

# TOWARDS PROMOTING ACCESS TO INFORMATION IN KENYA

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## ABSTRACT

This paper examines the issue of access to information within the Kenyan context. Drawing on fieldwork, it evaluates challenges facing the right to receive information ~~in~~ ~~the country~~. The study demonstrates that the public faces several difficulties in the quest to enjoy this fundamental right. This work makes specific legal and policy recommendations that could alleviate these challenges.

### I. INTRODUCTION

#### A. Background of the Study

Information is power. However, it is insufficient merely to allow individuals access to information. Rather, the information that is provided or that the public is allowed access to must be accurate, not distorted. The right of the public to know is fundamental in any society that is governed by the rule of law. As Governments hold information in trust for the public, it follows that the public have the right of access to the information that the State holds. Lucas Powe argues that ‘typically the right to know is aimed at the Government, and it demands more knowledge of what is happening’.<sup>1</sup> Thus, the ‘primary responsibility’<sup>2</sup> for disclosure lies with the State. Officials must, therefore, ‘facilitate added access to places of information’.<sup>3</sup> Other commentators have expressed similar sentiments. According to David O’Brien, the ‘right to know is constitutionally enforceable against the Government’.<sup>4</sup> He further writes that the ‘public have the legal right to investigate and examine the conduct of affairs’.<sup>5</sup>

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\* Thanks to Richard Calland for his constructive comments.

<sup>1</sup> Lucas Powe, *The Forth Estate and the Constitution: Freedom of the Press in America* (University of California Pres: Berkeley, 1991) at 256.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> David O’Brien, *The Public’s Right to Know: The Supreme Court and the First Amendment* (Praeger: New York, 1981) at 2.

<sup>5</sup> *Ibid.*

There are several benefits that could accrue if the right information is availed to the public. Primarily, access to the right information has an impact on the enjoyment of other fundamental entitlements that are due to human beings,<sup>6</sup> including life, health and education. Absent this right it would be difficult for any individual to realize any entitlement as he or she may not be aware of its existence. The provision of accurate information provides individuals with the data and knowledge that they require to participate effectively in the democratic process in any political society.<sup>7</sup> In many ways this promotes the right to participate in elections.<sup>8</sup> Additionally, information could enable individuals to make informed choices about their lives and livelihoods,<sup>9</sup> thus, promoting the fundamental right to life, among others. Further, an informed public is likely to contribute to the economic development of any society compared to one that is ignorant.<sup>10</sup> This contribution could be in the form of ideas. An informed public could also act as a guard against corruption within and outside of Government.<sup>11</sup> Access to correct information could also promote peace and tranquility within any society in the sense that it could act as a check against rumors and half-truths, which can trigger violence.<sup>12</sup> Moreover, information sharing is also beneficial as it is likely to save on resources and time that would otherwise be spent looking for data.

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<sup>6</sup> See also International Commission of Jurists, *Freedom of Information Survey* (International Commission of Jurists: Nairobi, 2006) at 1 (The right to information ‘is crucial to effective protection and respect for human rights’) at 1.

<sup>7</sup> Henry, one of the interviewees who participated in this study, described information as the “life-blood of democracy”. Interview with Henry, 24 July 2010. See also International Commission of Jurists, *ibid* at 1.

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

<sup>9</sup> According to Henry, the right of access to information is important as it could “save lives”. Interview with Henry, 24 July 2010.

<sup>10</sup> See also David Makali, *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers: Nairobi, 2003) at 121 (Arguing that when information is withheld from the public becomes ‘ignorant of their rights’).

<sup>11</sup> See also International Commission of Jurists, *supra*, note 6 at 7 (Noting that the right to know is useful ‘tool for fighting corruption [and] waste of public resources’).

<sup>12</sup> For an example of this theme, see Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed With Our Families: Stories From Rwanda* (Picador: London, 1998) at 136-140.

