to form one of the best legislation on access to environmental information.

The survey covered 19 organizations in total. The organizations ranged from government ministries, departments and agencies to non-governmental organizations dealing with environmental matters. The sample also comprised two leading media houses. The average number of employees in these organizations is 262.89 with a minimum of 4 and a maximum of 2000.

There were 41 individual respondents. The individual respondents were randomly selected. As regards institutional respondents the research method employed was to pay a physical visit at their offices and request the relevant officer to be interviewed or fill the questionnaire. In some cases the institutional respondents asked the researcher to collect the questionnaire on another date once filled by their relevant officer. In some cases the research made inquiries by telephone. Most of the respondents acceded to the request to fill the questionnaire or to be interviewed. The few who did not fill the questionnaire stated that they did not have the time to fill the questionnaire. Some did not give reasons for the refusal.

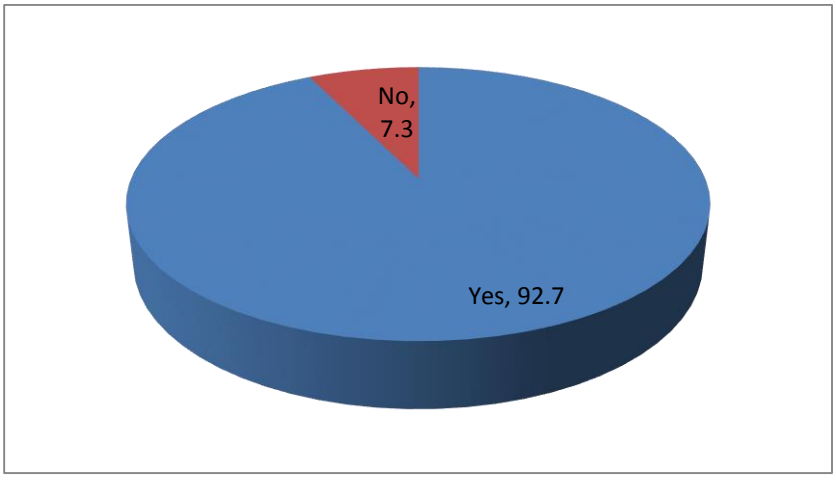
5.3 Research Findings from Individual Respondents

There were 41 individual respondents for this survey from which this report is based. The individuals were randomly selected and were mainly drawn from university lecturers, students and members of the public.

5.3.1 Information on Environment

Over 92 percent of the respondents surveyed have been in need of information on environmental issues such as waste management, local pollution, flood risk, planning applications and climate change or global warming among others. Only 7.3 percent indicated that they have never wanted information on environmental issues as further presented in figure 2 below.

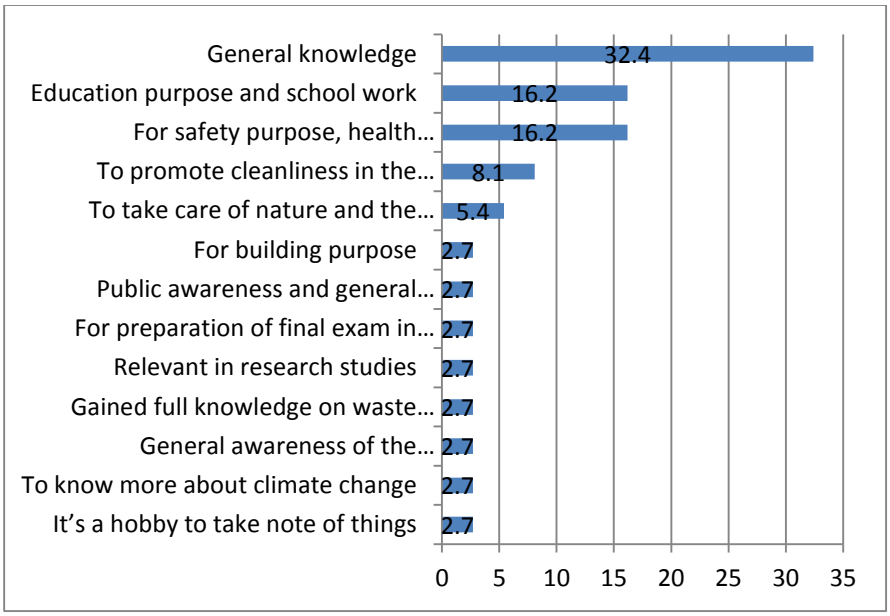
Figure 2 – whether Kenyans seek environmental information



Source: drawn by researcher

When further asked about the relevance and or use of the information, 32.4 percent of the respondents indicated that it was for general knowledge followed by 16.2 percent who needed the information for education purposes and for safety purposes respectively. Other reasons for the relevance of the information sought are as presented in figure 3 below.

Figure 3 – reasons given by Kenyans for seeking environmental information

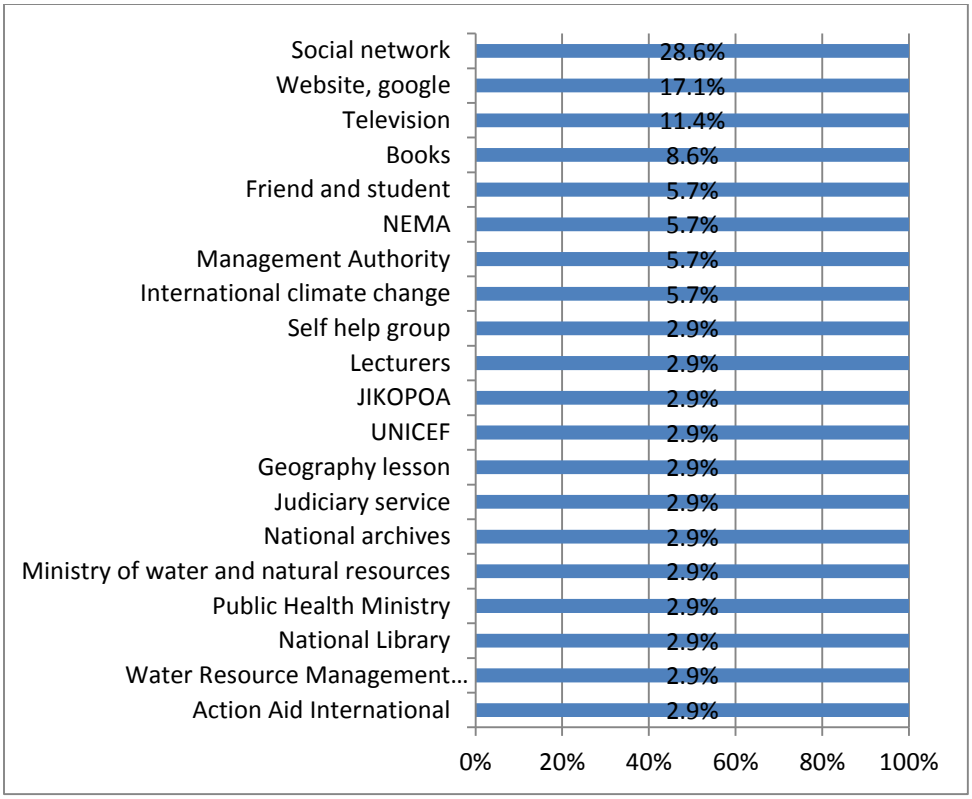


Source: drawn by researcher

5.3.2 Sources of Information

Among those who wanted information on environmental issues, 78 percent indicated that they got the information as opposed to 22 percent who said that they did not get the information. When those who got the information were asked to state the source of the information, 28.6 percent cited from social networks, 17.1 percent cited online websites, 11.4 percent cited by watching television while 8.6 percent from resource books. As presented figure 4 below.

Figure 4 – sources of environmental information in Kenya

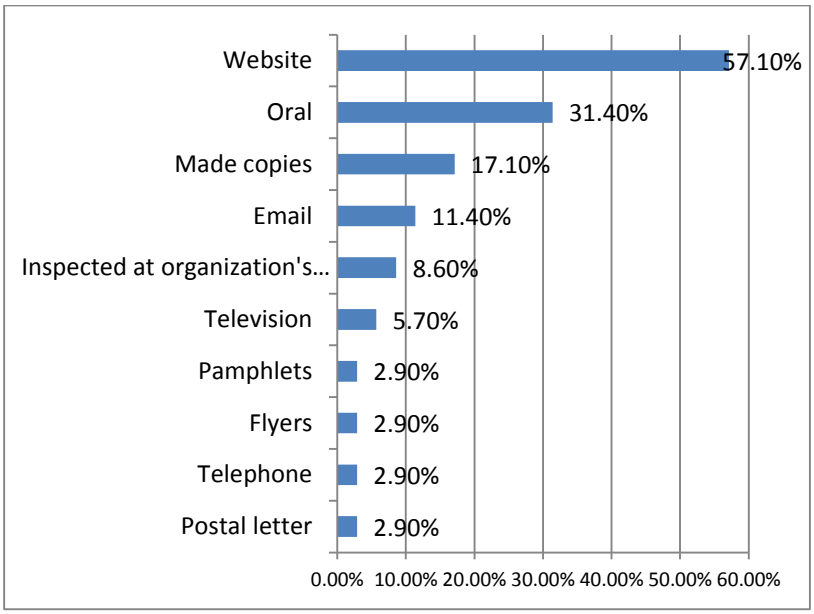


Source: drawn by researcher

5.3.3 Forms of Information

When the respondents were asked in which form was the information supplied to them, 57.10 indicated that they downloaded the information from the website, 31.4 percent said it oral, 17.1 percent said the copies of the information was done for the them, 11.4 percent had the information emailed to them while 8.6 percent captured it while watching the television as represented by figure 5 below.

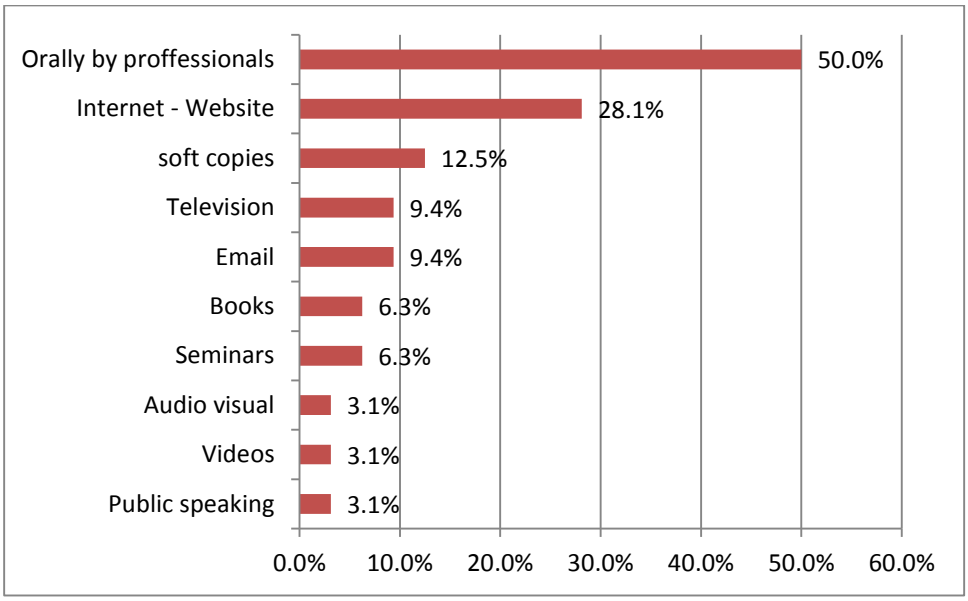
Figure 5 – forms of access to environmental information



Source: drawn by researcher

When further asked about their preferred method or form of obtaining the information they got from the sources above, 50 percent indicated that they would prefer it orally by a professional, 28.1 percent prefer a download from the internet, 12.5 percent prefer a soft copy from the organization, 9.4 percent prefer watching it on television while 9.4 percent prefer an email as represented by figure 6 below.

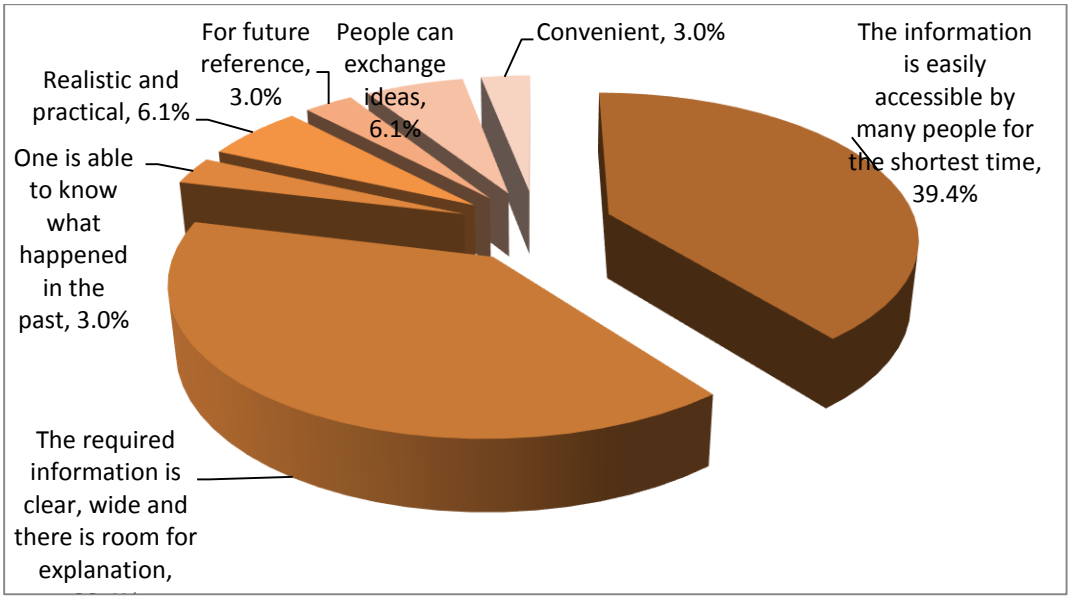
Figure 6 – forms of access to environmental information preferred by respondents



Source: drawn by researcher

Among the reasons extended for the preferred modes above are; the information is easily accessible by many people in the shortest time (39.4%), the required information is clear, wide, and there is room for explanation, realistic and practical (6.1%) and people can exchange ideas (6.1%) as represented by figure 7 below.

