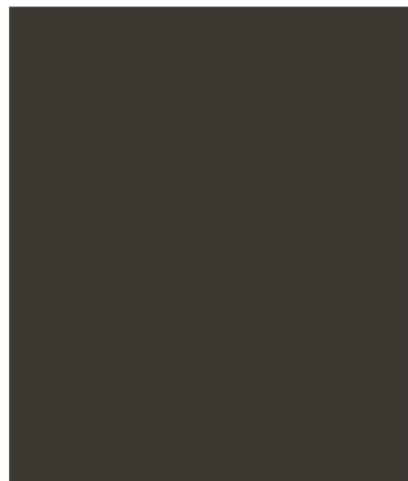
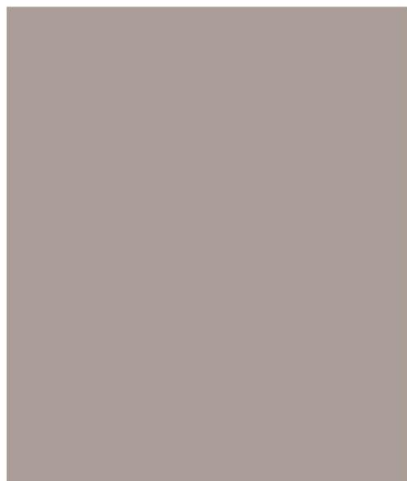
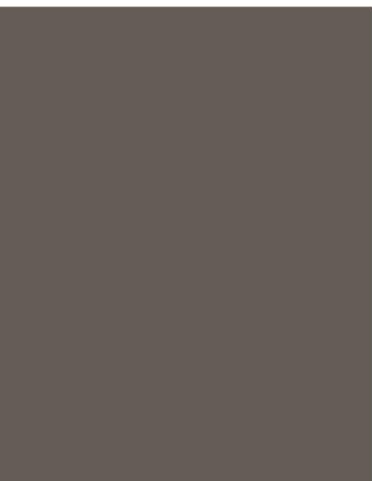


**THE COMMISSION ON
ADMINISTRATIVE JUSTICE**



**TRAINING GUIDE ON ACCESS TO
INFORMATION FOR PUBLIC OFFICIALS**



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Preface

The passing of an Access to Information law heralded a new era for transparency and accountability and establishes a clear framework for the promotion, protection and fulfilment of the right of access to information in Kenya.

The Access to Information (ATI) 2016 was passed into law on 31st August 2016 and is described as 'An Act of Parliament to give effect to Article 35 of the Constitution to confer on the CAJ the oversight and enforcement functions and powers and for connected purposes.'

Under the Act, public entities are deemed to hold information in trust for citizens and are therefore obligated to provide information to citizens proactively and upon request. The Act spells out the limitations on access to information and imposes sanctions on public officer who do not give information as obligated. The Act confers on the Commission of Administrative Justice (CAJ) oversight and enforcement powers concerning the implementation of the Act.

However, the passage of an RTI law does not mark the end of a country's push to provide the right to information. Rather, it signals the beginning of a new and challenging phase of implementation. The transition can be difficult for public officials, who are expected to shift from a system where information is withheld by default to one where a system is open by default.

The right to information can only be realized in practice when all stakeholders play their rightful role in implementation. Of these the CAJ is most crucial due to its conferment of enforcement and oversight mandate under the Act. The effective capacity enhancement of the CAJ on ATI is therefore the first step in ensuring effective implementation and oversight.

This training guide has been developed as a tool for Trainer of Trainers (TOT) on Access to Information (ATI) for public officials. It seeks to serve as a guide to enhance understanding on how this right can be implemented effectively; and to understand the extent and scope of the right and the particular obligations of public officials in providing information. With this guide, public officials will be empowered to complete the cycle of a free flow of information, which in turn will promote an atmosphere of accountability and trust. The guide will sensitize on collaboration and complementarity as different stakeholders have different capacities and opportunities, which together can be used to promote effective access to information regime.

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1. Understanding the Right to Information and its instrumentality

Objective of the session: *This session should help participants to understand the right of access to information as a fundamental human right and its instrumentality in the attainment of other socio economic and civil and political rights.*

Democracy depends on knowledgeable and informed citizenry. When people are informed they can participate meaningfully in public life and contribute to determining priorities on policies and priorities for public spending and can in turn use this information to promote transparency and accountability. It is because of this that access to information is increasingly being recognized as a fundamental human right and is thus located firmly in the universal discourse of broader human rights claims.

The right to information is a right for all natural and legal persons to seek access and obtain information from public bodies and private bodies acting in a public nature.