Despite these benefits, the laws in a number of African states do not expressly recognize this right.<sup>13</sup> Further, the laws are restrictive in the sense that they limit the information that one can access. In Kenya, for instance, the *Official Secrets Act* (1970) was passed to limit access by citizens to information that the Government believed would compromise its internal security.<sup>14</sup> The *National Security Intelligence Service Act*, No. 11 of 1998 ('*NSIS Act*'), buttressed this position. The problem lies in the fact that once the Government decides to classify any piece of information, that decision is final. In other words, it can not be challenged in court or tribunal. At best the *NSIS Act* outlines a complaints mechanism for those who are aggrieved by the way the service discharges its functions.<sup>15</sup>

## B. Methodology and Objectives

Since 2008 Kenya has been undergoing a constitution review process. A draft constitution was published in May 2010, and voted for overwhelmingly at a referendum in August 2010.<sup>16</sup> For the first time in its history the right to access information is contained in the bill of rights of the *Constitution*. Article 35 guarantees every citizen the right to 'information held by the State' and any 'person' that is 'required for the protection of any right or fundamental freedom'. However, this right is not absolute. Rather, Article 24, the general limitation clause, limits its operation. To pass constitution muster the limitation must be 'reasonable and justifiable in an open and democratic society based on human dignity as well as equality and freedom'.<sup>17</sup> The burden of proof lies on the person seeking to justify the limitation. Notably, applications will be required to be filed in court. In theory Kenya has taken great strides in the area of providing, promoting and protecting the right of access to information. The challenge will then lie in implementing this key

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<sup>13</sup> See, for instance, section 20 of the *Constitution of Zambia* (1996); section 39 of the *Constitution of the Federal Republic of Nigeria* (1999); section 20 of the *Constitution of Zimbabwe* (1982).

<sup>14</sup> See the preamble to this legislation.

<sup>15</sup> Section 24.

<sup>16</sup> For the results of this election, see Interim Independent Election Commission of Kenya, 'Interim Independent Election Commission 2010 Final Referendum Results,' available at [http://www.iiiec.or.ke/sites/default/files/COMPREHENSIVE%20IIIEC%20FINAL%202010%20REFERENDUM%20RESULTS%2009\\_08\\_10.pdf](http://www.iiiec.or.ke/sites/default/files/COMPREHENSIVE%20IIIEC%20FINAL%202010%20REFERENDUM%20RESULTS%2009_08_10.pdf) (visited 24 October 2010).

<sup>17</sup> In making this determination Article 24 requires the following factors to be taken into consideration: (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

right. Herein lies the objective of this research—to provide an understanding of access to information—as well as evaluate considerations that that must be taken into account for the advancement of this right in practice. In particular, this study will:

1. Evaluate the existing legal framework for access to information in Kenya.
2. Analyze current practices in respect to the supply and provision of information by various (selected) government departments.
3. Determine the level and factors influencing demand for information by Kenyan residents.
4. Assess government responsiveness to access to information practices (whether proactive or otherwise).
5. Identify major opportunities and constraints for the promotion of access to information in Kenya.
6. Provide recommendations for measures that could be taken to advance access to information agenda in Kenya and elsewhere.

This paper reports the results of a survey that was conducted in Kenya from July to October 2010. Sixteen research subjects, comprising Government officials (8, 50 per cent) and non-Officials (8, 50 per cent), were interviewed in Nairobi, the main administrative centre in Kenya. The study examined issues surrounding public access to information that is held by the Government. In addition to field work, a review session was held in Nairobi, with stakeholders. Attendees provided valuable feedback on the draft report of this study.

Based on the sample size, the findings of this research do not represent a comprehensive reflection of the access to information situation in Kenya. However, they do provide valuable insights into the scope and nature of this right as well as challenges faced by persons seeking State-held information. As such, the study contributes considerably to the already existing literature on the law and practice of access to information, primarily because its insights are drawn from empirical work. This study cannot also hope to cover every aspect of the issue of statelessness in Kenya. Rather, its objectives, as mentioned above, are to provide a conceptual overview of some of the key issues raised by the survey, identify the main factors that need to be

taken into account in order to realize this right in practice and begin an evaluation of the recommendations for reform.

### C. Outline of the Work

Section two reviews the legal framework that governs access to information in Kenya. This section demonstrates that, although the process seems straightforward in theory, several hurdles are faced in reality. Section three examines the challenges faced by those seeking official information, including the requirement for official permission, the lack of information, the absence of criteria and the culture of secrecy. Measures that could be taken to promote the public's right of access to information are explored in section four. To conclude section five contends that real steps must be taken in Kenya for this goal to be realized.