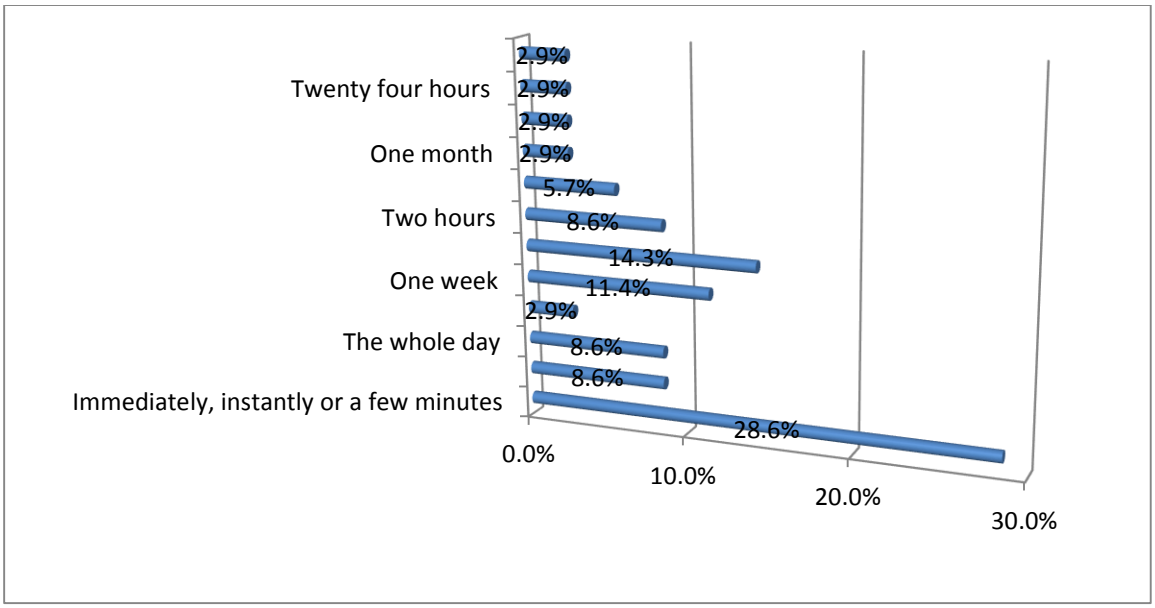
Figure 7 – reasons for preferred forms of access to environmental information



Source: drawn by researcher

Further, 28.6 percent of the respondents indicated that the information is immediately obtained from the television, internet, orally and audio visual as represented by figure 8 below.

Figure 8 – time taken to access environmental information sought

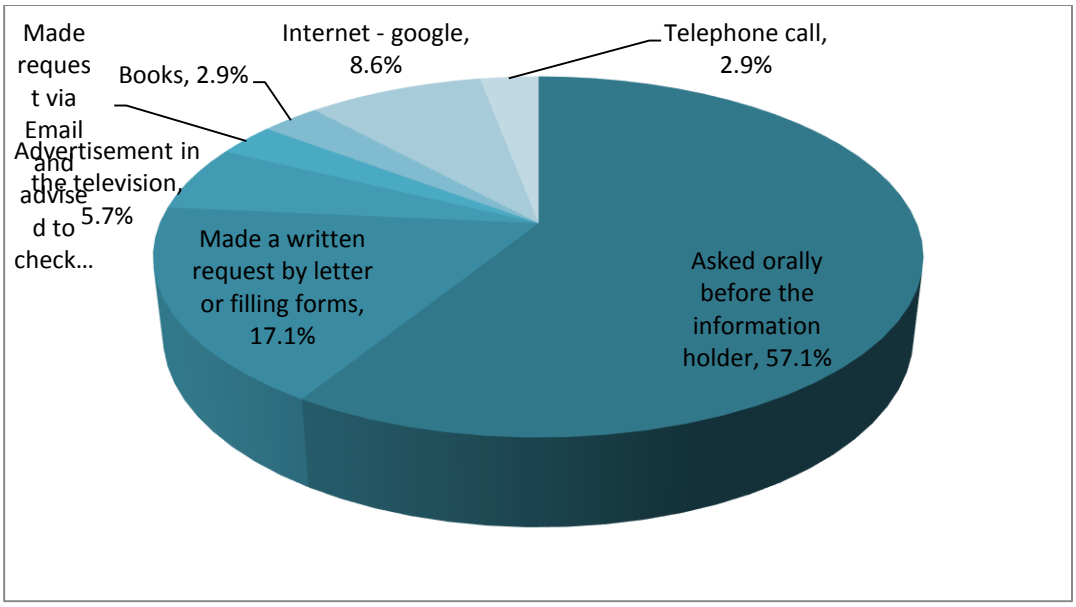


Source: drawn by researcher

5.3.4 Procedure for Obtaining Information

Respondents were also asked to state the procedure they used in seeking the information. From the figure below, 57.1 percent asked orally before the information holder, 17.1 percent made a written request by letter or filling some standard forms, 8.6 percent used the internet, 5.7 percent watched an advertisement on the television, 2.9 percent made a telephone call, 2.9 percent obtained a book while 2.9 made a request via email and were asked to check on a particular website as represented by figure 9 below.

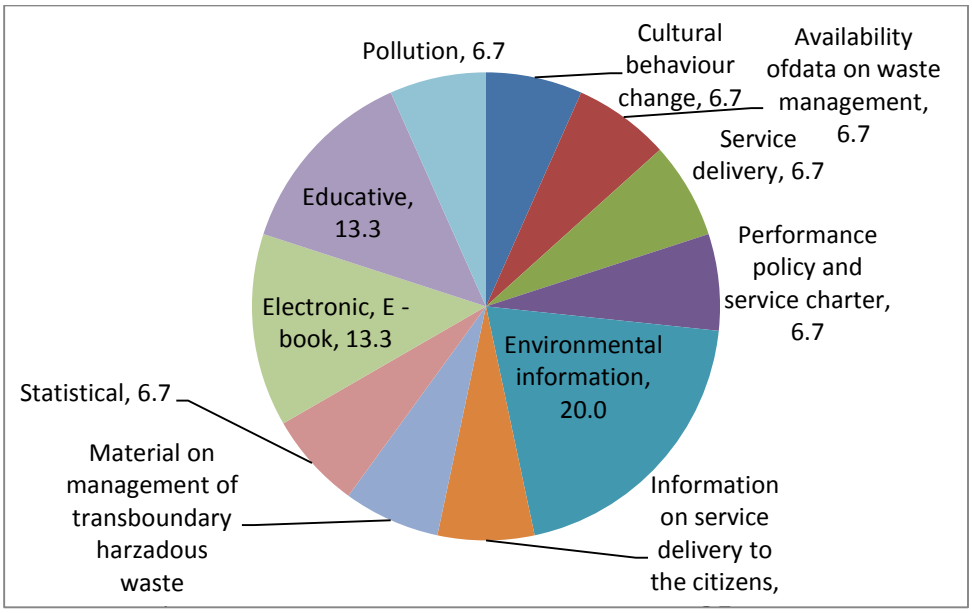
Figure 9 – request procedures for access to environmental information



Source: drawn by researcher

Over 26 percent of the respondents indicated that they paid for the information supplied to them as opposed to 73.5 percent who said that they never paid to obtain the information. Further, of those who paid to obtain the information, 81.8 percent said that the charges were reasonable or affordable as opposed to 18.2 percent who felt that the charges were high for the kind of the information they obtained. Respondents were evenly split at 50 percent about the question on if the holder of the information informed them if they could have accessed the information free of charge. The figure below provides a list of information that the respondents indicated that they were advised they could get it free of charge – see figure 10 below.

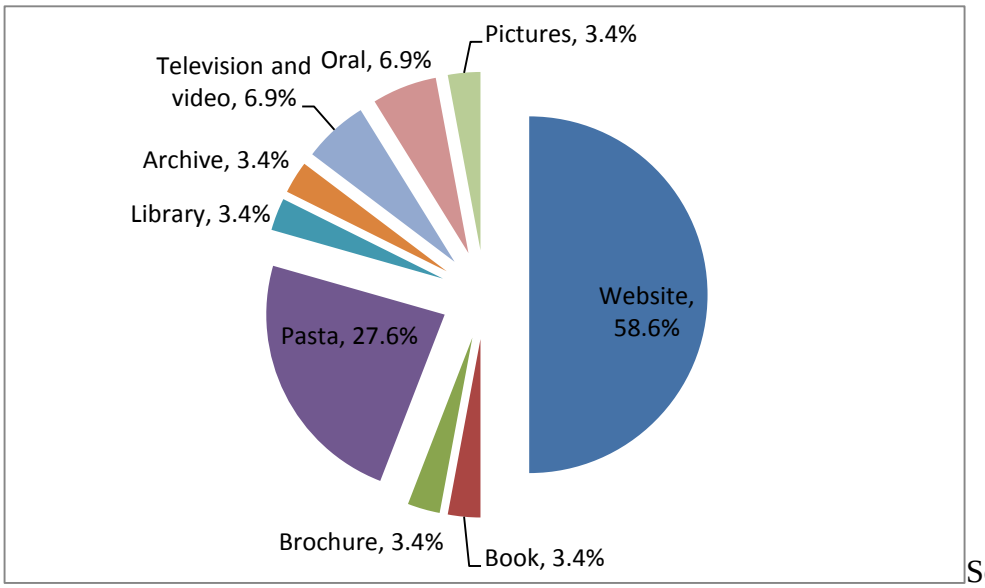
Figure 10 – environmental information accessible free of charge/costs



Source: drawn by researcher

The information that was obtainable free of charge was the website (58.6%), pasta (27.6%), television and video (6.9%), oral (6.9%), pictures (3.4%), archive (3.4%), library (3.4%), book (3.4%) and brochure (3.4%) as further presented in 11 figure below.

Figure 11 – other environmental information accessible free of charge



Source: drawn by researcher

5.3.5 Refusal for Access to Information

Only 10.5 percent of the respondents have been denied access to environmental information. Over 89 percent said that they have never been denied access to any environmental information from any source or institution. Of those who were denied access to information, 80 percent were not given any reason. Of those who were given a reason for refusal, they were told that they needed to follow procedure to obtain the information they were interested to obtain.

Of those who asked to be given an avenue which they could follow to obtain the information they wanted, 50 percent were told to make an application to an internal review body, 40 percent were told to ask a tribunal while 10 percent were told to come with a court order. Over 66 percent of the respondents followed the procedure above to obtain the information as opposed to 33.7 percent who gave up and resigned to obtain the information elsewhere.

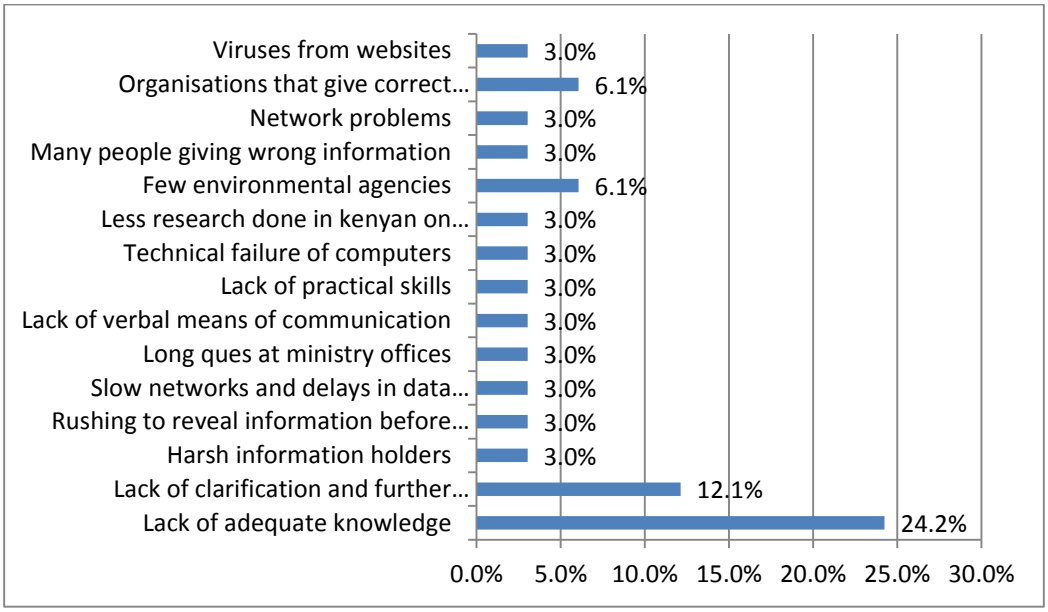
Among the reasons extended by those who never followed the procedure asked to obtain the information, 62.5 percent indicated that it could have been time consuming and hence run out of

time to apply the information they were seeking, while an identical 2.5 percent cited legal costs, prohibitive charges and cumbersome and complex procedures respectively.