The essence of the right to information is that the government does not hold information for itself but is merely a custodian; holding the information on behalf of citizens, who have the right to this information. Its aim therefore is to ensure the availability of information and the provision of equitable access to information to the general public.

The implementation of the new constitutional dispensation in Kenya and its high demands of integrity, openness, transparency and accountability in public service call for the implementation of the right of access to information in legislation and practice. The effective access to meaningful information is the first step in empowering citizens to engage a degree of control over public institutions following the constitution.

1.1 Importance of Right to Information

Access to information is important in the following ways:

- It enhances accountability and transparency by helping citizens to question the policies and decisions of government and demand better service delivery.
- It enables citizens to contribute to development by promoting participation of citizens in decision making processes.
- It is an important tool in the fight against corruption by enhancing openness in government institutions and practices
- Promote trade and business practices. – International trade requires access to information legislation and practices established put in place to facilitate exchange of information.
- Free flow of information between government, business and the community can also stimulate innovation to the economic and social advantage of the nation

- The SDGs emphasize good governance, accountable institution and freedom of the media which all require access to information.

1.2 Instrumentality of the Right of Access to Information

Access to information has an impact on the attainment of other fundamental rights including the right to life, education, health water, environment and extractives and has an impact on other spheres of life be they political, social or economic. For instance, one can only make the right choices regarding their health if they are provided with the right information regarding their ailment, options of treatment, choice of drugs etc. Likewise, important decisions regarding the environment can only be made when there is information regarding short and long term impacts, how citizens are affected etc.

To this extent, the right of access to information should also be understood not only as a fundamental right but as a “facilitative” or “leverage” right that is instrumental in the realization of other rights. This linkage of the right of access to information to other rights thus brings out the transformative potential of access to information.

ATI is thus a cross-cutting, multi-dimensional, enabling (facilitative) right, which is a crucial element in all areas of democratization; democratic participation, good governance and socio-economic development and as such must be part of any shared value framework.

In a question and answer session, the facilitator should give opportunity to participants to give their views regarding the importance of access to information.

2. Legal Framework on the Right to Information

Objective of the Session: *The session should help participants to understand the legal foundation of right to information at international, regional and country level and how it has been legislated*

The right to information (laws) provides a framework or process through which the public can access information which is in the possession of public authorities or relevant private bodies. Right to information also provides a right of access to information held by individuals but only when required for the fulfillment of other rights. They do so by providing for mechanisms through which the public can request for information from state bodies and relevant private bodies. These laws validate the right to information with a presumption in favor of granting access setting timelines within which requests must be processed and makes provisions for costs.

2.1 International legal framework

The right of access to information has a long history internationally. In 1946 the United Nations General Assembly adopted Resolution 59 (I) on freedom of information stating;

“Freedom of information is a fundamental right and is the touch stone of all the fundamental freedoms to which the United Nations is consecrated. Freedom of Information implies the rights to gather, transmit and publish news anywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.”

In 1948 the United Nations Declaration of Human Rights was the first international instrument to make provision for the right to information in Article 19 which states that, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

The International Convention on Civil and Political Rights which entered into force in 1976 also recognized the right to information in Article 19 which states that 1 (a) ‘everyone shall have the right to hold opinions without interference’ and (b) ‘everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice’.

Other notable instruments refer to the right to information in specific areas which include United Nation Convention Against Corruption (UNCAC) which Kenya was the first to simultaneously sign and ratify this convention when it was adopted in 2003. The Convention recognizes the instrumentality of ATI in the fight against corruption. Other examples include the 1992 Rio Declaration on Environment and Development and the UN Declaration of Human Rights Defenders.

Globally

The last 2 decades have witnessed an explosion in the number of comprehensive national access to information laws. In the past, this revolution was headed by the western democracies. Sweden was the first to enact ATI legislation in 1766 when the government passed the Swedish Freedom of the Press Act. It is now estimated that more than 100 countries around the world have enacted legislation to facilitate access to information.

2.2 Africa

In the past, African democracies have been slow in enacting access to information legislation but the past 5 years have witnessed a proliferation of access to information laws on the African continent and particularly the Eastern African region. There are so far 9 countries including Rwanda (2013), Tanzania (2016), South Sudan (2015), Rwanda (2013), Kenya (2016), Malawi, and Sudan. Ethiopia and Uganda have been among the first to pass ATI on the continent having done so in 2003 and 2005 respectively.

