

CEDGG

**CENTER FOR ENHANCING DEMOCRACY
& GOOD GOVERNANCE**



**Access
to Information
Act 2016**

Popular Version



Center for Enhancing Democracy and Good Governance

ACCESS TO INFORMATION
ACT 2016
POPULAR VERSION

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Center for Enhancing Democracy and Good Governance

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Table of Contents

List of Acronyms	3
Foreword	4
CHAPTER ONE: INTRODUCTION	5
CHAPTER TWO: BACKGROUND TO ACCESS TO INFORMATION:	7
CHAPTER THREE: OVERVIEW OF AIA	10
What is the purpose of Access to Information Act (AIA) of 2016	10
To whom does this law apply to?	10
What is the Right to Access to Information?	11
What kind of information can be disclosed by a public or private body under the right to access to information?	11
Who has the ultimate duty to ensure right to access to information in public bodies?	12
What is the nature of duty to ensure right to access to information?	12
Who has the duty to enforce the right to access to information?	13
What are the powers of the Ombudsman in regards to the AIA?	14
What is the process of requesting for access to information?	14
If dissatisfied with the performance of a public or private body in providing access to information or protection of personal data, how can a person seek redress?	16
How does the AIA protect whistleblowers?	17
What are there consequences for violating provisions of the AIA?	18
What are the exceptions for conviction in violation of the AIA?	19
Will the AIA affect other existing laws related to access to information?	19
What are some of the loopholes in the AIA?	20
CHAPTER FOUR: CONCLUSION	21

List of Acronyms

AIA	Access to Information Act
NGCDF	National Government Constituency Development Fund
CEDGG	Center for Enhancing Democracy and Good Governance
EMCA	Environmental Management and Coordination Act
ICJ	International Commission of Jurists
ICCPR	International Convention on Civil and Political Rights
NGO	Non - Governmental Organisation
POEA	Public Officers Ethics Act
PFM	Public Finance and Management Act
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Foreword

Access to information is a right that promotes the principles of openness and transparency in the running of public affairs. The right is instrumental to the fulfillment of all the other rights in the bill of rights and indeed the realization of the national values and principles of governance set out in Article 10 of Constitution of Kenya, 2010.

For so long, CSOs in Kenya have been involved in a concerted campaign to promote the right to access information and specifically for enactment of a legislative framework for implementation of the right. The campaign that has lasted over a decade has had huge successes including an explicit provision for the right in Article 35 of the Constitution and enactment of Access to Information Act, 2016. Even then, practically, access to information remains one of the most challenging tasks. This continues to impede social accountability work being done by CSOs and the fight against corruption generally. The main reason this is still the case is because many Kenyans are yet to understand and apply the new law. It is on this basis that CEDGG in partnership with Trocaire sought to produce a popular version of The Access to Information Act 2016 to help with creating awareness on the Act with a view to promoting its application in service delivery.

The focus of this booklet is to provide a broad overview of the Access to Information Act 2016. It has provided a rationale for the AIA and traced the history of the law within the Kenyan context. It summarizes the provisions of the law and goes further to analyze some of its notable gaps.

The booklet is important as a quick reference and civic education material. It is meant to be used in creating awareness on the Access to Information Act with the ultimate goal of empowering Kenyans to seek and apply information held by public agencies in their pursuit for good governance and realization of human rights. It is hoped that by publishing the booklet, CEDGG and its Partner Trocaire (Kenya) shall contribute to creating an enabling environment for social accountability and promote democratic governance practices in Kenya.

Masese, Kemunche
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Centre for Enhancing Democracy and Good Governance
February 2017

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May our Good Lord bless all of you!

Cornelius Oduor, CEO

Chapter 1

Introduction

There is a saying that goes, “knowledge is power”. To acquire knowledge, one needs information. Therefore, information is also power! Whoever controls information in society also controls power. Secrecy of government operations is responsible for high levels of corruption in the public sector and violations of rights of citizens. To effectively fight corruption and rights abuses, citizens need to access information on government actions and operations free of distortions and inaccuracies. Governments hold information in trust for the public and hence citizens have an inherent right to access such information.

For this main reason, over 100 countries have enacted laws (often known freedom of information laws) that facilitate access to information held by

government. The earliest freedom of information law was enacted in Sweden in 1766 (known as the Freedom of Press Act of 1766). By granting citizens access to such information, freedom of information laws therefore empower the people to hold their governments accountable and thereby reduce risk of corruption and violation of human rights. This is also promotes a culture of an informed citizenry, which is vital for citizen participation and engagement in public affairs.

- ✓ *Freedom of information laws promote disclosure of information held by public authorities and private sources for public interest, while ensuring respect for privacy and protection of data.*
- ✓ *Over 100 countries have enacted freedom of information law*
- ✓ *Sweden is the first country to enact such law- Freedom of Press Act of 1766*

The right of access to information is recognized in various international laws such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), African Charter on Human and People's Rights among others. The United Nations Economic Social and Cultural Organization (UNESCO) designated September 28th as the International Day for Universal Access to Information as a way of promoting this particular issue globally. It is therefore correct to say that the right to access to information indeed enjoys global support.

