

**THE COMMISSION ON
ADMINISTRATIVE JUSTICE**



**A Guide on
Proactive Disclosure for Public Entities
at National and County Government Level in Kenya**

(Constitution, 2010 Article 35(3) & Section 5, Access to Information Act, 2016)

Commission on Administrative Justice Nairobi, August 2018

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Foreword

The Commission on Administrative Justice (Office of the Ombudsman) is established under Article 59(4) of the Constitution and the Commission on Administrative Justice Act, 2011, to enforce administrative justice in the public sector to address all forms of maladministration. The Commission has the mandate to oversee and enforce the implementation of the Access to Information Act, No. 31 of 2016, which requires all public entities and relevant private bodies to proactively disclose certain information to the public crucial for the promotion of democracy and good governance.

The Commission in partnership with the USAID AHADI program developed this guide on Proactive Disclosure for Public Entities at National and County Government Level in Kenya.

This document sets out the processes and practices to help agencies comply with the Access to Information Act, 2016 and particularly with the requirements of proactive disclosure. This guide will assist public institutions to provide information proactively, even as we await the regulatory framework to be developed for implementation of the Act.

This guide is key and timely at this point in our nation's history when there is a convergence of minds concerning conclusively dealing with some challenges experienced in governance. It will enhance transparency and accountability, which are key elements of good governance to help realise our collective vision as a nation. Users will also find it useful to refer to a sister publication, developed by the Commission, on best practices in the implementation of the Access to Information Act, 2016.

Signed this 27th day of August 2018



**HON. FLORENCE KAJUJU,
MBS CHAIRPERSON OF THE COMMISSION**

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1.0 Overview

This guide clarifies the concept of proactive disclosure and provides a framework that public entities can use to meet the requirements of proactive disclosure under the Kenyan Constitution, 2010 and the Access to Information Act, 2016.

2.0 Scope and Applicability

The Guide applies to all public entities in both the national and county governments.

3.0 Meaning of Proactive Disclosure and Rationale

Proactive disclosure means public entities continually making information available without waiting for public requests. It is active transparency. All public entities are required to administratively and as a matter of course release information to the public, without the necessity of formal applications. The affirmative disclosure obligation not only requires public entities to proactively disclose information but also to update that information before January of the year it was first disclosed.

3.1 Rationale for Proactive Disclosure

The rationale for proactive disclosure is to satisfy the public demand for routine information while reducing the administrative burden associated with processing information requests. Additionally, proactive disclosure increases transparency hence public confidence in public entities.

4.0 Context and Background of Proactive Disclosure in Kenya

4.1 Constitution, 2010

Article 35(3) Constitution, 2010 provides:

‘The State shall publish and publicize any important information affecting the nation.’

This provision thus places an obligation on the State to proactively disclose any information affecting the nation. The provision is further elaborated and concretized by the Access to Information Act, which requires public entities to make certain categories of information available to the public.

4.2 Access to Information Act, 2016

Section 5 of the Act requires all public entities to voluntarily disclose certain information and to facilitate access to the information.

5.0 Commencement

The requirements on proactive disclosure are effective from 21st September 2017.¹

6.0 Information to be Proactively Disclosed

Section 5 of the Access to Information Act requires public entities to proactively disclose the following broad categories of information:

	Broad Category	Specific Information	Sources	Location within Public Entity
1.	What we are and what we do?	Information about the organisation – location, contacts, management structures, functions and duties of the organisation, powers and duties of the officers and employees	Establishing legislation	Website of Public Entity
2.	How we make decisions	Decision making procedures including channels of supervision and accountability	Establishing legislation Internal Manuals and Policy documents	Website of Public Entity
3.	How we spend resources	Salaries of officers by grade Recurrent and Development budget	Human Resources Records Budget records, asset registers	Website of Public Entity
4.	Our policies and procedures	Operational documents on dealing with the public and corporate bodies,	Regulations, Administrative Manuals, Protocols, Standard Operating Procedures	Website of Public Entity
5.	Lists and Registers	Information held by the public entity, subject to which the information relates, location of indexes for inspection	Information registers	Records Office
6.	Public Procurement Information	Public works commissioned, goods acquired or rented, services contracted, the scope of service and references contract sum, name of service provider/contractor, period of contract	Procurement contracts entered,	Website of Public Entity

The above categories represent the minimum statutory requirements of proactive disclosure.