The African Union has also in recent years , adopted several regional that require state parties to take certain steps to ensure the setting up of relevant policies, and institutions to enhance access to information, openness and transparency. Kenya has ratified most of these. They include;

The African Charter on Human and Peoples Rights (ACHPR) (Article 9) the African Charter on Statistics (Article 3), the African Union Convention on Preventing and Combating Corruption (Article 9 and 12 (4) the African Charter on Democracy, Elections and Governance (Article 19)

Significantly, the African Charter on Values and Principles of Public Service and Administration (Article 6) has devoted an entire section to the right of access to information and sets out the obligation of public officers in providing timely and accurate information to the public to enhance fair administration.

2.3 *Kenya*

Transparency and accountability are now entrenched in the Constitution through the setting out of the national values and principles of governance as set out in Article in Article 10. These include good governance, integrity, transparency and accountability and the provision of constitutional guarantees on access to information.

The Constitution of Kenya, Article 33 and 33 makes guarantees for the citizen’s right of access to information.

Article 33 (1) (a) provides” Every person has the right of freedom of expression which includes – freedom to seek, receive or impart information or ideas.

Article 35 makes express provision on access to information and states that

“Every citizen has a right of access to

(1) (a) information held by the state,

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom

(2) Every person has a right to correction or deletion of untrue or misleading information that affects the person

(3) The state shall publish and publicize any information affecting the nation.

This constitutional guarantee gave basis for the enactment of a national ATI law following the above provisions.

Chapter 13 of the Constitution which makes provisions for the values and principles of public service provides in Section 232 (1) (f) that “ Transparency and provision to the public of timely, accurate information shall be one of the principles of public service.”

3. Access to Information Act 2016

On August 31st 2016, President Uhuru Kenyatta assented to the Access to Information Act 2016 making Kenya the 21st country to have access to information legislation on the African continent. The ATI Act was enacted to give scope to Article 35 of the Constitution and to provide a framework for implementation of access to information. It aims to provide a clear framework for the promotion, protection and fulfillment of the right to freedom of information in Kenya.

The ATI Act prescribes the subjects of the law (both those with a right and those with a duty to uphold the right), puts obligation on government to provide information, it creates sanctions where the public officers fail to provide information and confers on the CAJ oversights and enforcement powers over the implementation of the Act.

There are however other legislations that make provision for access to information.

The County Government Act which is progressive in its provisions on Citizen Participation and Access to Information in Parts VIII and Part IX respectively. **Section 87** of Part VIII of the Act recognizes that timely access to information, data and documents and other information either relevant or related to policy formulation and implementation is one of the main principles influencing citizen participation in the management of a county government.

Section 96 of the Act expressly makes provision for the right of access to information at the county levels. Section 96 provides that

(1) every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other state organ following Article 35 of the Constitution.

(2) the county government and its agencies should designate an office to be used to ensure access to information as required by sub section (1)

(3) the county government should enact legislation to ensure access to information subject to national legislation.

The Principles (and Values) of Public Service Act of 2015 was enacted to give effect to Article 232 of the Constitution. The Act states in Section 8 that transparency and the provision to the public of timely and accurate information as one of the values and principles of public service.

In particular the Act requires public officers to desist from giving information that the public officer knows or ought to know to be inaccurate; or unduly delaying the provision of any information where required to provide that information. The Act also requires in **Section 8 (2)** that the public service, a public institution or an authorized officer shall develop guidelines for the provision to the public of timely and accurate information, and the promotion of transparency and accountability

Similarly the above mentioned international and regional treaties that create clear obligations and commit the government to implement comprehensive right to information laws also now form part of the countries laws vis a vis Article 2 (6) of the Constitution.

4. Principles of Right to Information

Objective of the session: *This session will aim to help participants understand the underlying principles that a good access to information legislation should enshrine and how these should guide implementation of legislation to the applicable international standards.*

The principles on Right to Information were developed to provide minimums on implementation and to reflect the applicable international standards that should be applied when implementing ATI legislation. The principles encapsulate the broad themes that should form the basis of any comprehensive ATI legislation.

4.1 Maximum Disclosure

This is one of the most important principles of ATI which exemplifies the fact that information should be disclosed to the widest extent possible. The principle of maximum disclosure holds that all information held by public bodies should presumptively be accessible, and that this presumption may be overcome only in very limited circumstances.

When deciding whether to release information to a person seeking access, decision-makers should always proceed from a presumption in favor of disclosure to promote a culture of openness. This presumption in favor of disclosure is based on the public's 'right to know.'

An important aspect of this principle is that the scope of ATI law should be very broad in application. Following international best practice, everyone, not just citizens, should benefit from the right and. Information should be defined broadly to include all information held by the body in question, regardless of form, date of creation, who created it and whether or not it has been classified. (The Kenya law falls short of the applicable international standards as it confers this right only to citizens)

This principle also underscores the fact that an individual requesting access should not have to demonstrate any particular interest in the information or explain the reasons for the request. In that regard, a body seeking to deny access to information bears the burden of proving that the information it has refused to give is being legitimately withheld.