5.3.6 Difficulties in Seeking Information

The figure below provides the difficulties respondents encountered while seeking environmental information. From the figure, lack of adequate knowledge (24.2%) and lack of clarification and further explanation on environmental issues (12.1%) were the leading reasons cited as impediments on accessing environmental information. Other reasons cited are as presented in figure 12 below.

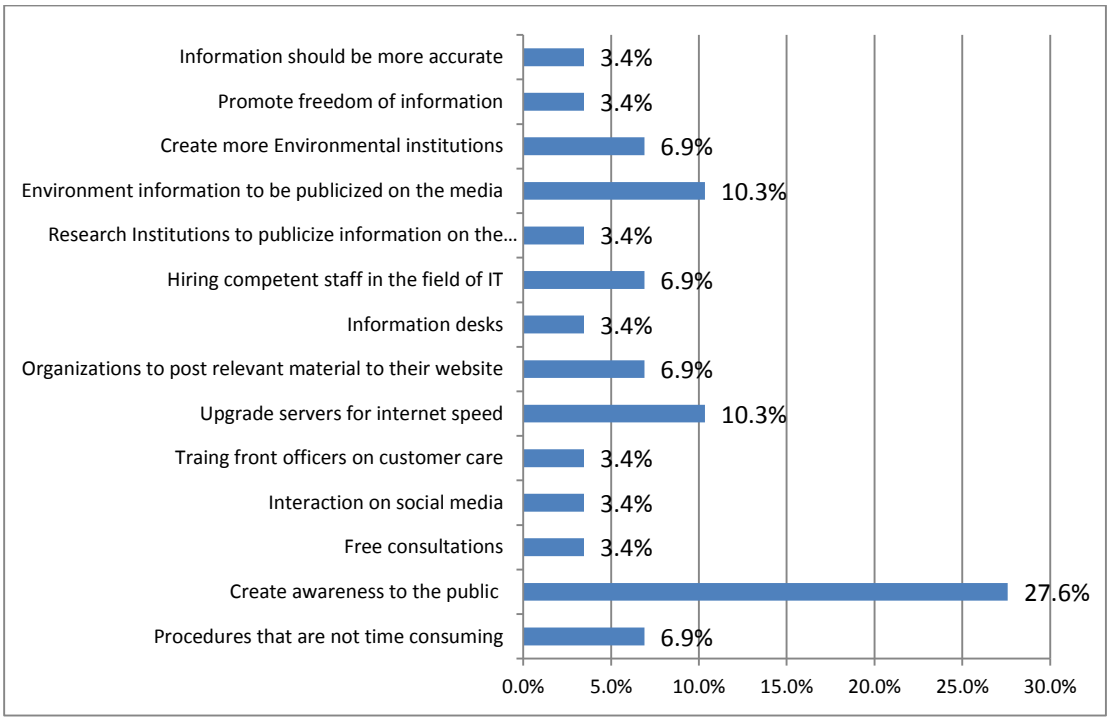
Figure 12 – obstacles to access environmental information



Source: drawn by researcher

To address the problems cited above, respondents suggested the following; create public awareness on environmental issues (27.6%), upgrade computer servers to allow for faster internet speeds (10.3%), publicize environmental information (10.3%), hire competent staff in information technology (6.9%) and create more environment institutions (6.9%) as shown in figure 13 below.

Figure 13 – measures suggested by respondents for greater access to environmental information



Source: drawn by researcher

5.3.7 Awareness on Freedom of Information Bill, 2012

Over 55 percent of the respondents are aware of the freedom of information bill 2012 as opposed to 45 percent who indicated that they are not aware of such a bill. Further, only 16.2 percent of the respondents have read the bill. From those who have read the bill, 50 percent indicated that it addresses environmental information.

When those who have read the bill were asked on what should be included in the bill to address environmental matters, 50 percent said that the bill should contain clauses on the ease of access to information, 25 percent of said that it should have stiffer penalties for offenders while 25 percent said that the bill should contain information on how to manage waste in the communities effectively.

5.4 Research Findings from Corporate Respondents

A total of 19 corporate were interviewed.

5.4.1Functions of the Organizations

Overall, from the table below, the organizations had varied functions and objectives in the country. The functions range from environmental, advocacy, empowerment to dissemination of information through public forums.

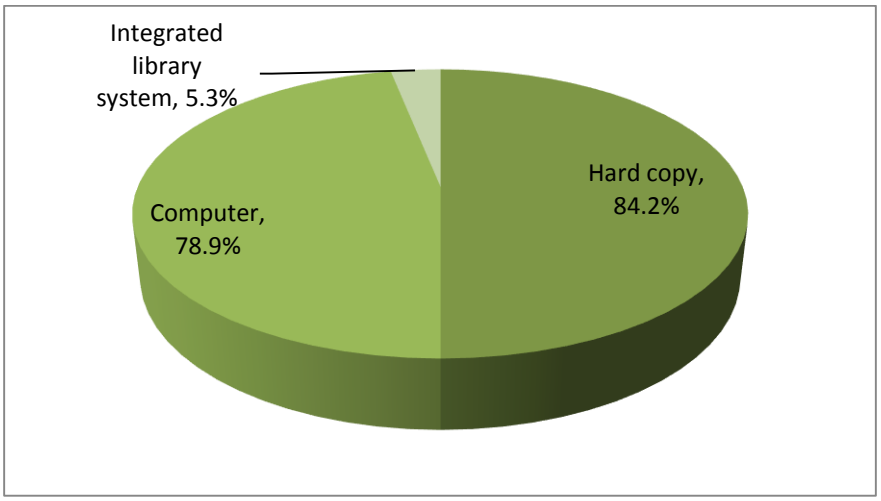
Functions of the organization
Provide advisory services on management of public records in the archives
Acquisition and preservation of public records in the archives
Provision of reference services to archival sources
Increase access to water and sewerage service
Human rights advocacy
Public awareness on human rights
Dissemination of information to relevant users. Empower local media personalities
Carry out survey to ensure proper management and conservation of the environment
Establish and review land use guidelines
Educate the public on law matters, housing and urban development
Regulations of telecommunications
Create awareness on political, social and economic issues.
Empower citizens to take part in governance and political processes.
Empowering youth with life skills
Inform, educate and entertain the public.
Report, publish and broadcast
Helping industries to be environmentally sustainable through trainings, assessments/ audits and sharing knowledge among industries
Humanitarian response on waste management

Help the community members embrace renewable energy

5.4.2 Storage Systems

The figure below presents the existing storage systems used in the institutions surveyed. From the figure, 84.2 percent keep hard copies of information, 78.9 percent store the information in computers while only 5.3 percent have an integrated library system as shown in figure 14 below.

Figure 14 – systems of storing information by organizations



Source: drawn by researcher

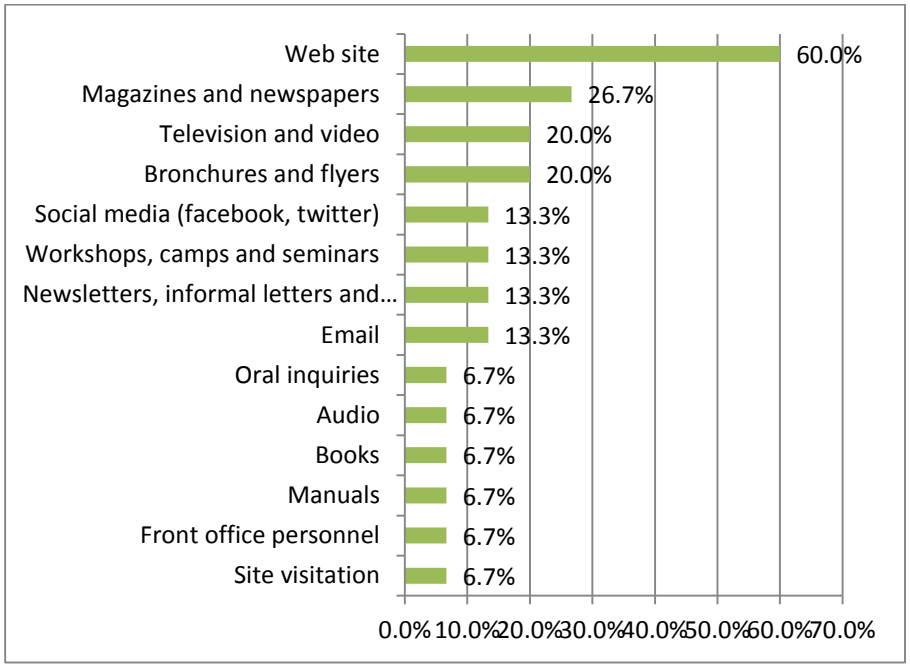
On the question of adequacy of the storage systems present, 68.5 percent of the respondents indicated that the storage systems were adequate as opposed to 31.5 percent who were of the view that the systems were inadequate and needed upgrading or keeping of information in both hard and electronic/soft forms.

5.4.3 Availability of Information

When asked if the information was available to the public or individual persons, 84.2 percent said it was available for both the public and individual access as opposed to 15.8 percent who indicated that the information is restricted to users.

Further, among those who said that the information is available to the public, 60 percent said the information is readily available on the organizations website, 26.7 percent said they have magazines and newspapers, 20 percent said it is aired on television while 20 percent have produced brochures and flyers for public consumption. This information is presented in figure 15 below.

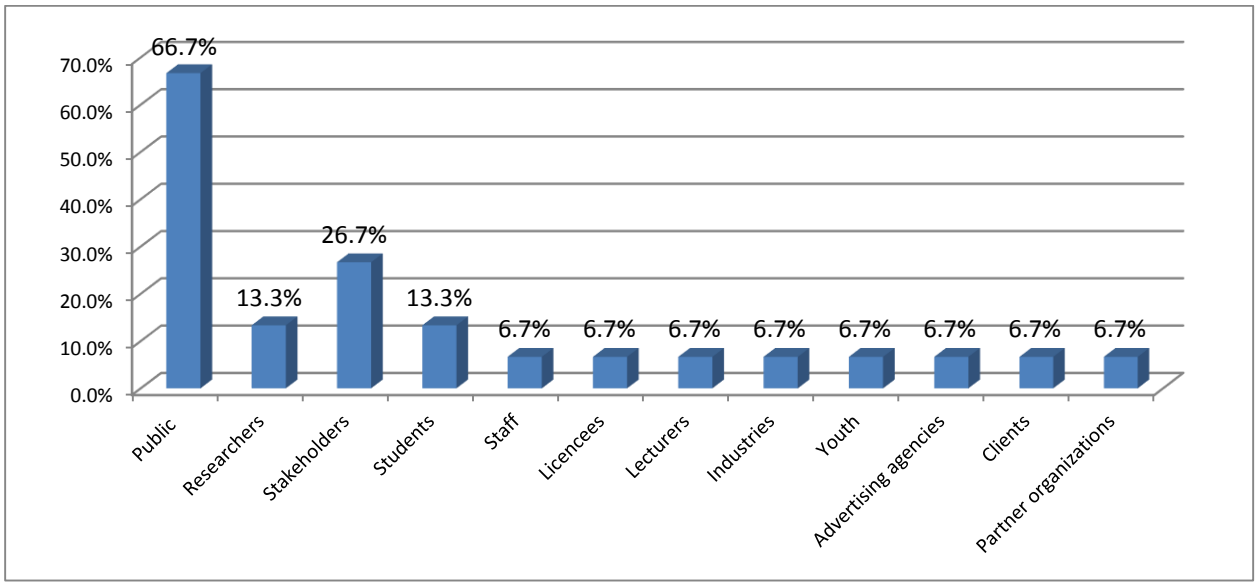
Figure 15–forms used by institutional respondents to provide information to the public



Source: drawn by researcher

Over 84 percent of the respondents indicated that they receive requests for access to their information compared to 15.8 percent who indicated that they do not get requests for their information. From figure 16 below, members of the public (66.7%), stakeholders (those who partner with the institutions be it organizations or individuals) (26.7%), researchers (13.3%) and students (13.3%) are the largest consumers of environmental information from the institutions surveyed as indicated by figure 16 below.