Most freedom of information laws place the primary responsibility for disclosure of information on the state. Corruption in government is most of the time facilitated by private sector actors and hence to address the problem of corruption effectively, it is necessary to impose a duty on business and corporations to disclose or divulge information. Private sector also increasingly carries out public sector roles (e.g. provision of basic services, implementing public projects etc) and by so doing, holds information related to such undertakings in trust for the public. Particular business activities lead to violation of human rights and therefore in order to hold private sector accountable, it is necessary for disclosure of information on harmful business activities and actions. For these reasons therefore, recent freedom of information laws now place a secondary responsibility on private sector to disclose information upon request by citizens.

The right to access to information often clashes with the right to privacy as well as the interest of government to keep sensitive information out of the public domain. To address this potential clash, various freedom of information laws provide for protection of privacy and private data and detail circumstances where access to information may be limited in public interest. To avoid undermining the right to access to information on account of public interest, most freedom of information laws place the burden on the state to prove why sensitive information should be disclosed.

Why the right of access to information?

- ✓ ***Promotes participation of citizens in decision-making and holding officials accountable***
- ✓ ***Promotes freedom of expression, speech and press***
- ✓ ***Protects human rights***
- ✓ ***Prevents corruption and abuse of power***

Some of the acclaimed benefits of freedom of information laws include:

- Emphasis on the importance of the right as the foundation for a democratic society, recognizing that citizens need information if they are to be able to participate effectively in decision-making and holding officials accountable;
- The right to information facilitates the right to freedom of expression, speech and press, given that free development and dissemination (flow) of ideas is in turn made possible by guaranteeing access to sufficient information. This is of particular importance to the right for journalists and the media;
- Access to information ensures citizens are able to exercise their rights and protect vulnerable groups from violations of their rights by the state and non-state actors. Access to information is also critical for enabling victims of rights' violations claim redress and remedies through courts of law
- Laws that promote government transparency aid in prevention and exposure of corruption as well as abuse of power. Freedom of information laws also promotes transparency in public sector (and private sector as well) by protecting those who expose corruption and corrupt dealings in government and private sector.

The clamour for legal recognition of right to access to information in Kenya started with the quest for a new constitution in the 1990s. Provisions bearing this right appeared in all the draft constitution proposals that were subjected to public debate. When the current constitution was enacted in 2010, the right to access to information was enshrined as a fundamental right granted to all as under Article 35 of the Bill of Rights. The constitution also required parliament to pass legislation that would give full effect to this fundamental right. Accordingly, the Parliament of Kenya enacted the Access to Information Act (AIA) in 2016. By so doing, Kenya joined the league of nations that have put in place freedom of information laws. This Act seeks to create a framework to facilitate access to information held by government and private bodies and

promote routine and systematic information disclosure by both public service and private sector.

This booklet provides a background to the AIA, outlines the key provisions of the AIA and discusses the implications of some of the contents of the law. The booklet is designed with the ordinary mwananchi in mind and therefore is meant to be an easy-read. Hopefully, this book will provide readers with necessary information on how put into good use, the provisions of the AIA towards promoting transparency and accountability within the State and private sector.

Chapter 2

Background to Access to Information

The quest for a freedom of information law in Kenya was as old as the advocacy for replacement of the independence constitution. That constitution granted a right to hold information and receive ideas and information without interference from the state or other persons (S.79 of Constitution of Kenya 1963- now repealed). This right was not absolute and was curtailed by the government on grounds of potential harm to public health, national security and safety. To that extent therefore, the right to information advance the right to access to information in a rather limited way.

The most sustained campaign in this regard was spearheaded by the a group of non-state actors led by the International Commission of Jurists (ICJ)-Kenya Chapter under the banner of The Freedom to Information Network. The Network developed a draft Freedom of Information Bill as an advocacy tool and sought

rather unsuccessfully to have it introduced in parliament as a private member bill. Parliament rejected the draft law, and instead advised the proponents to channel the proposal in the constitutional review process that was underway as that time. After protracted efforts, Kenya eventually replaced the independence constitution with a new supreme law in August 2010.

Before 2010

S.79 of the (repealed) Constitution of Kenya granted right to hold information, receive ideas and information without interference...but subject to various restrictions

The Constitution of Kenya 2010 introduced key reforms in Kenya, among them, a progressive Bill of Rights. Article 35 of the Bill of Rights enshrines the right to access to information for citizens. The Constitution therefore raised the bar for the right to information by expressly providing for it under the constitution. The recognition of the right to information and freedom of expression was one of the important inclusions in the new constitution.