## II. THE LEGAL FRAMEWORK

The right of access to information in Kenya is contained in the *Constitution* as well as several other pieces of legislation. In the context of the *Constitution* this right was first contained in the post-independent *Constitution*. It is also found in the *Constitution* that was promulgated in Kenya in August 2010. In the context of the previous Kenyan constitution this right was contained in the general provisions that governed freedom of expression. Section 79 of the former *Constitution* granted every person in Kenya the freedom to 'hold information' as well as 'receive ideas and information' 'without interference'<sup>18</sup> from the State or non-State agencies. Even so, this right was not absolute. On the contrary, it was limited on grounds of public health and national security or safety.<sup>19</sup> To put it in another way, the State, upon whom the burden of proof fell, had to demonstrate that its national safety, health or security was threatened before it could seek to limit an individual's right to receive and transmit information.

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<sup>18</sup> Section 79(1) of the former Constitution of Kenya.

<sup>19</sup> Section 79(2) of the former Constitution of Kenya.

The 2010 Constitution, like its predecessor, also contains provisions that govern the right of access to information. However, under the terms of the new constitutional order this right is limited. As was the situation with the pre-2010 *Constitution*, the right of access to information is not absolute. In the first place, it is only available to citizens, unlike the former *Constitution*. In other words, non-Kenyans can not enjoy the right of access to any information that is held by the State or any non-State actor. Article 35 of the constitution reads thus:

Every citizen has the right of access to—

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

The second limitation is contained in article 24 of the current Constitution of Kenya. This section provides that the right of access to information can be limited by law ‘only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose’.

The entrenchment of the right of access to information in the Bill of rights means that legislation restricting access to official information is a limitation on the right and would be unconstitutional and invalid unless justifiable in terms of the limitation clause of the Constitution.<sup>20</sup>

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<sup>20</sup> Iain Currie and Johan Waal, *The Bill of Rights Handbook* (Juta: Johannesburg, 2005) at 685.

Several domestic pieces of legislation reinforce the right of access to information by the public. These statutes govern information that is transmitted by print or electronic media. In the context of electronic media the *Kenya Broadcasting Corporation Act* (1998)<sup>21</sup> establishes the Kenya Broadcasting Corporation, which is a Government institution that is charged with the responsibility of ‘producing and broadcasting programmes ... by sound or television’.<sup>22</sup> Other statutes such as the 2007 *Media Act* underscore the importance of promoting and protecting the freedom and independence of the media.<sup>23</sup> This piece of legislation also seeks to promote the ‘constitutional freedom of expression’,<sup>24</sup> and, by extension the right of the public to receive information. Films and plays are another powerful tool for promoting the right of information. Thus, the *Films and Stage Plays Act* (1998),<sup>25</sup> which was designed to control the making and exhibiting of films and plays,<sup>26</sup> contains provisions that govern access to information by the public.<sup>27</sup>

However, these laws also stifle the disclosure of information, and, thereby, erode the right of access to information. National security is one of the limiting grounds. For instance, the *Official Secrets Act* of 1970 prohibits any person from obtaining and transmitting any information that in the opinion of the State ‘is calculated to be or might be or is intended to be directly or indirectly useful for a foreign power or disaffected person’.<sup>28</sup> Similarly, the 1998 *National Assembly (Powers and Privileges) Act* and the *Service Commissions Act* (1985) significantly limits the amount of information that is available to the public. Under the terms of these pieces of legislation wide powers are granted to the Government to limit the circulation of information that is in the custody of the State. Further the *Preservation of Public Security Act* also gives the president sweeping powers to make regulations the limiting communication ‘of any information’ on grounds of national security.<sup>29</sup> The 1985 *Penal Code* empowers the Minister of Internal security to ban the importation or production of any publication on grounds of, among others,

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<sup>21</sup> Chapter 221 of the Laws of Kenya.

<sup>22</sup> See the preamble to this Act.

<sup>23</sup> Sections 4(b) and 35(1). See also the Code of Conduct for the Practice of Journalism in second schedule to the Act.

<sup>24</sup> Section 7(1).

<sup>25</sup> Chapter 222 of the Laws of Kenya.

<sup>26</sup> See the preamble to the statute.

<sup>27</sup> See the preamble to the statute.

<sup>28</sup> Section 3(1).

<sup>29</sup> Section 4.

national security.<sup>30</sup> Although this statute, unlike the others, sets out a review process, this framework is problematic in the sense that there is no independent appointment process to members of this Board.<sup>31</sup> Generally speaking, the disclosure of any prohibited information is punishable by a fine or a term of imprisonment.