Figure 16 – requesters of environmental information from institutions

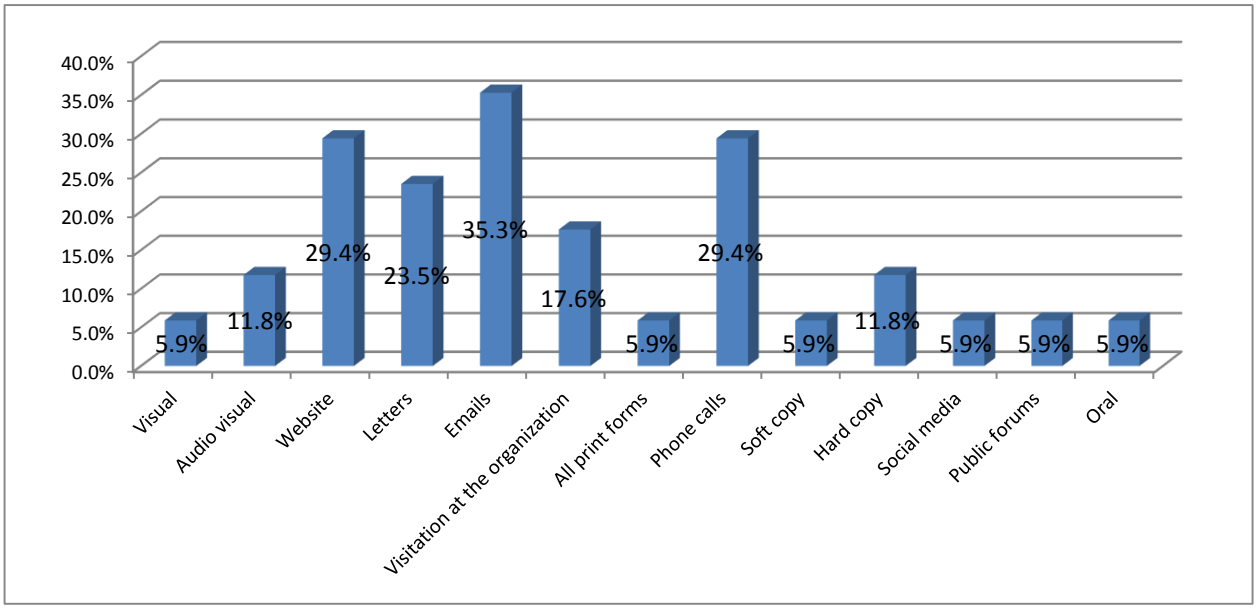


Source: drawn by researcher

Figure 17 below presents the information that is mostly sought by various users. From the figure, the information ranges from academic research data, political, social, legal, religious to documentaries and features and tapes.

The figure below presents forms of information in which users make request. From the figure, emails (35.3%), phone calls (29.4) and website (29.4%) are the leading forms of information requested.

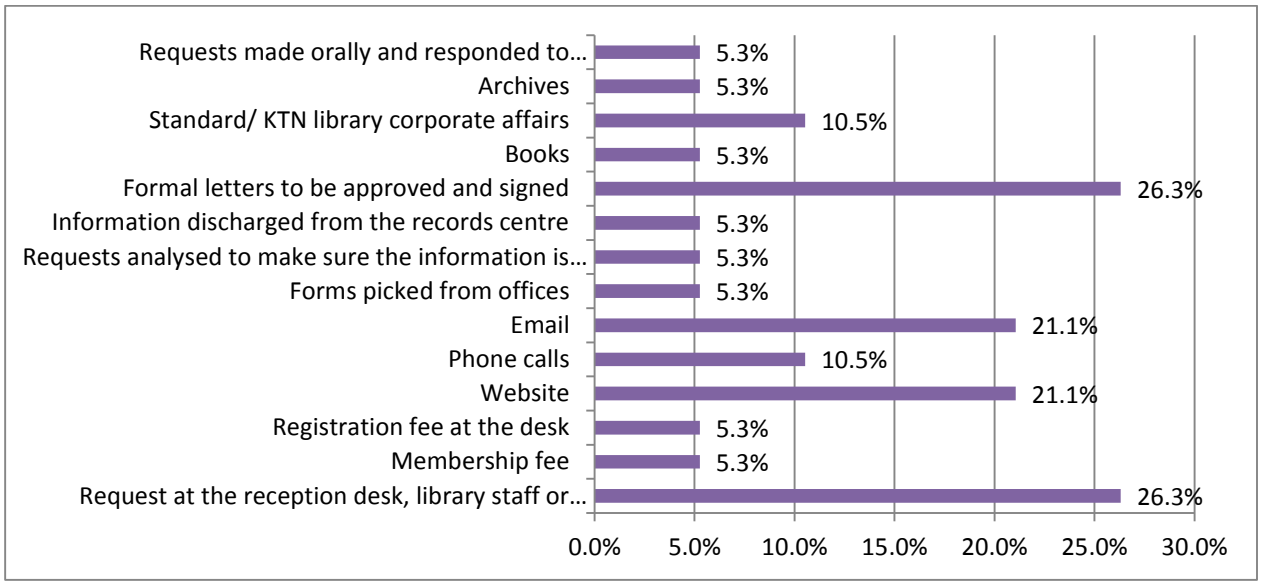
Figure 17 – type/form of environmental information sought from institutions



Source: drawn by researcher

The procedure for receiving, processing and granting requests for information in organization varies from a structured system that requires committee approval to basic log on the website. Figure 18below illustrates that formal letters to be approved by management (26.3%) and requests from the reception desk culminating in library approval (26.3%) are the leading procedures existing in most organizations surveyed. Other procedures mentioned are website (21.1%) and emails (21.1%).

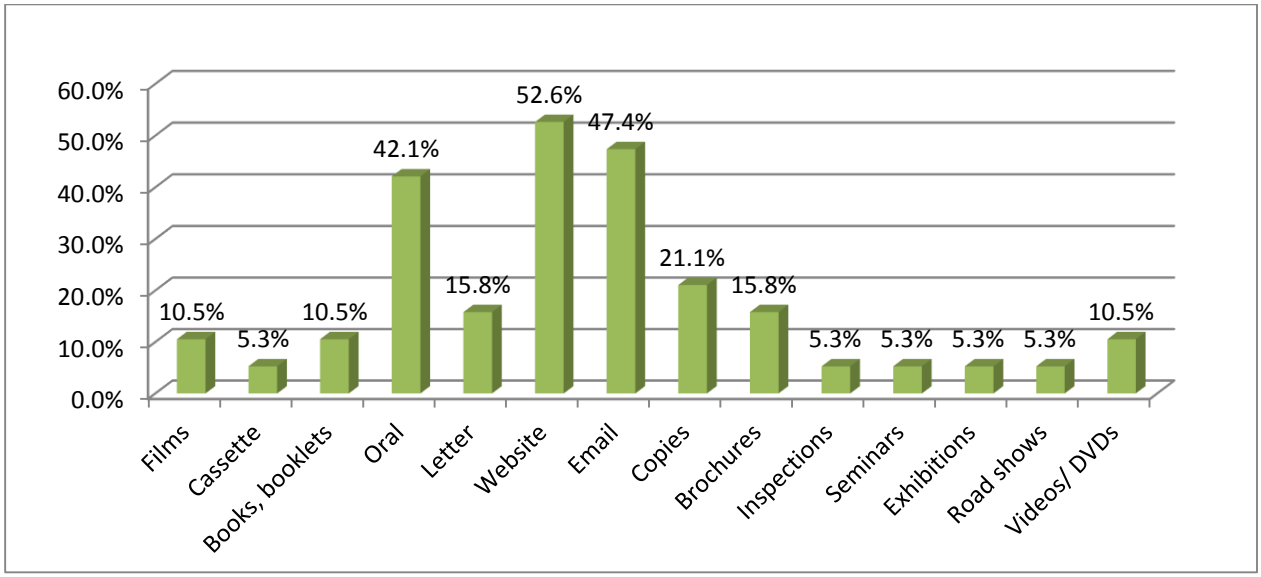
Figure 18 – procedures used to access/process information held by institutions



Source: drawn by researcher

The requests are mainly granted by an advice to visit the website (52.6%), emails (47.4%) and oral communication (42.1%) as presented in figure 19 below.

Figure 19 – forms of access to information held by institutions

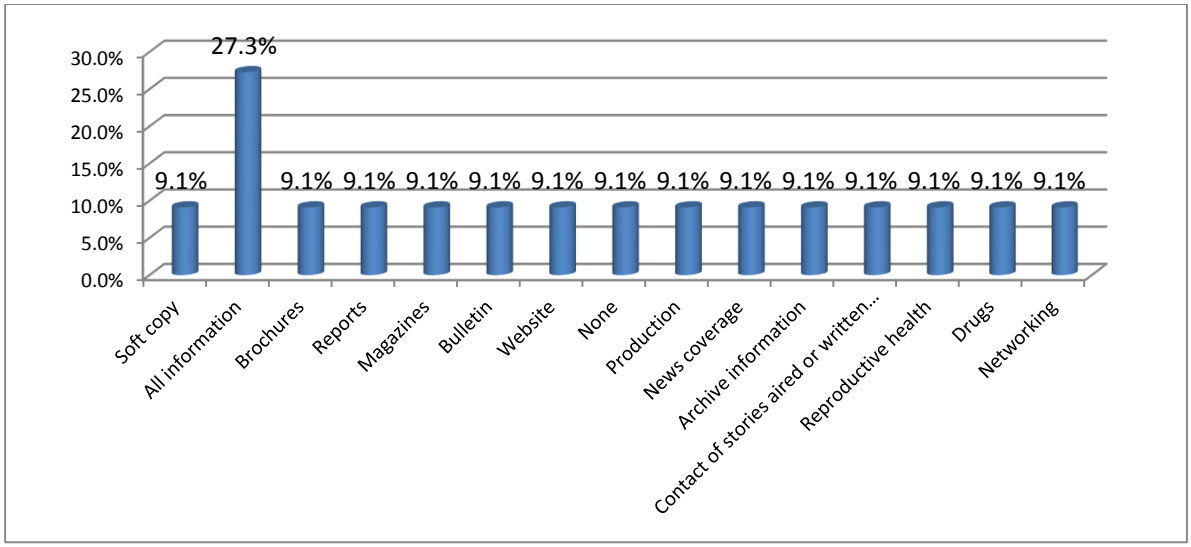


Source: drawn by researcher.

5.4.4 Fees for Accessing Information

Only 10.5 percent of respondents said that the institutions surveyed charge a fee for accessing information by members of the public as opposed to 88.9 percent. Further, the fee is not charged on all the types of information. Figure 20below presents the information the organization supplies at no cost. As indicated above, there are some organizations that do not charge for all the information they provide to the public (27.3%).

Figure 20 – costs for access to information held by institutions



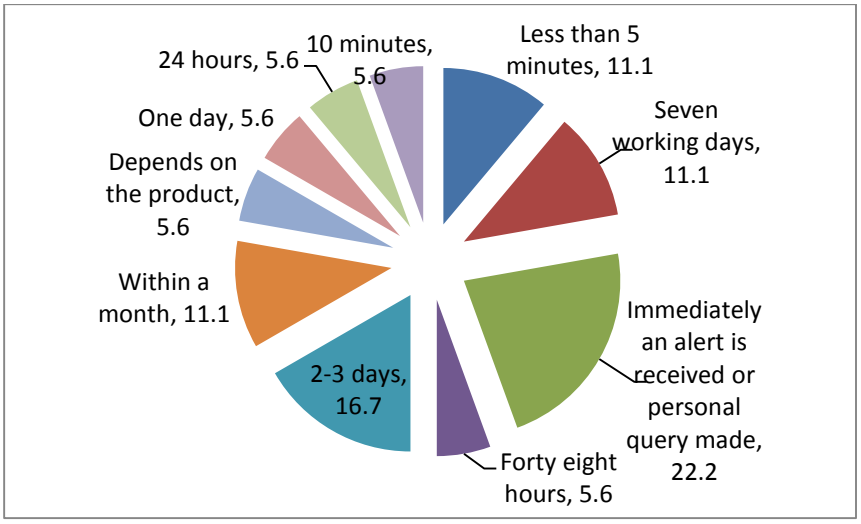
Source: drawn by researcher

Among those who charge some fee to access their information, some charge the registration fee, a fifteen minute television programme costs Kshs. 30,000 while for some, the fee is dependent on the service sought.

5.4.5 Time Taken for Response

From figure 21below, the time taken to respond to requests varies from immediately to over seven working days. Over 22 percent of the respondents indicated that the response is immediate followed by 16.7 percent who said that it takes 2-3 days.