Best practices from other jurisdictions point to categories of information that may be released under the proactive disclosure:

- i. Frequently requested records category – this refers to records released by way of information requests under Sections 9-11 of the Access to Information Act which the public entity determines are likely to be subject of subsequent requests; and
- ii. Records that are of significant public interest provided such records do not fall within exempted information under Section 6 of the Access to Information Act.²

7.0 Providing Information

7.1 Contact details

Public entities should provide the name and contact details of the information access officer for enquiries or guide how the information is to be availed.³

7.2 Mode of access

The Act provides that at minimum, proactively disclosed information is to be made available through:

- On the internet provided the materials are held in electronic format.
- Inspection at no charge.
- Supplying copies for which charges may be imposed for copying and supplying; and.⁴

The most preferable mode of availing proactively disclosed information is through the public entity's website through a direct link to the document.

7.2.1 Access on the Internet

The information should be easy to locate on the public entity's website:

- Through access to Information link on the public entity's homepage.
- Through the public entity's search function.
- If not possible to have it on the home page, then in a logical manner for instance in the 'About us' link.⁵

The most preferable means of access is through access to Information link on the public entity's homepage.

If a person is unable to access to online publication, the public entity should provide the information through alternative modes of access.

7.2.2 Access through inspection

The inspection requirement is satisfied by providing the public with access to the designated documents automatically, at no charge and without information requests. This could be carried out in citizen information centres in public entities.

7.2.3 Access through copies

If information is only available in hard copy, a summary describing the documents should be posted on the public entity's website together with details of accessing the information whether through copies and the related charges.

7.3 Proactive disclosure in local settings (low internet penetration, low literacy levels, rural areas)

The Access to Information Act requires information shall be disseminated taking into consideration the need to reach persons with disabilities, costs, local language and the most effective method in this local area.

In areas of low Internet penetration, low literacy levels and rural settings, proactive disclosure could be through notice/information boards, mobile alerts, and writing on walls, public announcements and media broadcast.

7.4 Fees and charges

Proactively disclosed information is to be made available at no cost.

Charges should only be imposed to cover the cost of photocopying and supplying the information and should be justified and limited to the actual costs set out in the Access to Information Act (Regulations).

8.0 Updating Information

The affirmative disclosure obligations require public entities not only to maintain information but also to update the information.

The Access to Information Act requires public entities to update proactively disclosed information before January following the initial publication of information.⁶

9.0 Rights of Vulnerable Groups (persons with disability, women, youth, marginalized populations illiterate persons)

Public entities should ensure that the information disclosed is accessible and usable by vulnerable groups in the population at no extra cost or at a cost taking into account the medium used.⁷

Best practices in this area include public entity websites that enable persons with visual disability to navigate. (Kakamega County).

10.0 Complaints

The Act mandates the Commission on Administrative Justice to receive complaints or act on its motion to review decisions by a public entity's refusal to proactively publish information.⁸

11.0 Information not Subject to Proactive Disclosure

The broad categories of information not subject to disclosure include information whose disclosure is likely to:

- Undermine national security.
- Impede the due process of law.
- Endanger the safety, health or life of any person.
- Violate the privacy of an individual, other than the applicant.
- Substantially prejudice commercial interests
- Cause substantially harm to the ability of the Government to manage the economy.
- Damage a public entity's position in actual or contemplated legal proceedings.
- Infringe professional confidentiality.
- Significantly undermine a public or private entity's ability to give adequate and judicious to a matter that is pending a final decision and is actively under consideration.

Notwithstanding the above-listed grounds, the Act imposes an absolute requirement of disclosure in the public interest.

12.0 Reporting Obligations

The Act requires Public Entities to submit annual reports to the Commission on Administration Justice concerning the implementation of the Act, which includes reports on the information proactively disclosed and updated.⁹

13.0 Sanctions

Section 14(3) of the Act mandates the Commission on Administrative Justice on its motion or upon a request by any person to review a decision of a public entity refusing to publish information that it is proactively required to disclose. The decision of the Commission is binding and may require the public entity to publish the information, pay compensation or any other lawful remedy.