Public policy is another ground that public officials can use to refuse to disclose any information that is in their custody. The *Evidence Act* (1989), for instance, gives officials wide discretion to decide whether (or not) the release of any information that they hold could be prejudicial to public policy.<sup>32</sup> If the response is in the affirmative, this information will not be released. Notably, there are no requirements for appeal or view. Nor are the officials required to assign any reason for their decision.

Similarly, the *Films and Stage Plays Act* places restrictions on those who intend to make movies, run exhibitions or display posters in the sense that all these activities can be stopped by a police officer or the Board of Censors.<sup>33</sup> This statute does not contain any provision for appeal nor does it require a police officer to assign any reason for his or her decision. Like the other statutes, any person who fails to comply with such an order shall be liable for prosecution.<sup>34</sup>

Let us now consider some of the challenges facing disclosure of information in Kenya.

### III. CHALLENGES FACING ACCESS TO INFORMATION

Although the right of access to information guaranteed in Kenya, this research noted several limitations. Experience on the ground suggested that several difficulties are faced by those seeking information from the Government. This section evaluates some of these difficulties.

#### A. Prohibitive requirements

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<sup>30</sup> Section 53.

<sup>31</sup> Under section 52(3) the Minister appoints four, of the seven members, of the Board.

<sup>32</sup> See sections 131-133.

<sup>33</sup> Sections 9 and 11-13.

<sup>34</sup> *Ibid.*

Some of Kenyan laws contain prohibitive requirements for the disclosure of information that is at the hands of the Government. Under the terms of some statutes, the consent of the president or of the Speaker of the National Assembly is first required before any information can be released to any member of the public. The *National Assembly (Powers and Privileges) Act (1998)*<sup>35</sup> prohibits public officers from giving evidence or producing ‘before the National Assembly or a committee’ of the Assembly ‘any paper, book, record or document’ that relates to ‘correspondence of any naval, military or air force’.<sup>36</sup> The release of secondary evidence touching on these matters is also prohibited. This information can only be disclosed ‘with the consent of the president’.<sup>37</sup> A similar condition applies with respect to information ‘relating to the correspondence of any civil department or to any matter affecting the public service’.<sup>38</sup> Those who sit in Parliamentary Committees as well as members and officers of the National Assembly are also prohibited from disclosing any information that comes to their knowledge in the course of their work without the permission of the Speaker.<sup>39</sup> Further, under the terms of the *Service Commissions Act (1985)*<sup>40</sup> any communication within the Public Service Commission (‘PSC’) and the Judicial Service Commission (‘JSC’) or between members of these commissions and other Government officials are privileged. This information can not be disclosed or produced in any proceeding, except with the written consent of the President.<sup>41</sup>

This legal framework presents a number of concerns particularly for those seeking to access information. In the first place, the procedure that an applicant seeking disclosure must follow is not provided by the law. Indeed, it is unclear whether he or she should lodge an application directly with the office of the President or the Speaker. Alternatively, should the application to the President in particular be sent to the Head of Civil Service, the Ministry or Government department that holds the information, with a request that it forwards it to the President for consideration for approval? Although this study did meet any individual who had lodged an application for consent from the president, it is apparent that the lack of a clear procedural framework by itself curtails the right of access to information. This uncertainty could expose the

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<sup>35</sup> Chapter 6 of the Laws of Kenya.

<sup>36</sup> Section 18(2).

<sup>37</sup> See section 18(2) (*Ibid*).

<sup>38</sup> See section 18(3).

<sup>39</sup> See section 19 of the *National Assembly (Powers and Privileges) Act*.

<sup>40</sup> Chapter 185 of the Laws of Kenya.