Figure 21 – time take to process and respond to information request

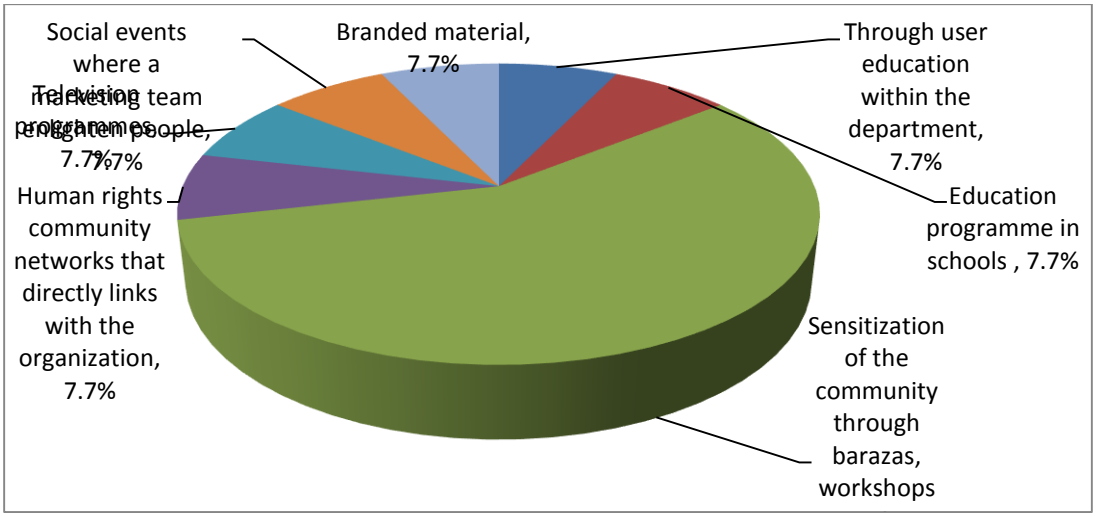


Source: drawn by researcher

All the institutions surveyed have been providing responses to requests for environmental information for over 5 years.

Respondents were asked on whether the organization provides help to improve public understanding of technical and specialist information or the nature of services rendered. Over 88 percent of the respondents indicated that they do offer technical and specialist information on what they are engaged in while 11.8 percent said that they do not offer such services. Figure 22below presents how various organizations provide technical and specialist information to their clients. It sufficed that, 61.5 percent of the respondents conduct community sensitization through workshops, seminars and *barazas* (informal gatherings).

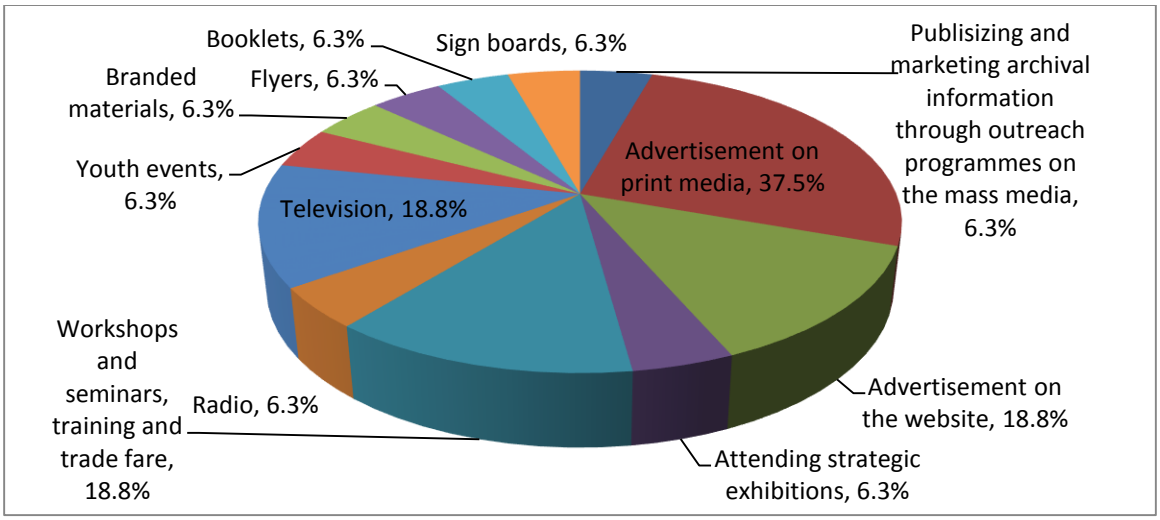
Figure 22 – Technical and specialist services provided by institutions in what they are engaged in



Source: drawn by researcher

Organizations promote provision of general and environmental information to the public through advertisements on television (18.8%), workshops/seminars (18.8%) and advertisement on the website (18.8%) as shown in figure 23below.

Figure 23 – forms in which general and environmental information is provided to the public



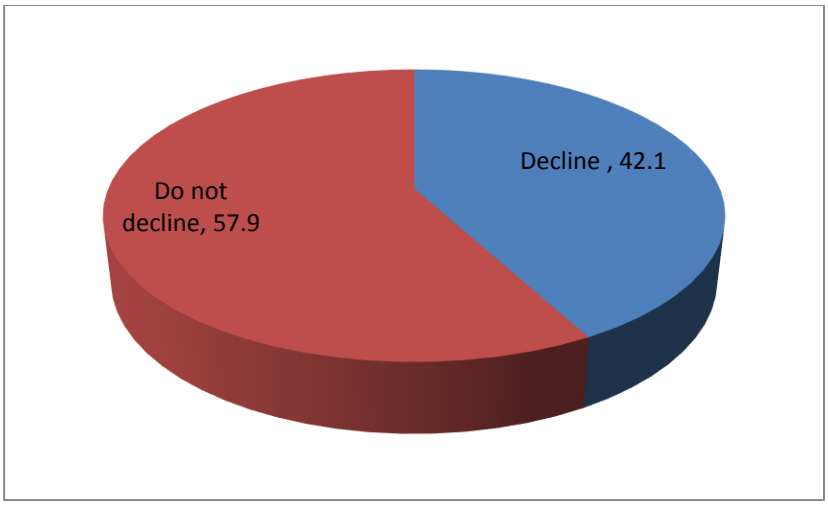
Source: drawn by researcher.

Most institutions are proactive and respond to requests promptly in providing information to the public. The newspapers (60%), emails and websites (53.3%), television (33.3%) and radio (26.7%) are the means through which organizations use to disseminate information to the public. 77.2 percent of the respondents indicated that they normally refer to the relevant institution for the information they cannot provide.

5.4.6 Declined Requests

Over 42.1 percent of the respondents stated that they declined to grant requests for information in their possession if the information was private and confidential (50%), related to their employees (for example media personalities) (10%), when the information is about other institutions such as police or politically exposed persons (10%), the information is damaging to one of their clients (10%), the request is not genuine (10%) and where one refused to declare the use for the information sought as presented in figure 24 below.

Figure 24 – Responses to information requests



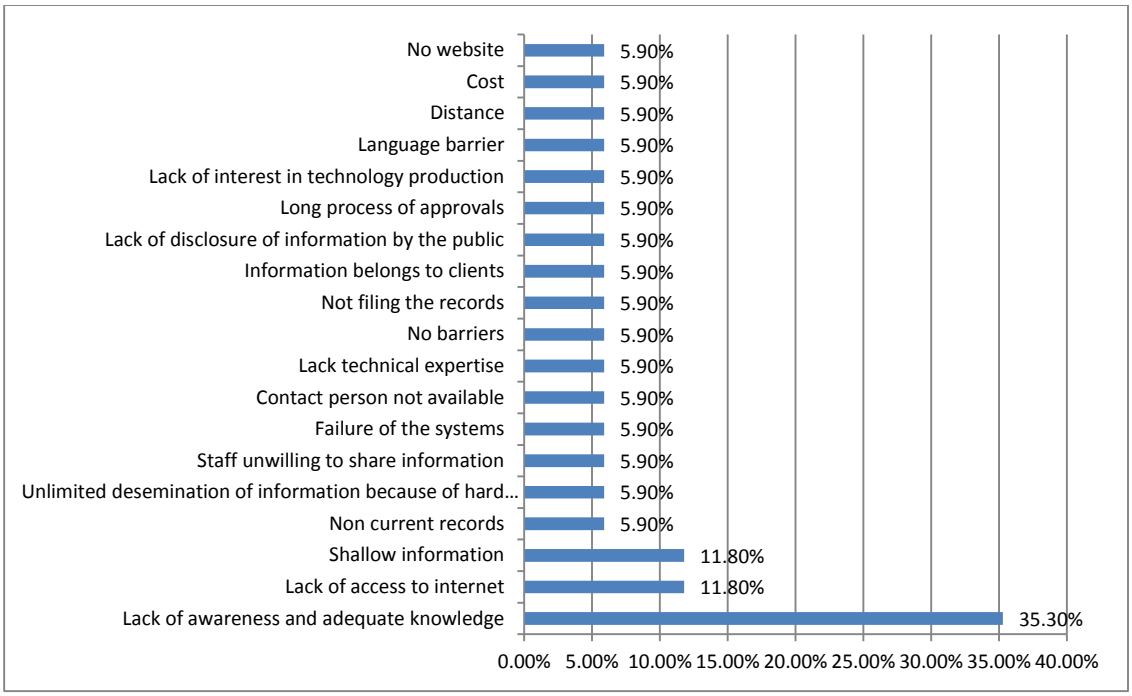
Source: drawn by researcher

Requests on private and confidential information, cases in court or before a tribunal, bank account information, security institutions, classified information and legal matters are automatically declined by the institutions surveyed.

When further asked why they automatically decline to give the information above, the Respondents gave a number of reasons such as that the information was only meant for member organizations only, laws of the organization prohibited, the information was confidential and private, disclosure of the information would compromise state security, disclosure of the information would amount to a breach of contract between organization and client, or that the information was sensitive information that could compromise the image of the organization.

The major barriers to accessing environmental information are lack of awareness and adequate knowledge on the sources of information (35.3%). This is followed by lack of access to internet (11.8% and shallow information (11.8%). Other barriers are as presented in figure 25 below.

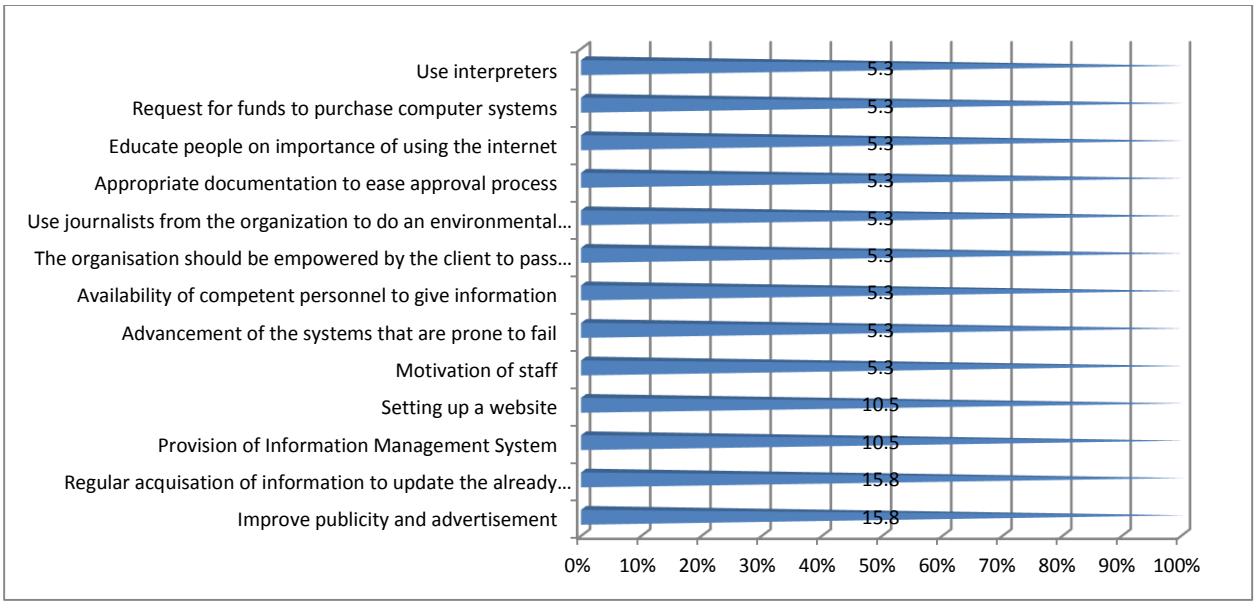
Figure 25 – barriers to accessing environmental information



Source: drawn by researcher

Among the measures taken to address the above barriers are; improving publicity and advertisement (15.8%), regular acquisition of information to update the existing (15.8%), provision of information management system (10.5%) and setting up of a robust website (10.5%) as further presented in figure 26below.

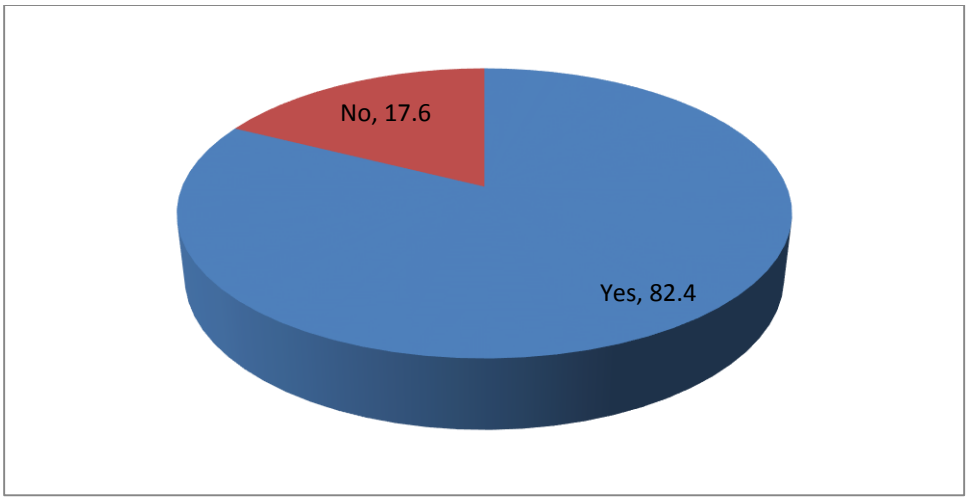
Figure 26 - measures taken to address access to information barriers



Source: drawn by researcher

Over 82 percent of the respondents have identified examples of good practices for accessing information on environmental matters over time as opposed to 17.6 percent as presented in figure 27 below.