After 2010

Constitution of Kenya (2010) clearly grants the right of access to information at Article 35 and provides for a wider basis for enjoyment of this right under Kenyan and international law

The right to access to information is also buttressed by other provisions of the constitution. Article 10 of the Constitution of Kenya lays down national values and principles of governance. These include; transparency, accountability, inclusion, public participation among others. In addition, Article 232(1) (f) of the Constitution provides that the principles and values of public service include transparency, and provision to the public of timely and accurate information. The inclusion of these clauses provided a legal and ethical foundation for freedom of information and expression in Kenya.

The constitution also made it possible for Kenya to give effect to international laws on right to access to information the country was party to. According to Article 2(6) of the Constitution of Kenya 2010, any treaty or convention ratified by Kenya shall form part of the law of Kenya. Universally, the right to freedom of information is enshrined in Article 19 of the 1948 Universal Declaration of Human Rights (UDHR) and the International Convention of Civil and Political Rights (ICCPR), to which Kenya is a party. Kenya has also ratified four of the six African treaties recognizing the right to information; The African Charter on Human and Peoples' Rights , African Union Convention on Preventing and Combating Corruption, African Charter on the Values and Principles of Public Service and Administration and the African Union Youth Charter. Kenya is also a party to the United Nations Convention against Corruption, whose chapter two is of particular importance with regard to the right to information.

Prior to the enactment of the AIA, Kenya did not have a dedicated law on Access to information. This meant that the only solid foundation for access to information right was to be found in the Constitution. There are other laws that have provisions that touch on access to public information.

Summary of some key-laws with provisions on access to information preceding the AIA:

	LAW/ ACT	BRIEF
1	Officials Secrets Act	Purpose of the legislation, as the name suggests was not to facilitate access to information but ensure restriction
2.	Preservation of Public Security Act	President was allowed to make regulations for the preservation of Public Security on several grounds including “the censorship, control, prohibition of the communication of any information, or any means of communicating or of recording ideas or information including any publication or document, and the prevention of the dissemination of false reports.” The Act, therefore gave the government wide powers to restrict the circulation of information which is in the custody of the State.
3.	Public Archives and Documentation Act	Provides for the preservation of public archives and public records
4.	Kenya Broadcasting Corporation Act	Established the Kenya Broadcasting Corporation as a Government corporation with the task of, amongst other things, providing independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and in such other languages as the Corporation may decide. The corporation also has the added responsibility of ensuring fair and equitable coverage during the campaign period as part of balancing different shades of political opinion.
5.	Media Act	Provides for the regulation of the media channels, both private and public.
6.	Media Council Act	Provides for the regulation of the media channels, both private and public.
7.	Kenya Information and Communication Act	Establishes the Communications Authority of Kenya with the responsibility to license and regulate the information and communication sector
8.	Films and Stage Plays Act	Governs the access to information by the public

9.	The National Land Commission Act	Provides for the formation of the National Lands Commission with a key function of developing and maintaining effective land information management system at both the national and county levels
10.	Leadership and Integrity Act	Requires leaders to make particular disclosures as preconditions for pursuing elective positions and includes a provision that seeks to protect misuse of such information
11.	Ethics and Anti-Corruption Commission Act	Provides for provision of necessary information in regards to the fight against corruption
12	Public Officer Ethics Act (POEA)	Incorporates the demand for access to information declared by public officers incorporating income, assets and liabilities of the officer, spouse and dependent children under the age of 18 years. This is captured with a period of two years
13.	Public Finance Management Act (PFMA)	Incorporates access to information by the public in public financial matters
14.	National Government Constituency Development Fund Act (NG-CDF)	Designed to provide financial support to the projects at the constituency level with an aim of spurring growth at the local level
15.	Environmental Management and Coordination Act	Regulates disclosure of information for environmental protection e.g. environment impact assessment reports
16.	Biosafety Act	Regulates disclosure of information relating to genetically modified organisms (GMOs)

Chapter 3

Overview of AIA

What is the purpose of Access to Information Act (AIA) of 2016?

The Access to Information Act (AIA) was enacted by Parliament in August 2016 and assented to by the President a few days later. The Act came into force on 21st September 2016. It was among the raft of laws that were supposed to be enacted during the transitional period of implementation of the 2010 constitution as per the Fifth Schedule.

The AIA was basically enacted to allow for the enjoyment as well as limitation of the right to access to information as provided for the Article 35 of the constitution. In this regard, the Act sets out the following as its key objectives:

- Ensure the state and non-state actors (private sector, NGOs etc) provide access to information held in their custody in compliance with the constitutional rights and principles
- Ensure protection of personal data as provided for by the constitution
- Provide for protection those who disclose information of public interest in good faith (particularly whistleblowers)
- Ensure civic education is carried out regarding the right to access to information.

To whom does this law apply to?

It is important to stress that the AIA does not only apply to governmental bodies but also the private sector and non-governmental organizations (NGOs), for as long as the latter hold information which affects the enjoyment of constitutional rights of citizens.