4.2 Duty To Publish (Proactive Disclosure) /Routine Publication

One of the objects of access to information legislation is to oblige the state to generate timely and quality information and proactively disseminate it for broader access by citizens.

Right to information legislation should promote the regular publication and dissemination of key information and documents in a manner that is easily accessible to the public.

This principle is based on the premise that there are sets of information that should be shared with the public even before request. The rationale is that information held by the state is a valuable national resource that should be available for community access and use. The benefit of effectively implementing proactive disclosure is that the more information routinely published the less likely citizen will need to make an application to public authorities to access specific documents, thereby reducing the administrative burden on public authorities.

Section 5 of the Access to Information Act 2016 provides for proactive disclosure and obliges public entities to facilitate access to information held by such entities; and specifies that this may include –

- (i) the particulars of its organization, functions and duties;
- (ii) the powers and duties of its officers and employees;
- (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
- (iv) salary scales of its officers by grade; the norms set by it for the discharge of its functions;
- (v) guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions.

More importantly **Section 5 (1) (vii)** obliges public entities to develop and publish a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person.

Other categories of information that should be proactively disclosed includes relevant facts while formulating important policies or announcing the decisions which affect the public.

Regarding the disclosure of signed contracts, the Access to Information Act 2016 requires publication of any signed contract on its website or any other suitable media. The particulars to be published include (i) the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference; (ii) the contract sum; (iii) the name of the service provider, contractor or individual to whom the contract has been granted; and (iv) the periods within which the contract shall be completed.

The ATI Act requires that the dissemination of information be undertaken while taking into account the needs of persons with disabilities, the cost, local language, the most effective method of communication in that local area.

4.3 Costs /Fees

Information should be provided free of cost or at minimal costs. Fees payable should not be so high as to deter citizens from seeking to access information. Preferably costs should only be charged where there is a request for large amounts of documents or complex requests.

Section 12 (3) of the ATI Act 2016 requires the CS in the Ministry of information to make regulations prescribing the fees payable for expenses incurred in providing information to an applicant.

Nevertheless, the Act states in Section 12 (1) provides that no fees may be levied concerning the submission of an application for information. Sections 12 (2) further provides that a public entity or private body from which an application for access to information has been made may charge a prescribed fee for the provision of the information and the fee shall not exceed the actual costs of making copies of such information and if applicable, supplying them to the applicant.

The FOI Act requires agencies to facilitate public access to information at the lowest reasonable cost. This principle applies when information is provided upon request or is published by an agency. Other Acts also authorise charges for specific documents or information access.

Agencies can reduce the cost of public access by publishing information online, especially information that is routinely sought by the public. Charges that may be imposed by an agency for providing access should be clearly explained in an agency policy that is published and regularly reviewed

4.4 Right of Appeal /Independent Administrative Body and Right of Review

Access to information legislation should include provision for the formation of an independent administrative body or for an already established administrative agency, which is independent, to take on responsibility for adequate implementation of the legislation.

The right to appeal to an independent body to review decisions made by public authorities, is reflected in most international standards. Given the importance of rapid, cost-effective access to information, appeals should go first to an independent administrative body, and this is provided for in most of the more progressive national laws.

The administrative agency should also hear appeals from any refusal by a public authority to provide access to information. The independent administrative body should be adequately resourced and shielded from interference.

The appeals process should provide an avenue for an enquiry and complaints procedure for the public to raise issues about agency publication and access decisions. The procedure should be published, explain how enquiries and complaints will be handled, set time frames for responding, identify possible remedies and complaint outcomes, and require that written reasons be provided in complaint resolution.

Finally, the law should provide for the right to appeal from the administrative body to the courts. Only the courts have the authority to set standards of disclosure in controversial areas and to ensure the possibility of a full, well-reasoned approach to difficult disclosure issues.

The Access to Information Act 2016 establishes the Commission on Administrative Justice as the main enforcement and oversight body to undertake appeals where citizens are denied information. The Act accords the CAJ with powers to effectively undertake these functions. If a person is further aggrieved by the decision of the CAJ a further right of appeal lies to the High Court as provided in Section

4.5 Protection of Whistle blowers

This principle provides that individuals who release information on wrongdoing – whistleblowers – must be protected. Many countries make separate laws for protection of whistleblowers, but it is important for Access to Information laws to envisage this aspect. Such provisions primarily seek to protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing. They effectively protect civil servants who in good faith and public interest, released information while in the course of duty. This protection is important to change the culture of secrecy; civil servants particularly should not have to fear sanctions for disclosing information or they will tend to err in favor of secrecy.