<sup>41</sup> Sections 7 to 9.

process to abuse or corruption. Pauline's experience underlines that challenges that face those who wish to obtain consent from the Speaker:

I was running a case and we wanted to see how counsel had conducted cross-examination in the \_\_\_\_\_ proceedings, which were heard by a committee of Parliament. I called our contact, and the official arranged for us to enter Parliament. When I informed him of the purpose of my visit, the official made it clear that we had to first obtain permission in writing from the Speaker before we could obtain a transcript of these proceedings. We explained to the official that the proceedings had in fact been covered by the media, but the person refused to allow us access to the transcript. Eventually, I gave up as, owing to past experience, I doubt whether the speaker could have exercised his discretion in our favor.<sup>42</sup>

The requirement that consent lies with the President or the Speaker is also problematic in the sense that there is no guidance on the forum that an aggrieved person (such as Pauline in the above situation) would go to challenge an unfavorable decision of these public officials. Arguably, one could apply for the remedy of judicial review.<sup>43</sup> On the substantive front he or she could challenge 'the content of the outcome of the decision made'.<sup>44</sup> Procedural grounds of review, in contrast address the question of the way in which a decision is made.<sup>45</sup> However, for one to challenge effectively a decision's reasons, too, particularly for rejected applications, would have to be provided. It is doubtful whether, if an application finally gets to the President or Speaker, he or she will set out any ground. Simply put, this framework does not comply with due process requirements.

Granted, there should be a restriction on the access and circulation of any information that is likely to threaten the security of any state.<sup>46</sup> Indeed, this practice is not unique to Kenya.<sup>47</sup> However, the requirement that, absent presidential consent, any member of the public can not access information that is held by the public service or any civil department is difficult to understand. So, too, are the restrictions that are placed on information that comes to the

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<sup>42</sup> Interview with Pauline, 30 June 2010.

<sup>43</sup> This is provided for under order LIII of the *Civil Procedure Rules*.

<sup>44</sup> Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights* (Oxford: Oxford University Press, 2006) at 503.

<sup>45</sup> *Ibid.*

<sup>46</sup> On this aspect, see the *Official Secrets Act* (Cap 187).

<sup>47</sup> See, for instance, part II of the *Official Secrets Act* (Kenya); section 4A(2) of the *Official Secrets Ordinance* (Tanzania); sections 3-9 of the *State Security Act* (Zambia).

knowledge of key institutions like the National Assembly, PSC or JSC. Like the National Assembly and its committees, the PSC and JSC, which are constitutional bodies under the terms of the old and new constitutions,<sup>48</sup> play a central role in the management of Government affairs. In particular the PSC is charged with the responsibility of appointing, disciplining and removing public officials from office.<sup>49</sup> A similar power is vested on the JSC, although it is restricted to the appointment and removal of judicial officers.<sup>50</sup> Against this background, it is difficult to understand why the information that comes through these public agencies can not be easily accessed by members of the public. If information, for instance, on any wrongdoing on the part of an official came to the knowledge of any of these publicly funded commissions, would it not be in the interest of the public or the concerned person to be allowed access to this data?

## B. Lack of Information

The [potential](#) benefits of allowing the public access to information held by the Government were noted at the outset. It was underlined that for the public to participate effectively in the management of the affairs of the country, they need to have correct information. Thus, it is imperative for the public to be provided with requisite information that will enable them to take part in policy formulation as well as critic Government strategies in key areas such as health, education, infrastructure and employment. These data could also check corruption and promote accountability on the part public officials since they know that their actions are subject to scrutiny. Accordingly, in the absence of the requisite information it would be very difficult for any member of the public to participate meaningfully in the affairs of his or her Government. Without information the citizens may not have an insight into the functioning of Government or participate in its decision-making processes.<sup>51</sup>

Despite the several advantages for allowing the public access to State-held information, the situation on the ground did not paint a positive picture. Fieldwork noted several instances where the public was hardly involved in decisions that are likely to affect them. This is highly

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<sup>48</sup> See sections 106 of the old Constitution and 233 of the new Constitution (on the PSC) and sections 68 of the old Constitution and 171 of the new Constitution (on the JSC).

<sup>49</sup> See section 107 of the old Constitution and 233 of the new Constitution.

<sup>50</sup> Section 69 of the Constitution.

<sup>51</sup> Makali, *supra*, note 10 at 122.

undesirable in any democratic society. One area of concern lies in the funding of projects at the local level. In 2003, the Kenya Government established the constituency development fund ('CDF'),<sup>52</sup> which was designed to provide financial support to projects at the constituency/local level,<sup>53</sup> and thereby spur growth at the local level. This is unlike the situation previously where the central Government drove all forms of development. Two per centum of the total revenue that the Government generated in every financial year is allocated to this fund.<sup>54</sup> In other words, this kitty is well resourced. Indeed, the idea behind establishing this fund, which targets 'community based'<sup>55</sup> projects, is laudable.<sup>56</sup> Absent the CDF, many of these kind of projects would have otherwise been compelled to wait for funding from the central Government directly; a process that had proven to be lengthy, slow and unpredictable. Accordingly, the CDF initiative was mooted to ensure that community based projects would receive funding expeditiously. One would also assume that because management is at the local level the projects that would be funded or undertaken would be those that the community, not an individual or a few members of the community, deems suitable.