A Private body within the act includes any private entity or non-state actor that either:

- Receives and utilizes public resources, funds and benefits (e.g. organizations that participate in public procurement, receiving grants or subsidies from government etc)
- Provides public services- e.g. companies contracted to provide or maintain public services
- Has exclusive contracts to exploit Kenya's natural resources e.g. mining and exploration companies
- Holds information of significant public interest- this includes information necessary to protect and promote human rights, the environment, public health and safety as well as information that aid in the fight against corruption of illegal activities.

International Standards which AIA should meet

1. Maximum disclosure: The AIA should ensure government and non-state actors disclose as much information as is required

2. Duty to publish: Govt and non-state actors should as a matter of routine publish key information (in websites, noticeboards etc)

3. Promotion of open government: Ensuring government to operations and procedures

4. Limited scope of exceptions: AIA provisions that limit the right to access should be clear and justified by significant risk to public interest

5. Processes to facilitate access: AIA should provide for processes and procedures that ensure efficient and effective access to information and remedy where access is unfairly denied

6. Costs: AIA should not set prohibitive fees and charges which discourage disclosure

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

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

9. Protection of whistleblowers: individuals who, in good faith, releases information on wrongdoing must be protected

Source UNESCO & Article 19

What is the Right to Access to Information?

The AIA recognizes the right of every citizen to access information held by the state or any other person (including private bodies) if such information is necessary for exercising and protecting constitutional rights.

What kind of information can be disclosed by a public or private body under the right to access to information?

As a general rule, public bodies are under obligation to disclose information when requested to. However the AIA creates exceptions which may allow public entities not to disclose information, if such information (also known as exempt information) may harm public interest (e.g. national security, public health and safety, smooth conduct of government business, threat to commerce etc).

Despite these exceptions, a court may require a public or private entity to disclose protected information where it is demonstrated that release of such information will not harm public interest and that public safety and environment health is endangered by withholding of such information. Thus, the burden of proving that information is protected (and therefore should not be disclosed) is upon the public or private entities claiming the right to withhold such information.

What can be disclosed	What may not be disclosed
<ul style="list-style-type: none"> • Particulars of an organization (its location, functions, powers, duties etc.) • Organization's policies, rules, regulations, procedures for decision making processes and chains of command & responsibility. • Information relating to its employees- salary scales, powers, duties, • Records held by the organization or under its control • Information relating to projects, programmes, schemes or laws about to be initiated by an entity • Contractual information relating to public works or projects (including designs, terms of reference, costs and fees, contractors' particulars) • Information (whether protected or not) which has been held by an organization for 30 years or more. • A guide on the nature of information which the organization holds (to make it easy for anyone to understand the kind of information held by such organization) 	<p><i>This includes information that may:</i></p> <ul style="list-style-type: none"> • Undermine national security such as cabinet records; military strategy; security intelligence information (domestic and foreign); information relating to military projects, installations, defence systems and classified military information as protected by law (Kenya Defence Forces Act) • Obstruct legal processes or undermine dispensation of justice • Threaten public health, safety or life • Compromise privacy of individuals and threaten professional confidentiality (e.g. medical information regarding a patient held by a doctor) • Undermine commercial interests of any entity producing, marketing, re-selling, or distributing goods or services for profit (business or trade secrets, intellectual property etc) • Greatly interfere with the government's ability to manage the economy • Information which ordinarily is accessible to the public by other means (e.g. information available in websites, publications, libraries etc)

Who has the ultimate duty to ensure right to access to information in public bodies?

The AIA places the ultimate duty to provide access to information upon the chief executive officer of a particular public body or a person assigned with ultimate administrative responsibility over a public body. This includes the head of a government ministry (Principal Secretary or County Chief Officer), head of a government parastatal (including public enterprises, schools and colleges), Secretary of a Constitutional Commission, head of an independent office, head of a security agency among others.

Request for and questions relating to access to information should be addressed to the head of a public body. However note that a chief executive officer may delegate to any officer (also known as “information access officer”) working under him/her the performance of his/her duties that relate to providing access to information.

What is the nature of duty to ensure right to access to information?

The above duty includes providing public access to information:

- In a speedy and timely manner
- At reasonable cost (not exceeding the cost of production of such information e.g. cost of photocopying documents)
- In appropriate form or format, taking into account special needs of persons with disability, local challenges and costs etc
- By posting such information in public domain (e.g. websites)
- By allowing for inspection of documents without charge

Other duties imposed upon public bodies in relation to access to information include:

- Duty to correct any out-of-date, inaccurate or incomplete personal information held in their custody, when requested to do so (S.13).
- Keeping and maintaining records that are accurate, genuine that have integrity and are useable
- Holding records in a manner that facilitates the right to access to information (S.17)
- Computerize records for ease of access within 3 years (by 2019) after the AIA comes into force

Question: I am a parent and I need information regarding the annual budget of my local public primary school. Who has the responsibility for providing this information?

Answer: A public school is a public body within the meaning of AIA and therefore the head teacher has the duty to facilitate access to information. The head teacher shall be held liable for denying anyone access to information as per the AIA

Who has the duty to enforce the right to access to information?