Section 16 of the Access to Information Act 2016 makes provisions for the protection of person making disclosure and prevents a person being penalized as a result of having made or proposed to disclose information which the person obtained in confidence if the disclosure is of public interest.

The Act also provides that where a disclosure which is made to a law enforcement agency or an appropriate public entity shall be deemed to be made in the public interest.

Section 16 (1) provides that a person shall not be penalized concerning any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to disclose information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.

The Act also recognizes that a disclosure which is made to a law enforcement agency or an appropriate public entity shall be deemed to be made in the public interest.

Disclosure of information under this provision includes information on—

(a) violations of the law, including human rights violations;

- (b) mismanagement of funds
- (c) conflict of interest;
- (d) corruption;
- (e) abuse of public office; and
- (f) dangers of public health, safety and the environment.

The law however creates safeguards where it is deemed that a person may disclose with the intent of malice. A person who provides false information maliciously commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

5. Salient Features of The Access To Information Act 2016

Objective of the session: to help participants to have an understanding of the purpose and the object of the Act and what it seeks to achieve; and to assess the extent to which it conforms to the Right to Information principles.

The Access to Information Act is described in the preamble as “An Act of Parliament to give effect to Article 35 of the Constitution ; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”

The Access to Information Act 2016 positively enshrines several internationally recognized access to information principles which enhance the effective implementation of ATI. These include:

- The right to access information from public bodies and relevant private bodies.
- A clear and simple procedure for accessing information that takes into account language barriers and imposes minimal costs.
- A comprehensive proactive disclosure regime
- Protection of whistleblowers
- Accountability by Information officers

Some salient features of the Access to Information Act (and that conform to a large extent to the principles enunciated above) include:

5.1 *Process to Facilitate Access*

One of the foremost objects of the Access to Information Act 2016 is to provide a clear, simple process for citizens to access information. This is provided for in Part III of the Access to Information Act which refers to the designation of an information officer, the process to

be followed by an applicant when seeking information, processing an application, transfer of applications, correction of information and fees. In this part, the Act stipulates the following

- 1) Designation of information access officer - the Chief Executive Officer of any public agency will be designated as the information access officer and he may delegate this responsibility accordingly.
- 2) Application for access –
An application for access to information should be made in writing in English or Kiswahili

Where a requester is unable to make a written request due to reasons of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs and assist the applicant to reduce their request in writing.

The information officer shall furnish the applicant with a copy of the request upon completion.

A public entity may prescribe a form for making an application to access information but this should not occasion unnecessary delays

5.2 *Processing of an application (Timelines)*

The ATI Act provides that a public officer should make a public officer shall decide on an application within twenty one days of receipt of the application

Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.

If the request is for a large amount of information or requires a search through a large amount of information, or consultations are required to comply with the request, the public officer may extend the time limit for a period not exceeding 14 days

The ATI Act also requires once a decision has been made about a request for information, the information officer shall immediately communicate the decision to the requester, indicating— (a) whether or not the public entity or private body holds the information sought; (b) whether the request for information is approved; (c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and (d) if the request is declined, a statement about how the requester may appeal to the Commission";

Rejected applications – where the applicant will not have received response within stipulated time, the application will be deemed rejected.

Transfer of application – No later than 5 days upon receipt of application, the applicant should be informed of the transfer no later than 7 days after application,

5.3 *Providing access to Information*

Once the decision is made to provide information, written communication will be done to the applicant informing him:

- (a) that the application has been granted;
- (b) that the information will be contained in an edited copy, where applicable;
- (c) the details of any fees or further fees to be paid for access, together with the calculations made to arrive at the amount of the fee
- (d) the method of payment of such fees, if any;
- (e) the proposed process of accessing the information once the payment if any is made; and
- (f) that an appeal may be made to the Commission in respect of the amount of fees required or the form of access proposed to be provided. (2) Subject to subsection

Within 2 working days from the payment of fees, an information access officer is allowed to provide the information and/or allow inspection of the information in the way in which it was kept.

5.4 *Fees*

The Act stipulates that no fee should be levied to provide information, unless that which is confined to the actual cost of making copies. The Act further mandates that regulations be developed prescribing the fees payable to provide information.

5.5 *Correction of Information*

An applicant may request a public entity or private body to within reasonable time, correct, update or annotate any personal information held by it relating to the applicant, which is out of date, inaccurate or incomplete. This should be done at the expense of the public body or private entity.