Appendices

Sample format for web posting (7.2.1)

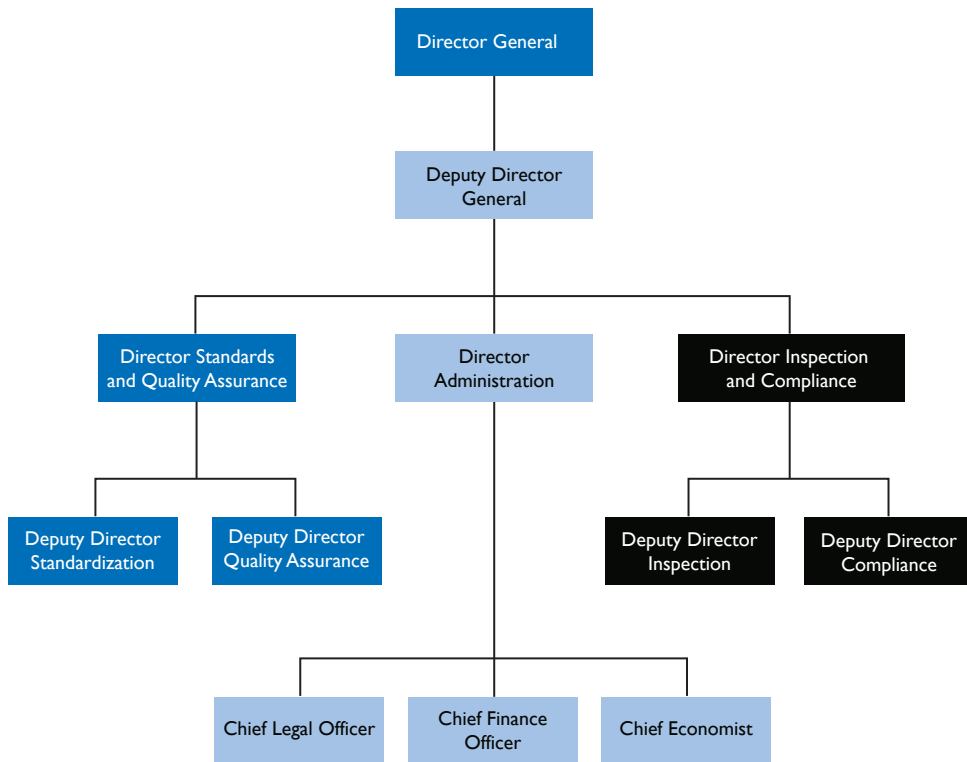
Annexes on Sample information to be proactively disclosed (6.0)

Annexes of Samples of Categories of Information to be Proactively Disclosed

Annexe 1 Powers and Duties of a Public Entity's Officers

Designation of Officer: Commission Secretary		Specific Duties
Powers	Managerial i. ii.	
	Administrative i. ii. iii.	
	Financial i. ii.	

Annexe 2 – Channels of Supervision and Accountability



Annexe 3 – Salary Grades of a Public Entity’s Officers by Grade

	Position	Grade	Basic Monthly Salary	Allowances	Procedure for Determining Salary & Allowances
1.	Director General	1	KES XXX	House - KES XXX Leave – KES XXXX Commuter – KES XXX Entertainment – KES XX	
2.	Data Clerk	12	KES XXX	House – KES XXX Leave – KES XXX Commuter – KES XX	

Annexe 4 – Classes of Information held by a Public Entity

	Category of Information	Documents information is found in	Document held by or in under the control of	Procedure for accessing the information
1.	Regulatory	Charter of the Entity	Director General's office	Inspection
2.	Financial	Budget statement	Finance officer	Website
3.	Procurement	Tender documents	Procurement officer	Inspection

Annexe 5 - Particulars in respect of Contracts Entered by the Public Entity

Name of Public Works/Goods/Contracted Service:	
1.	Terms of Reference : i. ii. iii.
2.	Scope of the work:
3.	Contract Sum KES XXXX
4.	Name of Contractor/Service Provider granted
5.	Timeline 90 Days