The AIA gives the Commission on Administrative Justice (commonly known as “The Ombudsman”) the ultimate duty and responsibility to ensure adherence to the right to access to information under the Act (Part V). In discharging this duty, the Ombudsman may:

- Carry out investigations (after a complaint is made or by the Commission’s own initiative) over allegations of violations of the AIA
- Hear and make decisions on complaints as well as review decisions of public bodies on allegations of violation of this Act
- Assess performance of public bodies in respect to implementation of the Act. In this regard, public bodies are required by submit annual reports to the Ombudsman with regards to the number of requests received and acted upon, the duration, fees collected and number of staff dedicated to acting on such requests (S.27).
- Conduct civic education in relation to right to access to information and protection of personal data
- Promote right to access to information and compliance with protection of data among public organization
- Monitor Kenya’s adherence to international law on matters relating to right to access to information
- Prepare and submit annual report to parliament as well as special report to the relevant Cabinet Secretary on matters related to its functions and assessment of performance of government with regard to access to information (S.26)
- Participate in decisions relating to disposal and destruction of obsolete public documents (S.29)

It is important to note that the decisions of the Ombudsman are binding on both national and county governments. In this sense, officials and organs of both levels of government are under duty to obey and give effect to the decisions of the Ombudsman.

What are the powers of the Ombudsman in regards to the AIA?

In discharging the above duties, the Ombudsman has the power to:

- (a). **Conduct investigations:** the powers entrusted to the Ombudsman are similar to those enjoyed by the Police for purposes of conducting investigations (S.24) e.g. enforcing attendance of persons for questioning through summons; demanding production of documents to aid investigations; taking statements under oath
- (b). **Conducting hearings:** the Ombudsman enjoys the powers of a judicial tribunal for purposes of holding hearings on matters related to violation of the Act (S.23). In this regard, the Ombudsman can require and enforce attendance of witnesses, demand production of any relevant document, question or examine any persons and require disclosure of information by any person
- (c). **Granting remedies:** After conducting an investigation and/or holding a hearing, the Ombudsman has the power (after being satisfied that a person(s) violated the AIA) to order release any information withheld unlawfully, recommend for payment of compensation and grant any other lawful remedy. Such an order can be enforced by the successful party as if it was a decision of the High Court of Kenya. Within 21 days, the unsuccessful party has the right to appeal against a decision or order of the Ombudsman.

What is the process of requesting for access to information?

Step One: Prepare and Submit Application (S.8)

This will entail a person (here referred to as “requester”) writing a request for access to information in either English or Kiswahili to a public or private body (here referred to as “requested body”). The request should provide enough details concerning the information applied for. Before submitting a request, one should first establish if the target public or private body has developed request or application forms. It is not necessary to disclose the reason for requesting for such information (S.4). Where a requester is unable to write a request clearly due to reasons of disability or illiteracy, the concerned information officer of the requested body is under duty to assist such a requester accordingly.

Step Two: Processing the Application and Response (S.9 & 10)

Once the application has been received, the requested body is under duty to provide a response within 21 days. However, where the information sought relates to life or freedom of a person, a response should be given within 48 hours even though this can be extended by a further 14 days if the information sought is bulky or requires processing bulk information or lengthy consultations are required before a response is given.

The response should indicate whether or not the request is approved; whether or not the requested body holds the requested information and; reasons for declining request where access to information is withheld. A requested body can decline to provide reasons, where such reasons are deemed as exempted or protected information in themselves. If a requester does not receive a response within the stipulated period, this will be taken that his/her application was rejected. The requested body is also under duty to inform the requester to appeal the Ombudsman, if the request is declined.

The requested body may seek the assistance of other public bodies in processing a request for access to information. However, where the requested body realizes that the information sought is held by another public or private body, the requested body shall transfer the request accordingly within 5 days. The body that receives the transferred request is under duty to notify the applicant within 5 days that it has received the request and provide a response within 21 days from the date the application was initially made to the requested body.

Step Three: Providing Access (S.11)

Once a decision to provide access is made, the requested body is required to write within 15 days to the requester, informing him/her that the request has been granted, details of how the information is to be accessed and the fees to be paid. Once the fee is paid, the requested body is required to provide access to the information within 2 days. A requester may be required to pay for actual costs of reproducing, photocopying or converting information where access has been granted. The requested body is under duty to inform the requester of their right to petition The Ombudsman if aggrieved over the fees and costs that are charged for accessing the particular information.