6. The Mandate of the CAJ under ATI Act

Objective of the Session: *To enhance participants understanding of the specific mandate of the CAJ under the Act; and the attendant functions and powers conferred by the Act*

6.1 Enforcement and Oversight

Every successful ATI regime has an effective oversight mechanism. Different regions globally have adopted different models of oversight. Oversight entails looking over successful implementation of the provisions of ATI legislation to ensure it meets its objectives. This enforcement is carried out by a quasi – judicial organization that oversees the administrations compliance with legislation.

There are four main types of bodies that resolve complaints under ATI – an ombudsman office, a commission/information commissioners office, a tribunal and a court. Of these, the two most common types of ATI oversight bodies are the ombudsman and information commissioner. The ability to carry out their functions are boosted by powers granted by law such as the authority to access any documents called into question as part of an appeal opr to issue binding, legally enforceable decisions.

Kenya joins countries such as Ethiopia, Sweden, Norway, Bosnia and New Zealand in bequeathing its oversight role to the ombudsman.

The ATI Act grants the Commission on Administrative Justice (CAJ) powers of oversight and enforcement over the Act. The Act requires that the Commission be guided by the national values and principles of the Constitution when undertaking oversight and mandates the Commission to designate one of the Commissioners as "Access to Information Commissioner" with specific responsibility of performing the functions assigned to the Commission under this Act.

6.2 Functions of the CAJ

To enable it to adequately undertake its mandate, Part V of the Act has spelt out the specific functions and accorded attendant powers to the CAJ to implement them.

Specifically the functions of the CAJ under the Act as specified under **Section 21** are to:

- (a) investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions of this Act;
- (b) request for and receive reports from public entities concerning the implementation of this Act and the Act relating to data protection and to assess and act on those reports
- (c) develop and facilitate public education awareness and develop programs on right to access to information and right to protection of personal data;
- (d) work with public entities to promote the right to access to information and compliance with data protection measures in terms of legislation;

(e) monitor state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data;

(f) hear and determine complaints and review decisions arising from violations of the right to access to information;

(g) promote protection of data as provided for under this Act or the Constitution; and (h) perform such other functions as the Commission may consider necessary for the promotion of access to information and promotion of data protection.

6.3 *Powers of the CAJ*

The Act provides that for the CAJ to perform these function, it shall invoke its powers as provided for in the Access to Information Act, the Constitution and its constitutive Act. Some of these powers are quasi-judicial as the CAJ is empowered to undertake investigation, undertake hearings and issue certain powers with regards to providing information. Specifically the CAJ has powers to:

- issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission; Access to Information No. 31 of 2016
- question any person in respect of any subject matter under investigation before the Commission; and
- Require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

If satisfied that there is an infringement the Commission may order for the release of any information withheld unlawfully or make a recommendation for the payment of compensation or any other lawful remedy or redress.

6.4 *Powers of Investigation*

Concerning investigation, the ATI Act mandates the Commission to utilize the services of any public officer or investigation agency of the Government at the expense of the Commission.

For purposes of investigation, the public agency or investigating agency may do the following:

- summon and enforce the attendance of any person for examination;
- require the discovery and production of any information;
- subject to the provisions of this Act, requisition any public records or copy thereof from any public officer; and
- take a statement under oath concerning any investigation it is undertaking

The public officer or investigating agency whose services are utilized shall investigate and submit a report thereon to the Commission in that behalf. The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it and for that purpose, the Commission may make such inquiry, including the examination of any person who conducts or assists in the investigation, as it considers necessary.

6.5 Issuing of orders

One of the foremost obligations for the Commission under the Act is to inquire into complaints by applicants which may be made orally or in writing.

When the Commission receives a complaint, it may take 2 actions- call for the information or a report from the public entity regarding the complaint in a time specified by the Commission or initiate an inquiry into the complaint.

If the information or report called for is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report; or if on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by the public entity, the Commission shall, in writing, inform the complainant accordingly and take no further action.

6.6 Further right of appeal to the High Court

According to Section 23 (3) A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.

6.7 Other functions of the Commission

To receive reports by public entities and relevant private bodies reports as required by the Act.

- In consultation with the public, develop and publicize guidelines detailing the reporting requirements including the manner, means and timeframes that apply to public entities and relevant private bodies.
- Request any further information from the public entity or the relevant private body to facilitate and enhance monitoring at any time

- Request any further information from the public entity or the relevant private body to facilitate and enhance monitoring at any time and may issue an order compelling the provision of such further information.

In 30-minute group work session, participants should be organized in groups to discuss what is the envisaged role of the CAJ vis a vis its strengths. Participants should also identify challenges for the CAJ that need to be addressed to fulfil its mandate effectively.