Several problems were noted with regards to the CDF. The first problem lies in the composition of the committee that is charged with the mandate of running this fund. According to section 23 of the *Constituency Development Fund Act* ('CDF Act'), members of a committee are drawn from the following persons in the constituency: the elected member of Parliament ('MP'), two councilors, one district officer, two persons representing religious organizations, two men and women, one youth representative and a representative of an 'active' Non-Governmental Organization.<sup>57</sup> This committee was designed to have a broad-based representation. As Arnold notes, it was designed to "reflect the face of the constituency in terms of needs and diverse groups".<sup>58</sup> However, in reality its operation is limited. This is because the power to appoint lies on the MP.<sup>59</sup> Practice suggests that the appointment process is not fair. Hardly are the positions

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<sup>52</sup> The 2003 *Constituency Development Fund Act* ('CDF Act') governs the operation of this fund.

<sup>53</sup> *Ibid*, section 6.

<sup>54</sup> *Ibid*, section 4(1).

<sup>55</sup> The *Constituency Development Fund Act* governs the operation of this fund.

<sup>56</sup> Some contend that 'in some parts of the country the CDF has done wonders'. Interview with Arnold, 28 August 2010.

<sup>57</sup> Section 23(1) of the *CDF Act*.

<sup>58</sup> Interview with Arnold, 28 August 2010.

<sup>59</sup> Section 23 the *CDF Act*.

advertised. The public is, thus, completely locked out of the recruitment process as the information does not trickle down to the local level. Rather, experience demonstrates that MPs usually appoint their friends, relatives or party officials to fill slots available in this vital institution. As the Kenyan High Court (Warsame J) underlined in *John Oyoo and Others v Zadock Syongo and Others*:<sup>60</sup>

The [CDF] Act gives sweeping powers to the area [MP] to appoint the persons who would serve in the CDF committees, which means it is a legislation which is friendly or advantageous to the current member of parliament in order to shut out perceived or real rivals in the control, use and management of the funds allocated to a particular constituency.<sup>61</sup>

Herein lies the second problem, which relates to the discharge of the committee's mandate.

Because of their composition, experience showed that the projects that received funding were those that an MP has approved, despite the requirement for community participation in the management of projects, from start to finish. Granted, members of the constituency are required to draw 'a list of priority projects',<sup>62</sup> which should be submitted to the committee. The committee is then required to 'deliberate on project proposals' that have been submitted, and 'draw up a priority list' containing 'immediate and long term' projects.<sup>63</sup> Fieldwork found that this process is not always followed. Some argue that, although the committee consults, it is but a "public relations exercise. Ultimately, the projects that receive funding are those that the MP has selected."<sup>64</sup>

The fact that it is the MP who chairs the committee<sup>65</sup> made it difficult for other members to challenge his or her choices. The critical issue is that the public is hardly involved, either directly or through these representatives, in the decision-making process. As they say, two heads are better than one. Although the community is permitted by the law to be involved in the running of

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<sup>60</sup> [2005] eKLR.

<sup>61</sup> *Ibid* at 8.

<sup>62</sup> Section 23(3) the *CDF Act*.

<sup>63</sup> Section 23(4) the *CDF Act*.

<sup>64</sup> Interview with Arnold, 28 August 2010.