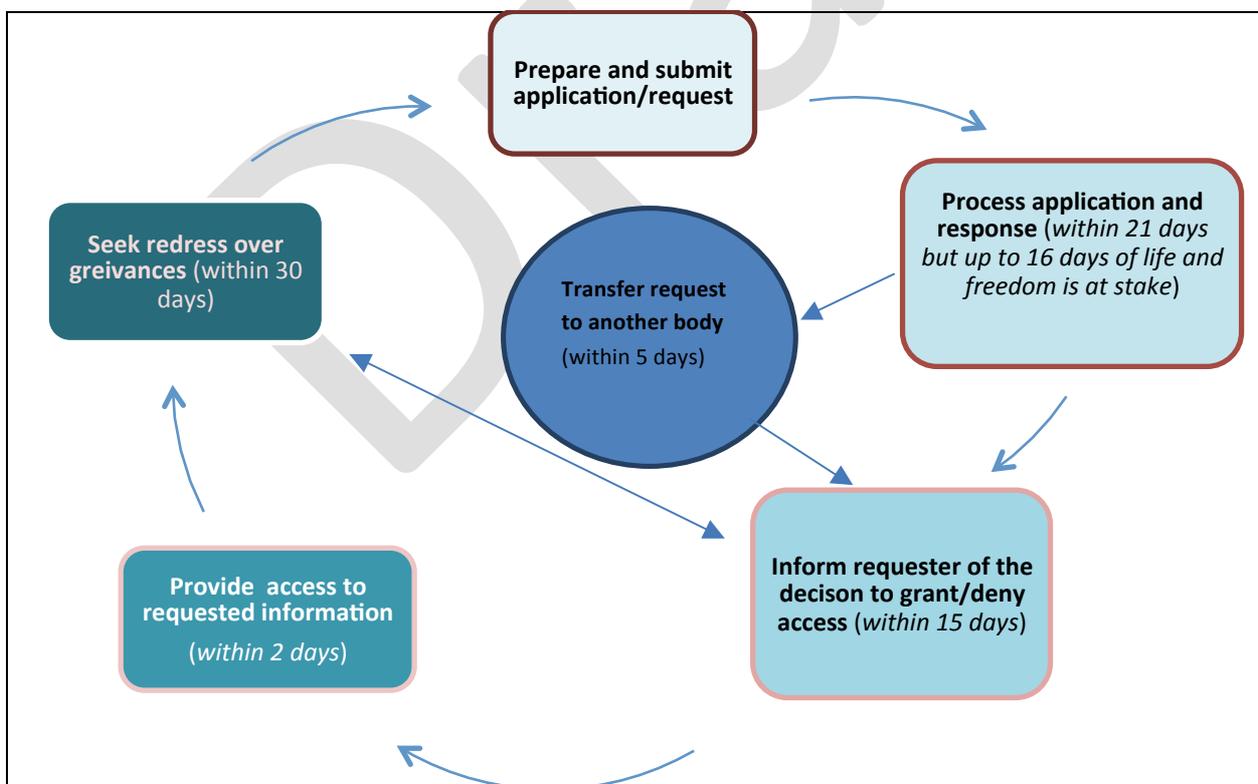
Step Four: Seeking Redress Over Grievances (S.14)

The Ombudsman is empowered to review decisions made by public and private bodies in respect to applications and request for access to information. An application for review of decisions should be made within 30 days after

the requested body has made a decision, even though the Ombudsman may extend this deadline. The Ombudsman may also on its own motion (in the absence of a complaint), undertake a review of a decision made by a requested body. Decisions which the Ombudsman may review include:

- Decisions relating to the grant of access to information applied for: this could include refusal to grant; denial of grant of access in spite of approval of grant;
- Decisions related to actual provision of access to information: e.g. delay to provide access to information; giving access only to specified person
- Decisions relating to fees: this includes decision to impose or reduce fee
- Decision refusing to correct, update or provide explanation on a record of personal information
- Decision refusing to publish information which a public body is required to do so under the AIA

The Ombudsman is also empowered to seek assistance of third parties (by notifying them in advance) who may have something to do with access to the requested information.



If dissatisfied with the performance of a public or private body in providing access to information or protection of personal data, how can a person seek redress?

The Ombudsman is also empowered to receive and act on complaints from any person (complainant) related to violation of the AIA (S.22). A complainant is required to present their complaint either orally or in writing to the Ombudsman's office. The Ombudsman is required to act on the complaint by seeking information regarding the complaint from the concerned public or private body; carryout an inquiry (investigation) into the complaints and take any necessary action. If however the Ombudsman arrives at the conclusion that the complaint lacks merit and therefore no further action is required, the complainant shall be informed accordingly.

How does the AIA protect whistleblowers?

The AIA protects from punishment or retaliation, any whistle blower who acts in good faith when disclosing information of public interest. Such information relates to:

- Violations of the law- including human rights violations
- Corruption- including mismanagement of funds, conflict of interest and abuse of office
- Dangers of public health, safety and environment

A whistle blower may not be punished for disclosing in accurate information, for as long s/he had reasonable belief that such information was accurate. However, the law does not protect a whistle making false disclosure with the malicious intention of injuring the reputation or violating the rights of another person.



Reading the story of David Munyakei in the opposite caption, do you think the AIA would have adequately protected him as a whistle blower had Kenya enacted it in the early 1990s?