7. Exceptions/Limitations of Access to Information

Objectives of the Session: to ensure that participants understand the instances and categories of information that can be rightfully withheld from citizens; and how the exceptions should be properly interpreted.

7.1 Exceptions in general

There are instances where information can be legitimately and lawfully withheld from citizens. These are referred to as exceptions or limitations of ATI. The regimes of the exception/limitations should be clear and well founded in law so that it is very clear in what instances information can be legitimately withheld. Exceptions should also be very narrowly applied/interpreted meaning that there can be very few and specific instances/situations where information can be genuinely withheld. Each ATI law makes exception provisions and these may vary from country to country. Nevertheless, exceptions may fall in the following broad categories:

National Security or Sovereignty: There is some information, relating to a country's national security, which could genuinely cause harm if released to the public. (*Tshwane principles on National security and Right to Information*). However, common commercial interests relating to defense should be made public to reduce the likelihood of corruption tainting the procurement process.

National Economic Interests: Disclosure of information about currency or exchange rates, interest rates or taxes, proposals for expenditure or borrowing could in some cases harm the national economy, particularly if released prematurely. However, lower level economic and financial information e.g. contracts and departmental budgets should not be withheld under this exemption.

Relations with Foreign States/Diplomatic Relations: The relationships between countries can often be sensitive, and could damage a country's international interests. During decision making, there is a level of confidentiality, but once a decision is made, the public has a right to access relevant information so that they can better understand the policy making process.

Law Enforcement and the Judicial Process: While investigations are underway, there may be information which needs to be protected

Cabinet and Other Decision-Making Documents: Cabinet papers, including records of deliberations of Cabinet Secretaries are excluded, but once a decision is made, the reasons for the decisions and the document which were used to make decision should then be disclosed to the public.

The regime of exceptions is one of the most difficult issues facing those drafting a freedom of information law and one of the most problematic parts of many existing laws. This is because they are often widely interpreted and sometimes the basis for denying citizens information.

7.2 Exceptions under the ATI Act

Limitations of the right of access to information are contained in **Section 6** of the Access to Information Act which is drafted following **Article 24** of the constitutions that relate to privacy.

According to Section 6 of the ATI Act, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

- (a) undermine the national security of Kenya;
- (b) impede the due process of law;
- (c) endanger the safety, health or life of any person;
- (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
- (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
- (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- (h) damage a public entity's position in any actual or contemplated legal proceedings; or
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession

According to international best practice, for limitations or exceptions to apply, they should be subjected to a three part test;

1. Is the information covered by a legitimate exemption?
2. Will the disclosure cause substantial harm?
3. Is the likely harm greater than the public interest in disclosure?

The ATI Act recognizes this principle of public interest override and provides in **Section 6 (4)** that “despite anything contained in subsections (1) and (2), a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.

Although limitation of the right of access to information serve a crucial function, they are often abused and used to undermine citizens right to information in interpretation.

In a question and answer session, participants should be led into a discussion on whether they think the right to information should be applied as an absolute right. And in what instances they consider information can be rightfully withheld.

8. Role of other stakeholders

Objective of the Session: This session is intended to enhance participants understanding of the role others play in ATI implementation and how they can engage collaboratively with the sectors and enhance partnership for the effective implementation and promotion of ATI

In a plenary session, the participants should discuss how they can work with various entities including Parliament, the Judiciary, Civil Society, the Private sector, academia and media to promote ATI.

Legislation is only the first step towards the realization of ATI. By itself, it does not guarantee access to public information in practice. Different stakeholders, both those with a duty to provide information, and those with the right to information must understand and play their part in ensuring effective implementation of ATI. Stakeholders with key roles in implementation include:

8.1 Parliament

Parliaments and legislatures, as the ultimate democratic institutions, must be in the forefront of efforts to increase the public’s right to access to information. As a law making body, Parliament played its role in ensuring the implementation of the right to information in Kenya by enacting the Access to Information Act 2016.

The Kenyan constitution has transformed the role of parliament and given it more powers than before, especially concerning oversight. Where there is conflict between existing laws and the ATI Act parliament should ensure that the ATI Act takes precedence.

One of the most important roles the parliament can now play includes the repeal of existing legislation that is repugnant to the right of access to information being realized. These include the Official Secrets Act, and the National Assembly (Privileges and Immunities) Act.

Parliament should also ensure that as an institution, it is also ensuring access to information with regards to its functions and allow the greatest access to parliamentary documents and activities such as plenary sittings and committee meetings. Parliament should also ensure that there is little or no possibility of abuse by classifying as confidential parliamentary documents that should rightly be made public.