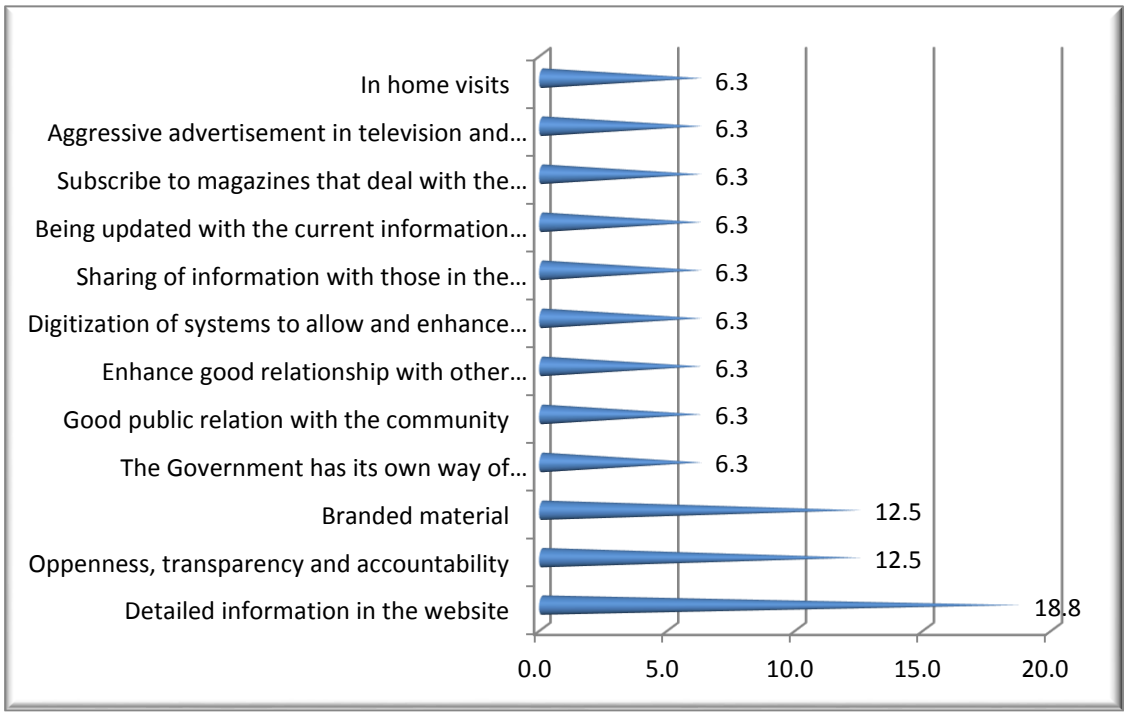
Figure 27 – institutional responds that identified good practices for access to environmental information



Source: drawn by researcher

When further asked to explain some of the good practices they have identified from their interaction with other similar bodies, posting detailed information on the website (18.8%), openness, transparency and accountability (12.5%) and disseminating branded materials (12.5%) among others as presented in figure 28 below.

Figure 28 – examples of good practices for access to environmental information – identified by institutional respondents

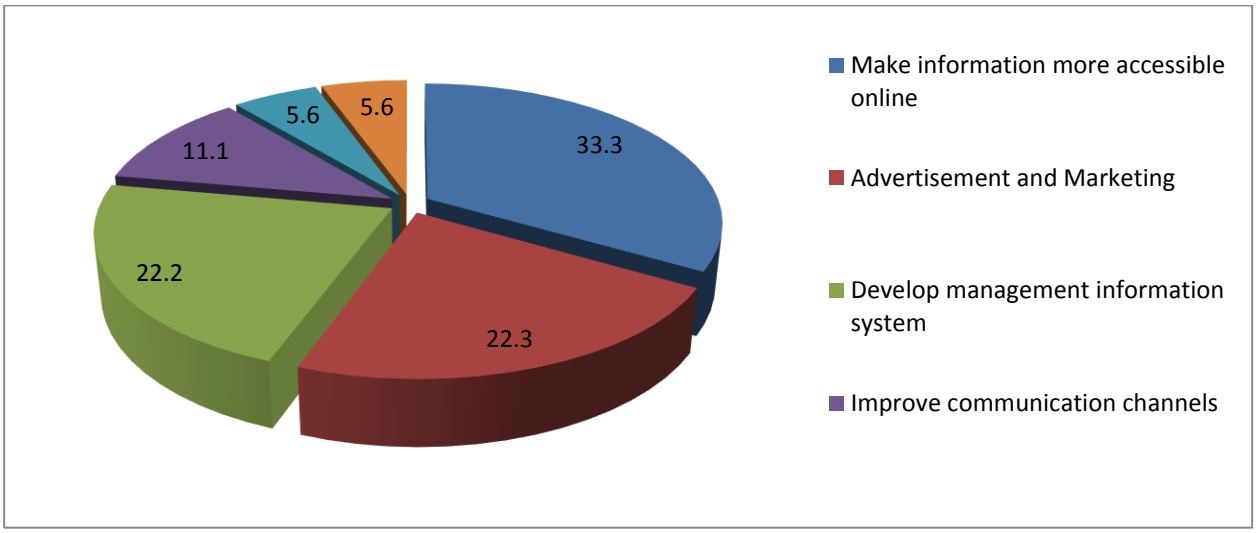


Source: drawn by researcher

5.4.7 Top Priority

To improve the provision of information to the public, the respondents were finally asked about their top priority be in the next 12 months. From the figure below, making information more accessible online (33.3%), advertisement and marketing (22.3%) and developing information management systems emerged tops for most organizations surveyed. Other measures mentioned were improving communication channels (11.1%), clients to be given authority to disseminate information on behalf of the organization (5.6%) and training of staff (5.6%) as further presented in figure 29 below.

Figure 29 - institutional respondents top priorities for the next 12 months regarding access to information



Source: drawn by researcher

What comes from the field research in summary is as follows:

1. The majority of the Kenyan people are aware that their government is required to provide them with environmental information and other information in general.
2. Kenyans do seek access to environmental information and other information in general from government institutions and private organizations.
3. Some government institutions have websites on which they provide information on their activities and functions. Websites and the media play a very important role in promotion of public awareness and education.
4. In some cases access to information is hindered. There are no laid down policies or regulations that apply across the institutions on circumstances under which disclosure should be denied. Whether to disclose information or not is left to the individual institution. Some of the institutions would give reasons for non-disclosure other would not.
5. Generally there are no internal review and appeals mechanisms for challenging refusal to disclose information.

6. There is absence of a general legal framework on access to information in Kenya.
7. Fees for accessing information is also a challenge. There is no criteria for charging or not charging fees for processing requests for information.

The findings underscore the need to come up with a freedom of information law in Kenya.

5.5 Analysis of the provisions of Kenya's Freedom of Information Bill 2012

The Bill is styled as Freedom of Information Bill, 2012. In the Memorandum of Objects and Reasons the Bill is intended to enhance access to information held by Government Ministries and other public authorities. The Bill was "borne from the realization that access to information held by Government and public institutions is crucial for the promotion of democracy and good governance." The Bill is therefore intended to promote proactive publication, dissemination and access to information by the Kenyan public in the furtherance of the right of access to information. The Bill generally sets out mechanisms for ensuring public access to information as well as the factors that may hinder the right of access.

Clause 26(1) provides for every citizen the right of access to information held by or under the control of a public authority. The Clause extends the citizen's right of access to information held by or under the control of a private body provided that the information is necessary for the enforcement or protection of any right.

This part sets out the key provisions of the Bill that impact on this research. The provisions will be related to the study in the previous Chapters and research findings and see how best the Bill can provide for access to environmental information.

5.5.1 Interpretation

Clause 2 is the interpretation clause in the Bill. The Clause gives a wide definition of what "information" is. The Bill provides for the right of access to information as including – (a) both a right to request and receive information; and (b) an obligation on the part of public bodies and officials to disseminate essential information that the public is entitled to know including their

core functions and key activities. This provision will address the field research findings where some of the respondent institutions declined to give information without giving any reasons.

The phrases “right to information”, “access to information” and private body feature throughout the Act yet the Bill does not define them. The Bill also while defining “public authority” and uses this term in the Act it does however at some point use the term “private body” but does not define what that means. The Bill should define all these terms under the definition Clause. The definition of “third party” should also be provided for. This will prevent the problem of interpretation by information officers as to what the terms mean and also prevent a narrow interpretation of the terms.

Information officer is defined as

> means any officer of a public authority designated as such for the purposes of this Act who in the first instance is the chief executive of the public authority, and any delegated officer in any other instance.

By this provision the chief executive officer (CEO) of a public body automatically becomes the chief information officer in that authority. This provision gives the CEO the primary responsibility of enforcing the Act. By this provision the CEO of a public body must ensure that the public authority he or she leads/manages must comply with the provisions of the Act. The last limb of the definition is, however, problematic. The Act does not provide for the creation or employment of information officers by public authorities and it seems that the staff of public authorities performing other functions will have the added responsibilities of complying with the provisions of the Act if they are delegated officers. There is no procedure for delegation and it may be assumed that the CEO delegates his responsibilities under the Act to public officers working under him. A provision should be provided for requiring every public authority to employ officers specially designates as information officers who will comply with the provisions of the Act with the aid of the existing staff performing other functions. Taking the route of making officers that already perform other functions to deal with information access may affect their efficiency and hinder the operation of the Act, as demonstrated in the comparative study Chapter.

The research findings are quite informative. Most of the respondent organizations did not have an information officer. Instead the researcher was referred to either the Chief Executive Officer or the Human Resource officer/s for information. Requests for information had to be dealt with by either the Chief Executive Officer or by the Human Resource department. The employees of some of these organizations declined to respond to questionnaires unless authorized by the Chief Executive Officer or the Head of the Human Resource department. This may continue if not addressed in the information legislation by providing for information officers. A provision for the employment of officers to specifically deal with information requests is necessary for efficient and effective handling of information requests from the citizens.

5.5.2 Objects

Clause 3 of the Bill sets out the objects of the Act which are:-

(a) To give effect to the citizen's right of access to information as provided under Article 35 of the Constitution;
(b) To give effect to the citizen's right of access to information – held by or on behalf of public authorities or to which public authorities are entitled by law to have access, including information relating to national security matters, subject only to specific and limited exemptions necessary to prevent identifiable harm to legitimate state interests or to the private and business interests of persons whose information is collected and held by public authorities;
(c) To require public bodies to proactively disclose information that they hold and to provide information on request;
(d) To create a right of access to information held by private bodies if those bodies are public contractors or if such hold information required for the exercise or protection of any right protected by the Constitution and the laws of Kenya;
(e) To bar public authorities from imposing sanctions on employees or members of the public for releasing information of compelling public interest in good faith.

The Objects Clause is very important as it links the Act to its core purpose which is to give effect to the Constitutional provisions on access to information.

The provision of the Clause accord with the international principles of maximum disclosure by creating a presumption in favour of disclosure, obligation to publish, and promotion of open governance discussed above. Proactive disclosure will entail voluntary publication and disclosure of information to the public without the prompting of any person and this is important in the sense that it increases transparency and accountability in a democracy. It is also a time and cost saving measure since there will be fewer requests for information limited to information that

is not published. Object 3(e) is quite significant. The barring of public authorities from imposing sanctions on their employees is intended to ensure that employees of public bodies do not fear to disclose information for fear of sanctions and thereby frustrating the purposes of the Act. This will address the culture of secrecy that is still practiced by the government.

5.5.3 Proactive disclosure of Information

Clause 28 requires public authorities to proactively publish and disclose information in their possession and goes ahead to set out how the proactive publication and disclosure is to be achieved; through guides on what information they have in their possession, means of disseminating the information, the requirement to publish on the internet information that is in electronic form and other requirements. A public authority is given a maximum period of twelve months from the commencement of the Act to publish in a particular form approved by the Commission the information set out in Clause 28 of the Bill. As stated above this will lead to greater open governance and eliminate the culture of secrecy perpetrated by Government institutions.

5.5.4 Guiding Objects and Principles

Clause 7 sets out guiding objects and principles that the Commission shall apply in the performance of its functions under the Act. This are:

(a) Accommodate the diversity of Kenyan people;
(b) Observe the principle of impartiality and gender equity;
(c) Protect the sovereignty of the people;
(d) Secure the observance by all state organs of democratic values and principles;
(e) Promote constitutionalism;
(f) Have regard to all applicable international information management and dissemination standards and;
(g) Ensure that public authorities provide adequate safeguard for personal information.

These are principles to be found in any freedom of information law that abides by the international standards on freedom of information law. The principles also stem from the Constitution of Kenya provisions.[1] It is therefore a welcome move to have them in the Bill.

[1] See Articles 2, 2(5) & (6), 3, 10 and Chapter VI of the Constitution of Kenya 2010.