The Story of David Munyakei and Goldenberg Scandal

On July 31st 2006, David Sadera Munyakei, arguably Kenya's biggest whistleblower passed away in rural obscurity, 14 years after exposing the infamous Goldenberg scandal. Munyakei had joined the Central Bank of Kenya (CBK) in April 1992 as a clerk. In the course of his duties, he noticed that one particular company, Goldenberg International, was receiving large sums of money for the alleged export of gold and diamonds. Such exporters were to receive a government subsidy to help them compete on the international gold trade market. But in a country with no known commercially viable gold mines worth talking about, Munyakei smelt a rat. Nonetheless, the CBK continued to pay Goldenberg International compensation for exporting non-existent gold. It later emerged that the Goldenberg merchants, smuggled gold from Congo and then pretended to export it at the higher price.

In 1993, Munyakei approached two opposition MPs (Anyang' Nyong'o and Paul Muite) with concrete evidence of the illegal payments made by CBK to Goldenberg International. The MPs used the dossier in Parliament, blowing the lid on the worst financial scandal and most blatant act of corruption at the time. For his bravery, Munyakei was arrested and charged under the Official Secrets Act. Munyakei's plight broke his mother's heart and two days after he was charged in court, she suffered a stroke. She then sunk into depression and died two months later. He was eventually released only to find he had been fired from his job. His act of courage cost him his dream job and made him an enemy of the state. Fearing for his life, he fled to Mombasa. Ostracized but resilient, Munyakei appeared before the Goldenberg Commission, to testify in 2003. In his submission to the Goldenberg Commission, Munyakei described the events that eventually pushed him to speak up: "After 1992 elections this thing became very rampant and became open theft", he testified. In total, the Goldenberg was paid more than Sh60 billion worth irregular compensation amounting to one-fifth of the country's GDP at the time. The commission recommended the prosecution of several top-ranking Kenyan officials. Munyakei died three years later, a broken man. His legacy of bravery and sacrifice has seen many others take the plunge into whistleblowing despite the dangers involved.

What are there consequences for violating provisions of the AIA?

The Act creates several offences with penalties as follows:

	VIOLATION	PENALTY
1.	Deliberately preventing disclosure (Defacing, altering, blocking, erasing, destroying or concealing record held by a public body, with the intention of preventing disclosure by that public body of information which a request for disclosure has been submitted and approved lawfully).	Penalty of a fine not exceeding Ksh 500,000/= or a jail term not exceeding 1 year or both.
2.	Deliberate disclosure of exempt or protected information.	Penalty of a fine not exceeding Ksh 1 million or jail term not exceeding 3 years or both.
3.	Offences by an information access officer (refusal to assist a requester who is unable to write an application; refusal to accept a request for information; failure to respond to request within stipulated time; failure to take reasonable steps in making available requested information that is appropriate to a requester with a disability).	Penalty of a fine not exceeding Ksh50,000 or a jail term not exceeding 3 months or both. <i>If however it is proven the these offences were committed with the intention of deliberate preventing disclosure of information in relation to an approved request, then the offender is liable to a fine not exceeding Ksh500,000/= or a jail term not exceeding 2 years or both.</i>

4.	Offences relating to impeding provision of access to information where an approval is already granted (this includes charging a requester fees that exceed the cost of making and supplying copies of requested information; failure to respond to a request for information necessary for protection or exercising a right; failure to respond to a request to correct personal information or correct, destroy or delete such information upon request).	Penalty of a fine not exceeding Ksh100,000/= or a jail term not exceeding 6 months or both.
5.	Deliberate non-disclosure by information access officer of a private body	Fine not exceeding Ksh 500,000 but no jail term (A private body or any of its officers who is convicted of an offence (s) under the AIA or found to have committed a serious breach of the Act may be barred from entering into contracts with the government for procurement and disposal of goods and services).
6.	Offences related to dealing with the Commission (failure to appear before the Ombudsman as per summons or an order to appear; deliberately giving false or misleading information; causing obstruction of disturbance during hearings).	Penalty of a fine not exceeding Ksh 300,000/= or a jail term not exceeding 6 months or both
7.	Deliberately altering, concealing or misrepresenting disclosed information to third parties	Penalty of a fine not exceeding Ksh200,000 or a jail term not exceeding 1 year or both.

What are the exceptions for conviction in violation of the AIA?

The AIA however provides immunity from conviction for any person who makes or authorizes a disclosure but in good faith when relying on the provisions of the Act. This is one of the measures contained in the AIA for encouraging disclosure of information, and is meant to protect responsible public officers acting without malicious intention.

In some instances, public or private body may hold information received from third parties, which could be harmful to the reputation or image of other persons (such information is said to be defamatory). Where such bodies provide access to defamatory information to a requester, such information cannot be used in a court of law by the defamed persons against the requester or source of the information (the requested body or third party source), unless it is proven that the information was disclosed with a malicious intention (S.19).

Will the AIA affect other existing laws related to access to information?