<sup>65</sup> Section 24(5) of the *CDF Act*.

any project,<sup>66</sup> this hardly the situation owing to the lack of access to requisite information in the first place. On the contrary, the committee informs them of the projects that will be undertaken in the constituency and at what cost. Clearly, this state of affairs is out of step with spirit and intention of the *CDF Act*, which envisaged an all-inclusive decision-making process. Arnold, who worked as a Program Manager with a Non-Governmental Organization specializing with local governance in Kenya, reiterates these challenges:

In reality [members of the CDF committee] are appointees of the MP. Thus, when they get to office they serve the interest of the MP. Community interests are hardly taken into consideration. Further, in most constituencies there are no local level public monitoring mechanisms to put checks on the work of this committee.<sup>67</sup>

Research conducted in other constituencies reported similar results.<sup>68</sup>

In order to make this noble idea work on the ground the public should have been provided with or be allowed access to information on, among others, the amount of funding available, the standards used to recruit members to the committee, the question of appeals (where to lodge and with whom), the dates for considering applications or appeals, the criteria used for funding, the priority areas and how these were arrived at, the target groups and how these were identified as well as an outline of projects that have been funded previously, the amount of funding these projects received and a regular update on the status of implementation. For justice to be seen to be done all decisions, rejected or allowed, should be communicated in writing. Sufficient reasons, too, should be provided.<sup>69</sup> Forums, where the public can pose questions regarding the operation of this initiative need to be held regularly.

Whereas the CDF was designed to serve the interest of the community, in the end it is used as a tool to promote the influence of the sitting MP.<sup>70</sup> Further, the fact that the public does not

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<sup>66</sup> Section 38 of the *CDF Act*.

<sup>67</sup> Interview with Arnold, 28 August 2010.

<sup>68</sup> In her study on Mwingi and Dagoretti constituencies, for instance, Wanjiru Gikonyo found that the community was ‘completely locked ... out of the CDF operations’. See Wanjiru Gikonyo, ‘Citizens’ Roles in Devolved Fund Monitoring in Kenya’, in Maurice Makoloo (ed), *Access to Information and Devolved Funds in Kenya* (International Commission of Jurists: Nairobi, 2010) at 50-68 at 52.

<sup>69</sup> For a wider discussion of this theme, see Edwin Abuya, ‘Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective’, (2007) 19 *International Journal of Refugee Law* 51 at 91-92.

<sup>70</sup> See also *Oyoo, supra*, note 60 at 8 (the legislation ‘gives the sitting [MP] unlimited and unchecked executive powers in [its] implementation’).

participate in the process is also highly problematic. The “knowledge gap” made it impossible to the public to evaluate the projects.<sup>71</sup> The fact that the sitting MP is the one who decides ultimately the projects that will be funded and the amount of funding that will be allocated also raises serious problems. Arguably, the ideas that the committee will receive and work with are limited, hence, curtailing development in any constituency in particular and the country at large. It is also questionable whether these committees serve public interests. Based on the fact that the public can not engage meaningfully in the design and implementation of projects, this could create an avenue for corruption. Arnold also made this point:

The public are denied information [on the specific amount of money that is in the CDF kitty] deliberately. Even committee members do not share this information. They are not open to the public. They can not give you facts or figures. There is nowhere else to get ... information .... on the planning, implementation and evaluation [of projects as this] is locally based. The problem is that the information is at the hands of the committee who are cronies of the MP. .... [As] there is no accountability, prices of projects are often escalated.<sup>72</sup>

Section IV of this paper evaluates some of the measures that could be taken to promote public participation in the management of the CDF.

Access to information could also promote transparency. For instance, in the context of the fight against graft, it is imperative for those who are charged with this responsibility to be able to retrieve all the data they need, considering the crucial role these officials could play in countries such as Kenya that are struggling to deal with corruption. Indeed, it is in the interest of the Government to ensure that corruption is fought full-force. However, the lack of information has hampered efforts to combat corruption. Alice, an official of the national Anti-Corruption Agency, noted the frustrations she experienced in her effort to obtain evidence from other Government agencies for potential use in court:

[The Tax Authority, for instance,] claims that the information is classified. But for tax [related offences to be combated effectively] we need this information. They take us round [in circles] when we do investigations. I have cases that I have shelved because I can not complete investigations. ... It is difficult to pursue economic crimes [under these

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<sup>71</sup> Tom Beauchamp and Norman Bowie, (eds), *Ethical Theory and Business* (New Jersey: Pearson, 2004) at 402.