5.5.5 Reasons for Request

The Applicant is not required to give a reason for requesting information (Clause 26). This addresses the research findings where institutions rejected information requests on grounds that the applicant did not state the reasons for the request. This is in line with international standards which require that an applicant need not give reasons for requesting information.

5.5.6 Time

Public authorities as well as private bodies are required to release information requested for expeditiously and inexpensively (Clause 26(4). Public servants are required to work on an information request within a period of 15 working days from the time of receiving it. Information relating to life or liberty is to be furnished within 48 hours. The Commissioner of Information may nevertheless grant an extension of up to 15 working days where the information sought is usually complex or voluminous.

5.5.7 Fees

No fee is to be charged for supplying the information. Any cost charged is not to exceed the cost of making copies and supplying the information. The provisions on fees (Clauses 28 & 34) are aimed at ensuring that any fee charged is not high that it prohibits the public from requesting information.

5.5.8 Reasons for Decision

A request for information may be granted in full or in part or it may be declined. Where the request is declined or only partially allowed, the public body incurs an obligation to give reasons to the person requesting.

5.5.9 Limitations on the Right

The right of access to information is not absolute. The right is subject to limitations but such limitations must be as are necessary for public interest (Clause 26(5). The Act shall be interpreted on the basis of a duty to disclose and non disclosure shall be permitted only in exceptionally justifiable circumstances and any refusal to disclose information shall be subjected to appeal (Clause 26(6) & (8)).

5.5.10 Right to Information for Private Entities

Under the Bill the right to access information applies to private entities that – (a) receive public resources and benefits, engage in public functions; or (b) provide services, particularly in respect of information relating to the public resources, benefits, functions or services. This augurs well with international standards of access to information which provides that the duty to disclose information does not stem from public ownership of the subjects but from their public functions.

The various grounds given for refusal to grant requests for information by various government institutions, as found from the field research, was that either the information was confidential, it related to the organization's employees, related to bank accounts, related to the organization's client, was commercially sensitive information, related to State security or the police service, or was classified as secret. Sometimes the refusal was based on the fear of penal or administrative sanctions by the employer or from government if the information sought is granted. The organizations did not disclose how they arrived at these classifications. The classification was done at the discretion of the management of the institutions. The Objects clause addresses this problem by requiring that exemptions to disclosure must not only be specific but limited and necessary to prevent identifiable harm to legitimate state interests or to the private and business interests of persons whose information is collected and held by public authorities.

This provision will make it possible for public bodies to disclose information of private persons that is held by them if the information related to public contracts.

5.5.11 Exemptions to Disclosure of Information and Public Interest and Harm Test

Clause 27 is an exemption provision and provides for information that is not subject of disclosure. The exemptions are the same as those contained in the United Kingdom's Freedom of Information Act 2000 and Environmental Information Regulations 2004 and the South African Promotion of Access to Information Act 2000. However, there are also other exemptions in the Bill. These are: if disclosure of the information will – (i) endanger the safety of a rare or endangered species; (ii) cause serious prejudice to the ability of the Government to manage the economy of Kenya; (iii) damage a public authority's position in any actual or contemplated legal proceedings by revealing the legal advice which it received in anticipation of or connection with such proceedings. Exemptions (i) and (ii) shall not apply to a request for environmental information where the information concerned reveals a serious public safety or environmental risk. In determining whether or not the information under consideration is exempt public interest test must be applied and by Clause 27 a public authority is required to disclose information if the public interest in disclosure outweighs the harm to protected interests. In determining issues of public interest public authorities are required to have particular regard to – (a) promote accountability of public authorities to the public; (b) ensure that the expenditure of public funds is subject to effective oversight; (c) promote informed debate on issues of public interest relevant to the Act; (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions. Information that is more than thirty years old is presumed to be exempt (Clause 27(6)).

Exemptions to disclosure are necessary as the Constitution itself contemplates exemptions as necessary to protect other constitutional rights as well.[2]

5.5.12 Exemptions and Severability Clause

The Bill lacks severability clause. Since there is a presumption in favour of disclosure under the Act which is a universal principle of disclosure in information laws the principle should be well and effectively utilized by the principle of severability which is also another principle that is contained in information legislations around the world. By the severability principle where

[2] See Articles 24 of the Constitution of Kenya 2010 discussed above in this Chapter.

information subject of non disclosure contains other information that is not covered by the exemption clauses the information officer is required to determine whether the latter information can be severed from the former, and grant the latter to the requester if it is severable. A severability of information clause should be provided for in the Bill.

Clause 27(4) provides that "Notwithstanding anything contained in sub-section (1), a public authority shall disclose information where the public interest in disclosure outweighs the harm to protected interests." Clause 27(1) provides for exemptions to disclosure. This is the first time the Bill mentions the words "protected interests". It is not clear what those words or what the whole sub clause mean. Clause 27(1) deals with exempt information. Clause 27(4) should be revised to provide that "Notwithstanding the exemptions provided for in the Act, a public authority must grant access to a request for information unless it can demonstrate that there is substantial harm to a legitimate interest and that harm outweighs the public interest in disclosure."[3]

5.5.13 Review and Appeal Procedures

Internal review procedures and appeal are provided for. An applicant dissatisfied with the decision of a public authority refusing disclosure of information is required to apply in the first instance to the public authority for review of its decision. The public authority is required to immediately after rendering its decision on review notify the applicant or requester of information to every third party involved of the decision including the provisions of the Act relied upon and also inform them that if they are dissatisfied with the decision of the authority they are at liberty to appeal against that decision to the Commission within 30 days from the date that decision was communicated to him (Clauses 36 to 39).

Whereas the Bill gives a requester of information dissatisfied with the decision of the public authority to file an application for review to the authority within a period of thirty days from the date he was notified of the decision, there is no provision for the timeframe within which a public body must hear, determine the application and communicate the decision on review. A provision on timeframe for hearing and determining and communicating the decision on review

[3] Ibid. Mendel T., note 18.

to the applicant and any requester or third party that is affected by the decision should therefore be provided for (Clause 36 to 39).

5.5.14 Public Education and Training

Whereas the Commission is mandated to inform and educate the public as to their rights under the Act (Clause 6(c)) there is no corresponding requirement for the training of public officers on their duties and functions under the proposed Act. A provision providing for such training should be incorporated in the Bill. Public officers in general and specifically information officers must be trained in order to realize the provisions of the Act. See, for example, in South Africa where the implementation of the Promotion of Access to Information Act 2000 (PAIA) has been ineffective and one of the reasons, considered one of the major reasons for PAIA's failure to achieve its objects, is lack of training of public officers and information officers on PAIA's provisions. The Bill should be revised to provide for training of information officers by the Commission. The Commission should also be empowered to provide training to public officers generally on the provisions of the Act.

As discussed above the respondents in the field research were of the view that for easier and faster access to information organizations needed to have trained and friendly information officers to handle information requests. They respondents felt that they were mistreated by public officers and information requests rejected because the officers were not trained to handle information requests and therefore they did not appreciate the requirements for provision of information to the public.

The proposed Act will be a general law in its application as it covers all classification of information. Owing to the special status of environmental information and the benefits of a specific law or regulations on environmental information, as discussed in the comparative study, there is need to come up with Regulations under the Act providing for access to environmental information.

5.6 The Relationship between the National Law and County Government Laws on Access to Information

As discussed earlier the County Governments Act requires each County to come up with a law providing for access to information in that County. The Act also contemplates implicitly that there will be a national law on access to information. There is therefore need for the Bill to set out how the national law will impact on the Counties and the County laws on access to information, the relationship between the national law and the County access to information laws should be defined in the Bill. The Bill should provide for cases where a conflict may arise between the national law and the County laws on access to information as well as the relationship/partnership that is expected among the institutions established under the national law and those to be established under the County Government laws.

5.7 The Relationship between the Freedom of Information Bill and Environmental Information

The right to a clean and healthy environment is constitutionally underpinned (Article 42). The Kenyan State is under a constitutional duty to publish and publicize environmental information. In Kenya the environment and environmental resources directly affect the economy as well as social and political arrangements.

There is therefore a correlation between socio‑economic status, poverty and gender on the one hand and the environment on the other.[4] Kenya relies heavily on agriculture and other natural resources for its development and the support of millions of livelihoods who live in rural areas. There is therefore the need for all men and women to effectively participate in all economic, social and political decision making processes through education and improved access to basic healthcare and environmental resources which would lead to more sustainable management of the environment and ultimately, to the delivery of Vision 2030."[5]

[4]Kenya State of the Environment and Outlook 2010.Supporting the Delivery of Vision 2030 Summary for Decision Makers. Kenya's National Environment Management Authority, 2011. Available at <http://na.unep.net/siouxfalls/publications/Kenya_SDM.pdf> Accessed on 10th May 2013.
[5]Supra.

A major concern in Kenya is the lack of adequate climate change information, knowledge and long-period data to researchers, planners, policy-makers and the general public on climate change impacts, adaptations and mitigations measures."[6] Some of measures that should be pursued to deal with the looming climate change catastrophe are: informing the public of climate change, its impacts and the necessary adaptation and mitigation measures to be taken; public awareness and education on climate change; training at community level on climate change and ensure that communities can use climate data and information acquired through systematic observations; supporting public debate on climate change issues by promoting parliamentary public hearings, participatory policy making initiatives at both central and local level, and a vibrant civil society; collaborative and joint action with all stakeholders (private sector, civil society, NGOs and others) in tackling the impacts of climate change; and encouraging participatory approach to rangeland management involving pastoral communities who depend on rangeland resources for their livelihoods.

All these literature show that the Kenya's socio-economic and political activities are dependent on the environment and its resources. Degradation of the environment will have negative consequences on these activities. Environmental information and education will make it possible for all stakeholders to participate in sustainable use of the environment. It is imperative therefore that every person in Kenya accesses environmental information to enable them participate fully in sustainable use of the environment and the realization of Vision 2030. Making environmental information readily available to the public is one way of implementing article 35 of the Constitution of Kenya 2010.

Participation, inclusiveness, transparency and accountability are some of the national values and principles of governance listed under Article 10 of the Kenya Constitution. Article 69(1) (d) requires the State to encourage public participation in the management, protection and conservation of the environment. Participation by the public and transparency and accountability

[6]Climate Change Response Strategy 2010, Government of Kenya. Available at <http://cdkn.org/wp-content/uploads/2012/04/National-Climate-Change-Response-Strategy_April-2010.pdf> Accessed on 10th May 2013.

by State organs cannot be achieved without the public or citizens having access to information. Article 69(2) places on every person a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Cooperation by persons and the intent of Article 69(2) which is the protection and conservation of the environment and ensuring ecologically sustainable development and use of natural resources will be realized only if the constitutional provision of the right of access to information is implemented.

5.8 Critique of the Freedom of Information Bill

The importance of citizen's access to environmental information is well captured under Principle 10 of the Rio Declaration on Environment and Development, 1992.[7]

The only time the Bill gives specific attention to environmental information is in Clauses 27 and 47. Clause 27 lists information that is exempt from disclosure and included in the list is information that may cause serious prejudice to the legitimate commercial or financial interests of the public authority concerned or third party from whom the information was obtained; or information that may cause prejudice to the ability of the Government to manage the economy of Kenya (sub-clause (1) (d) & (e)). The Bill, however, suspends in mandatory terms the operation of these two exemptions where a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious safety or environmental risk (sub-clause (3)). Sub-clause (3) is a positive step.

However, the scope of the provision is narrow. There is need to amend the provision to make disclosure of all environmental information not to be subject to the exemption provisions. This is in line with the central importance of environmental information in decision making and sustainable development as discussed above in this Chapter.

[7] See the discussion in Chapter 1 on the Rio Declaration on Environment and Development.

The Bill also requires that in considering public interest[8] regard shall be had to the need to keep the public adequately informed about the existence of any danger to public health or to the environment. Clause 47 is aimed at protecting whistle blowers. It protects whistle blowers from being penalized where they disclose information obtained in confidence if the disclosure is in the public interest. Such information includes information on dangers to public health, safety and the environment. Protection of whistle blowers is a welcome development as it is one of the international standards that should be included in freedom of information laws. However, there is need to revise Clause 47 to provide for disclosure of such information gained in confidence to be made even anonymously. Legal protection may be felt not to be enough safeguard or consolation to those who may want to disclose information received in confidence. A provision on anonymity as well as a provision on protection against disclosure of the identity of the publishers of such information will provide room for greater disclosure and thereby give effect to the objects of the Act.

The Bill should be revised to include a specific Clause providing the prescription of environmental information regulations. Being Regulations the provision should provide that the Minister shall, in consultation with the Kenya Information Commission, make regulations providing for access to environmental information. An applicant should not, however, specify the regulations or the Act when making a request for environmental information. The information officer should be the one charged with the responsibility to determine whether the information sought within environmental information or other information provided for under the Act, and apply the Act or regulations accordingly. This should be provided for in the Bill.