Yes. The AIA basically amends various laws related to access to information, by limiting the type of information that cannot be disclosed by public bodies to the categories provided for under Section 6 of the Act. This is meant to ensure that categories of exempted or protected information are uniform across the board and in line with Article 35 of the Constitution. The amendments also empower the Ombudsman to be consulted before a decision to destroy public documents is made. The following are the specific effects of the amendments:

- (a). The AIA amends the Records Disposal Act (Cap 14) by granting powers related to disposal (destruction) of public records to the Kenya National Archives and Documentation Service and the Ombudsman
- (b). The Public Archives and Documentation Service Act (Cap 19) is amended to ensure documents to which the public cannot access in from the National Archives are those protected or exempted under Section 6 of the AIA. Decision on destruction of public documents held by the National Archives requires consultation of the Ombudsman as well.
- (c). The AIA also amends the Public Officers Ethics Act of 2003 by limiting the categories of documents which public officers may not divulge or disclose to those protected or exempted under Section 6 of the AIA
- (d). The AIA aligns the Official Secrets Act (Cap 187) to the provisions of Article 35 of the constitution.
- (e). The Statistical Act of 2006 is also amended to ensure that restrictions on disclosure of data is only limited to those categories contained in Section 6 of the AIA.

What are some of the loopholes in the AIA?

Even though the AIA is a progressive law that attempts to holistically capture the spirit of Article 35, it nevertheless reveals the following weaknesses:

- Whereas the AIA applies to both public and private bodies, its provisions however focus more on public bodies. In few instances, the Act provides

guidance on how private bodies are to carry out the duties imposed on upon them to facilitate access to information. It is therefore upon development of regulations and guidelines as well as guidance by courts that it will be clear on how citizens can hold private bodies accountable in respect to facilitating access to information.

- Protection of personal data is one of the key objectives of the AIA. However, there are relatively few provisions on how public and private bodies should ensure protection of personal data. A draft data protection law was formulated in 2012 but is yet to be enacted by parliament.
- In one provision (S.9), the AIA gives requested bodies up to 21 days to respond to an application for access to information yet in another provision (S.11), the same law requires the requested bodies to provide access to information within 15 days after receiving such an application. It is therefore not clear which provision takes priority and this may cause confusion during implementation of the law.
- As chapter 2 demonstrates, there are quite a number of laws that touch on the right to access to information. However, the AIA did not provide for amendments to all these laws. It would have been prudent to have a provision whose effect is to declare supremacy of the AIA on access to information matters and align all other laws to the Act.

Chapter 4

Conclusion

This booklet has provided a rationale for the AIA and traced the history of the law within the Kenyan context. We have underscored the fact that Kenya lacked an explicit freedom of information law and thus, citizens relied on the freedom of expression as provided for the independence constitution to advocate for right to access to information. A large body of public law existed, which however appeared to favour restrictions rather than facilitation of right to access to information. The enactment of the constitution of Kenya (2010) heralded a new era which saw the entrenchment of the right to access to information. This right is not absolute, but the parameters for imposing limits on the right are fairly clear and understandable, in line with the international standard on limiting scope of exceptions. The new constitution also made it possible for Kenya to give effect to the international obligations which the country had in regard to facilitating enjoyment of right to access to information. The AIA was therefore enacted to elaborate on the constitutional right to access to information.

We have provided a broad overview of the AIA. The Act has provided an elaborate scope of the right to access to information, thereby listing categories of information that are exempt or protected and those that are open access. Every citizen has a right to access information which may not be affected by what the public entity's beliefs are as to the person's reasons for seeking access. To this extent, the AIA substantially complies with the international standard on maximum disclosure.

The law empowers the Commission on Administrative Justice (or Ombudsman) broad powers of enforcing the Act. This ensures a fairly accessible and affordable administrative mechanism of seeking redress and remedies when right to access to information has been violated by public and private bodies.

Government agencies are now obligated to computerize their records and information management systems in order to facilitate more efficient access to information. (This should be done within 3 years). The law will inevitably affect prior existing laws, including the Official Secrets Act. A subsequent alteration will have the effect of repealing the provision of law which makes criminal actions such as accessing or taking photographs of prohibited places, as well as granting access or giving information believed to be privileged by State officers. This in a sense ensures that disclosure takes precedence in line with international standards. However, more needs to be done to amend all other laws affecting access to information, to ensure they are in line with the AIA.

The Act is borne of the realization that access to information held by the Government and public institutions is crucial for the promotion of human rights, democracy and good governance. This is a definite win for all Kenyans as our government seeks to grant us quality Public Service delivery. However, the law has a few weaknesses which should be addressed to ensure it sufficiently guarantees the right to access to information for all.

One can therefore conclude that the AIA is a progressive legislation (despite its weaknesses) and if well utilized, it could expand possibilities for citizen participation in governance, limit human rights violations, corruption and abuse of power while at the same time promoting enjoyment of other rights related to access to information. It is however the duty of well-meaning citizens to read and understand the provisions of the Act and take active measures in testing these provisions in a bid to realize the right of access to information in Kenya.



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