8.2 The Judiciary

The courts play an important role in interpretation and this regard may also help to widen the scope of the application of ATI. The interpretation that the courts give ATI is one of the true determinants of the scope of rights to be enjoyed by the intended beneficiaries of the law. The judiciary in Kenya therefore plays a crucial role in the interpretation of both the Constitution and the ATI Act in cases relating to access to information.

Article 20 (4) of the Constitution of Kenya provides that courts and other adjustment authorities shall, “promote the spirit and objects of the bill of rights and promote the values that underlie an open and democratic society, humanity, equality, equity and freedom.

The courts in Kenya have made several important pronouncements on the issue of ATI in recent years that have served both to limit and advance the implementation of ATI. Most importantly, the courts have underscored the importance of the right to information and its centrality in the exercise of other rights.

In both the cases of *Nelson O. Kadison vs Advocates Complaints Commission & AG*, and *Famy Care Limited Vs the Public Procurement Administrative Review Board & Another* the court noted that the right of access to information is one of the rights that underpin the values of good governance integrity transparency accountability and other values as set out in the Constitution. It is based on the understanding that without access to information, the achievement of higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.

In *Nelson O. Kadison Vs Advocates Complaints Commission* the court noted further that “Access to information relating to public complaints against people seeking state or public office is especially significant because Chapter 6 of the Constitution, which deals with leadership and integrity is one of the pillars of the Constitution and the right of access to information is pivotal to its effectiveness”.

One of the negative aspects of courts interpretation so far is that they have limited the application of the right to citizens, which is against international best practice. In cementing the issue further the court ruled in the case of *Nairobi Law Monthly Vs the Kenya Power and Lighting Company Ltd* the right of access to information in Kenya, applies only to Kenyan natural persons and not Kenyan juridical or legal persons (Thus excluding legal and

other entities such as private companies from having a right to information). This goes against the maximum disclosure principle which obligates public entities to disclose information to the largest entity possible and all persons present in the territory of a country.

Other decisions of the courts have also had the effect of limiting the application of proactive disclosure by requiring that action against a public entity can only be taken where there has been refusal according to a request for information. In **Kenya Society for the Mentally Handicapped Vs the Ag**, the court held that “Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state and its agencies and has been denied.

However, the courts have been progressive in their willingness to challenge traditional reasons given to restrict disclosure of information. In **Peter Kariuki vs the AG**, the courts challenged the wide interpretation of exemptions based on national security, which is often relied on by states when refusing to give information. In this matter, the court ruled that Article 35 of the Constitution grants the petitioner the right to information held by the Department of Defence (DoD) to enable them pursue their claim.

While it may take some time for sound, coherent jurisprudence to emerge on Access to Information, it is important for citizens, and civil society through public interest litigation, to utilize this avenue to further entrench the right of access to information in Kenya.

8.3 *Civil Society*

Civil Society in Kenya has been at the fore front of entrenching a culture of constitutionalism in Kenya and also spear headed efforts to ensure the enactment of Access to Information legislation in Kenya.

CSOs have a role to play in enhancing ATI beyond advocating for the enactment of ATI legislation. Demonstrating the practical value of ATI could be the most important role that civil society can play post enactment. Civil society should support relevant government agencies to put in place functioning systems that will promote implantation of ATI.

Some of the envisaged roles could be:

- Work with public agencies to enhance capacity of public officers to understand their role in implementing ATI.
- Enhance capacity of other civil society organizations and citizens to understand their rights under the ATI act
- Drive up demand for information by supporting citizens to undertake information requests.
- Monitor and audit the performance of various state agencies in implementing ATI.
- Make recommendations for strategies that will enhance implementation.
- Support citizens to use ATI to achieve wider socio – economic goals
- Use litigation to secure a wider jurisprudence from courts in interpreting access to information.

Reference List

Access to Information (ATI) Act No. 31 of 2016

African Charter on Democracy, Elections and Governance

African (Banjul) Charter on Humans & Peoples Rights (ACHPR)

African Union on Preventing and Combating Corruption

African Charter on Statistics

African Charter on Values & Principles of Public Service

Constitution of Kenya, (2010)

International Convention on Civil & Political Rights (ICCPR)

National Assembly (Powers & Privileges) Act, Chapter 6

Principles (and Values) of Public Service Act, Act No IA of 2015

Rio Declaration on Environment & Development

Swedish Freedom of Press Act of 1766

The County Government Act, No 17 of 2012

The Official Secrets Act, Cap 187 Laws of Kenya

Universal Declaration of Human Rights (1948)

Universal Declaration of Human Rights Defenders

United Nations Convention Against Corruption (UNCAC)

United Nations General Assembly Resolution 59 (I)

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