5.9 Conclusion

There is ample evidence from the research findings that members of the public in Kenya do require and request information from the Kenyan Government, Government institutions and private organizations for various reasons. There are, however, various obstacles as stated in the findings which make them unable to secure the information sought. These are a lack of a

[8] See Clause 27 (1) and (4) on information exempt from disclosure and the requirement to disclosure exempt information in the public interest where the public interest benefits in the disclosure outweigh the harm that may be caused by disclosure.

structured system for access to information, lack of trained information officers to handle information requests, high charges/costs for handling requests, lack of awareness on information held by organizations, lack of a proper internal appeal mechanisms, delays in handling information requests, prohibitive legal costs, complex court procedures, and complex procedures for accessing information among others.

A law providing for the right of access to information should have as the bare minimum provisions on global standards and principles on freedom of information.

To make greater access to environmental information in Kenya the following should be done:

1. Enact a general law on the right of access to information.
2. The general law should incorporate the international principles, standards and best practices on access to information.
3. Provide in the general law for making of regulations on environmental information. A provision in the general law as well as in the regulations should provide that the regulations shall apply to the exclusion of any law or rule that is in conflict with the regulations on access to environmental information.
4. Make provisions in the general law and the regulations providing that requests for access to environmental information shall be dealt with under the environmental regulations.
5. Make provisions in the regulations an exhaustive list on exceptions to disclosure[9] of environmental information. A provision for the three-part test on non-disclosure should be provided for in the regulations. The regulations should provide for exceptions to disclosure that are narrower in scope than those in the general law for greater access to environmental information.
6. The general law and the regulations should comply with the international principles, guidelines and standards on freedom of information.

The Freedom of Information Bill, 2012 is a progressive Bill as most of its provisions are modeled along the best freedom of information provisions and international standards on

[9]Discussed in Chapter Two – Literature Review.

freedom of information laws. Most of the respondents' worries and recommendations have been captured in the Bill. If passed, the Act will be a milestone in the Kenyan State and Kenyan jurisprudence in giving effect to the constitutional right of access to information. The Bill's provisions, however, should be revised and amended in line with the recommendations stated in the analysis provided above to make the Act to fully realize the constitutional right of access to information.

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

This Chapter provides a conclusion and recommendations of the study. Further areas for research are also provided.

6.1 Conclusion

The research problem was whether the Constitutional provisions on the right of access to information were enough or legislation was required to implement the right. The research has found that the Constitutional right of access to information is not enough. Legislation is required to implement the right. Further the research inquired whether or not a general law on access to information was adequate or a specific law on access to environmental information was required. It has been found that there is need for the enactment of a general law on access to information providing for implementation and enforcement mechanisms. A special law on access to environmental information is not necessary. However, provisions under the general statute should be made to provide for regulations on access to environmental information.

The research hypothesis has been answered in the affirmative; how a freedom of information legislation in general and access to environmental information in particular provides for the right of access to information determines how the right is implemented. Therefore there is need to ensure that the general law and the environmental regulations that will implement the provisions of Article 35 of the Constitution on access to information by Kenyan citizens are well crafted. This is to ensure that the legislation meets the purpose for which it was enacted. In order to come up with a good access to information law or environmental information regulations the best practices and international principles on access to information, key policy and legal principles should underpin the legislation. Lessons learnt from the experiences of other countries that have enacted access to information laws and environmental regulations on access to environmental information and case law should be used as well in crafting the legislation.

It has been found that the existing legislation on access to information in Kenya is not enough. There is no specific law providing for access to information in a comprehensive manner. Some of the laws are in direct conflict with the Constitutional provision on access to information; they hinder access to information. This calls for enactment of a comprehensive legislation on access to information and regulations on access to environmental information.

The Bill on freedom of information pending before Parliament should be amended to provide for the making of regulations on access to environmental information. Both the general statute and the regulation should be modeled on the international principles, standards and best practices on freedom of information laws.

6.2 Recommendations

The study therefore recommends the following measures, both short term and long term:

6.2.1 Short term Measures:

1. The current bill on freedom of information laws should provide for the making of regulations on access to environmental information.
2. A provision in the general law as well as in the regulations should provide that the regulations shall apply to the exclusion of any law or rule that is in conflict with the regulations on access to environmental information. It should also be provided for expressly that the existing laws on information are subject to the law and the regulations.
3. Make provisions in the general law and the regulations providing that requests for access to environmental information shall be dealt with under the environmental regulations.
4. Make provisions in the regulations providing an exhaustive list on exceptions to disclosure[1] of environmental information. A provision for the three-part test on non-disclosure should be provided for in the regulations. The regulations should provide for

[1]Supra.

exceptions to disclosure that are narrower in scope than those in the general law for greater access to environmental information.

5. The general law and the regulations should comply with the international principles, guidelines and standards on freedom of information.
6. More importantly, political good will is needed to see to it that the law is enacted and that when enacted the political leadership will becommitted to ensuring that the law is fully implemented and enforced. The engagement and collaboration of the citizenry, the media and civil society organizations with the government is necessary to ensure that the law is not only enacted expeditiously but that it is enacted in terms of the recommendations.

6.2.2 Long term Measures:

It is not enough to enact a framework law on access to information as well as regulations on access to environmental information. From the study it has been shown that countries that have information laws still encounter implementation problems as identified in the study. The long term measures call for a periodic review and update of the information laws based on lessons learnt and experiences drawn from the implementation of the laws.

6.3 Areas for Further Research

Further research is required to examine to what extent the new information and communication technologies such as email, twitter, face book, blogging and other communication networks affect the way Government information is stored and shared.

In addition the results of this research require testing on a large number of cases to assess the strength and weaknesses of the Freedom of Information Bill in relation to environmental information especially when the law becomes effective.

The experiences from other jurisdictions discussed in the comparative study chapter show that information laws will invariably encounter unexpected challenges and this calls for periodic examination of the success of, and amendment to, the laws to make them realise either fully or

substantially the promotion and protection of the right of access to information in general and to environmental information in particular.

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APPENDIX I

Research Tool
Information Seekers' Survey

Good morning/afternoon. I'm Mr. /Ms. _____. I am conducting thesis research on access to environmental information. The research seeks to monitor the progress in the fight for freedom of information in Kenya and in particular freedom for access to environmental information in Kenya over time. You have been sampled as one of the interviewees. I would like to ask you some questions access to information in Kenya and particularly to environmental information. The interview is in the nature of a questionnaire and will take about 30 minutes.

My research topic is on implementation of the constitutional right of access to environmental information in Kenya. From the interview I need to know how individuals/citizens in Kenya access information in general and environmental information in particular, from whom they seek information, why they need the information and any procedural hurdles encountered in seeking the information. The interview is intended to contribute to informing the research on what should be contained in the Kenyan legislation on access to information in general and environmental information in particular to form one of the best legislation on access to (environmental) information. Legislation is needed to provide a legal framework for implementation and enforcement of the constitutional right of access to information.

The answers you shall give shall remain confidential and shall only be used in analyzing the findings of this research.

Please let me know if I have your consent to proceed with the interview?

Name:

Contact:

Signature:

Date:

Questions

1. Have you ever required information about environmental issues, e.g. information about waste management, local pollution, flood risk, planning applications, climate change or global warming?'

□□Yes □□No

b. Why was this information relevant to you?

2. (a). Did you get the information that you wanted?'
□□Yes □□No

(b) From whom or where did you get the information?

(c) In what form was the information supplied to you (oral/postal letter/on website/email/telephone/telegram, inspected at the organization's offices, made copies, or other form)?

(d) What would have been your preferred method/form of obtaining the information?

(e) Why do you prefer that method?

(f) How long did it take to receive the information?

(g) Was that duration reasonable in your view?

(h) What would have been a reasonable duration for getting the information?

3. (a) What was the procedure used in seeking the information? (Did you present yourself before the information holder and ask orally for the information, or did you make a written request either by letter or by filling forms?)

(b) Did you pay for the request or for the information supplied?

(c) Were the charges reasonable/affordable?

(d) Do you think that you should have paid for the request/supply of information?

(e) Did the information holder inform you of any information within their organization that is accessible free of charge?

(f) What was the nature of the information?

(h) In what form was the information? (on website/book/file/booklet/brochure/on pasta/notice board/library/archive/or other form to be stated)?

4. (a) Have you ever been refused access to information or to environmental information?

(b)Were any reasons given for the refusal?

(c) What were the reasons?

(d) Do you think that the reasons given were reasonable?

(e) Were you informed of any procedures for challenging the decision?

(f) If yes, what was the procedure and forum for challenge (internal review body, tribunal, or courts)?

(g) Did you follow that procedure? And if yes was the challenge successful and information sought given?

(h) If you did not follow the procedure for challenge, what were the reasons? (Cumbersome or complex procedures/prohibitive costs/legal costs/time consuming procedures/or other reason - to be stated)?

8. What other difficulties, if any, have you encountered while seeking environmental information?

9. What in your view needs to be done to ensure such difficulties do not occur?

9. Are you aware of the Freedom of Information Bill, 2012?
[Yes] [No]

10. If yes, have you read the Bill?
[Yes] [No]

11. Does the Bill address environmental information?
[Yes] [No]

12. If yes, what, in your view, should be included in the Bill?

APPENDIX II

Research Tool
Information Seekers' Survey

Good morning/afternoon. I'm Mr. /Ms. _____. I am conducting thesis research on access to environmental information. The research seeks to monitor the progress in the fight for freedom of information in Kenya and in particular freedom for access to environmental information in Kenya over time. You have been sampled as one of the interviewees. I would like to ask you some questions access to information in Kenya and particularly to environmental information. The interview is in the nature of a questionnaire and will take about 30 minutes.

My research topic is on implementation of the constitutional right of access to environmental information in Kenya. From the interview I need to know the nature of information in your possession/custody/control, the information storage system, whether or not the public can access the information, the form or mode of access, whether or not some information in your possession/custody is not subject to disclosure, and in general the framework your organization has for providing access to information to the public and individual persons. The interview is intended to contribute to informing the research on what should be contained in the Kenyan legislation on access to information in general and environmental information in particular to form one of the best legislation on access to (environmental) information. Legislation is needed to provide a legal framework for implementation and enforcement of the constitutional right of access to information.

The answers you shall give shall remain confidential and shall only be used in analyzing the findings of this research.

Please let me know if I have your consent to proceed with the interview?

Name of the organization:

Approximate No. of employees

Postal address and tel.:

Name of contact person and designation:

Signature:

Date:

ORGANIZATION

Questions

1. What are the key objectives/functions of your organization in Kenya?

2. (a) What storage systems do you use to keep your organization's information?

   (b) (Are these storage systems adequate in your view?

   (c) Why do you not use other storage systems?

   (d) Is the information available to the public or individual persons?

   (e) If yes, in what form/mode is the information accessed by the public?

   (d) Do you receive any requests for access to your information?

   (e) From whom?

   (e) What is the nature of the information usually sought?

(f) In what form do they seek the information?

(g) Do you grant them the information sought?

(h) What is the procedure for receiving, processing and granting requests for information in your organization?

(i) In what form do you grant the requests? (oral, letter form, on website, email, copies, brochures, booklets, inspection, or other mode – to state)?

3. (a) Do you charge any fee for accessing information by members of the public?

(b)Is the fee charged on all types of information given?

(c) What information does your organization supply at no cost?

(b) How much on average do you charge for processing and supply of information?

4. How long does it usually take to respond to a request?

5. How long have you been providing responses to requests for environmental information?

6. Do you work in partnership with other organizations to provide this information?
□□Yes □□No

If yes, please provide details.

CURRENT SERVICE

7 Does your organization provide help to improve public understanding of technical and specialist information or the nature of services rendered by your organization?
□□Yes □□No

How?

MEASURING PERFORMANCE / EFFECTIVENESS

ROMOTION

8. How do you promote your organization's provision of information in general and environmental information in particular to the public?

ACCESSIBILITY

9. What media does your organization use to disseminate information to the public?

10. Are you proactive in providing information, or do you only respond to requests only?
□□Proactive
□□Yes □□No

□□Respond to request
□□Yes □□No

11. If you are unable to provide the information or environmental information requested what does your organization usually do?

12. (i) Do you sometimes refuse to grant requests for information?

(ii) What are the possible reasons for the refusal?

(iii) What information do you automatically refuse to disclose?

(iv) Why?

13. (a) Do you have any procedure for challenging your decision on requests for information?

(b) If yes, what is the procedure?

14 What do you understand are the most common barriers to access the environmental information that you do provide?

15 What measures do you take to address the above? Please give details.

IMPROVEMENT AND LEARNING

16 Have you identified any examples of good practices for access to information?

□□Yes □□No

Please give details:

17 What would your top priority be in the next 12 months to improve your information provision service?

RESPONDENTS

INDIVIDUALS

1. University Lecturers
2. Students
3. Employees of organization/institutions in their private capacities
4. Citizens on the Street

ORGANSATIONS

1. National Environment Management Authority
2. Commission on Administrative Justice
3. Commission on Implementation of the Constitution
4. Kenya Law Reports
5. Kenya Law Reform Commission
6. Kenya National Commission on Human Rights
7. Kenya Forest Service
8. Universities
9. Parliament
10. Kituo cha Sheria
11. Ministry of Environment
12. Ministry of Information & Communications
13. Water Resources Management Authority
14. Athi Water Services Board
15. Green Belt Movement
16. Office of the Attorney General & Department of Justice
17. Media Houses
18. Ministry of Lands, Housing and Urban Development
19. Environmental NGOs e.g. IELRC