<sup>72</sup> Interview with Arnold, 28 August 2010.

circumstances]. We hardly make much progress. .... I have had a similar experience with other Government departments that deal with energy and medical facilities. .... I was once investigating a [corruption] claim that involved Parliament. They co-operated [eventually] and gave us the information. [But] they behaved like gods and took us round and round.<sup>73</sup>

In order to surmount this hurdle one's status was crucial. Alice, for example, was able to get information in the last example because of her position: "Anyone else could not be able to get the information. I am able to get the information because I work for Anti-Fraud agency."<sup>74</sup>

Personal contacts, too, came in handy:

It is based on who you know. There is no formal access. We are usually helped by informal channels. For instance, there is once that we had to go to investigate an issue in a Prison. We used our personal contacts as we could not trust their formal counterparts to deliver.<sup>75</sup>

Etimgeta, who once chaired a national commission, and Pauline also noted that personal contacts were of utmost importance.<sup>76</sup> While this approach may have worked for these interviewees as well as the author of this report, this state of affairs is highly undesirable. The implication is that those without contacts have very little chances of accessing State-held information. Overall, this could "impede",<sup>77</sup> rather than promote the fight against corruption. The absence of a mechanism to verify the information that has been supplied also stifles this battle. It is also doubtful whether this state of affairs promotes efficiency and honesty in the public service.<sup>78</sup>

### C. Absence of Criteria and Appeals Process

Guidelines are an essential tool for any organization. There are several advantages that are likely to accrue to an institution that has a clear set of standard operating procedures. In addition to promoting the smooth running of any organization (efficiency), rules also contribute a great deal to effective management. Guidelines play a vital role in any organization as they spell out to

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<sup>73</sup> Interview with Alice, 1 July 2010.

<sup>74</sup> *Ibid.*

<sup>75</sup> Interview with Mark, 9 July 2010.

<sup>76</sup> Interview with Pauline, 30 June 2010; Interview with Etimgeta, 3 July 2010.

<sup>77</sup> *Ibid.*

<sup>78</sup> See section 8 of the *Public Officer Ethics Act, 2003* (No. 4 of 2003).

employees as well as management the rules of the game. In other words, they set boundaries by delineating what can be done and what can not be done. They also outline the consequences of particular conduct as well as the available channels for seeking recourse. Accordingly, this framework could enhance confidence in an organization as individuals are aware of the rules, the consequences of non-compliance and where an aggrieved person would go to seek relief. They, thus, do not need to worry about being in the good books of either party—employee or management—irrespective of whether it performs. Guidelines are thus an important tool for promoting productivity. They also inform employees of the objectives of an organization. Guidelines are also important for those dealing with an organization as they communicate how it works as well as how it seeks to achieve its mission and vision. This information influences how the external world would deal with a particular organization.

It is reasonable to assume that, like any organization, Governments would like to run their affairs efficiently and effectively. Accordingly, operating procedures are of central importance. In order to achieve its goals a Government must have a clear set of guidelines. To be effective these must be communicated to all its employees and reviewed periodically to keep pace with the changing working environment. This information should also be available to the public as they are key stake-holders in the management of the Government.

Despite these advantages mentioned above, as of the moment, Parliament is yet to legislate comprehensively on issues surrounding freedom of information in Kenya. Pauline, an official who works for a rights-organization, noted that there were efforts a few years ago by the Government to draft a Freedom of Information policy.<sup>79</sup> Interestingly, the work of the body that was mandated to carry out this exercise was not made public. Owing to this approach, the output of this initiative, although sound, remains unclear. Simply put, there are no official guidelines in Kenya on issues surrounding access to information by the public.

As noted earlier, under the terms of the old and new constitution the right of information was provided for. However, for this constitutional promise to be fulfilled there is need for domestic law, which, among others, would spell out the application process and conditions under which

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<sup>79</sup> Interview with Pauline, 30 June 2010.

information would be released or denied as well as the appeal process to be followed by any person who is aggrieved by the decision of the decision-maker. Internal guidelines, which would give effect to provisions of domestic law, should also be promulgated. These could also provide clarity in the implementation of the law. Many research subjects whom this research interviewed expressed concerns with the lack of policy guidelines.<sup>80</sup> Under the terms of the old constitutional order it was impossible for Government to release formally any information that was in its possession. According to Mark, there was “no legal obligation to release information.”<sup>81</sup> There is also no criterion for storing data.<sup>82</sup> Henry, a Government official, observed that many chose to err on the side of caution: “There are no guidelines to guide civil servants on what should be released or what should not be. The safe position is not to release.”<sup>83</sup> Similar sentiments were expressed by other research subjects. Pauline, for example, lamented that there is no “boundary on what sensitive information is and what it is not. Even where documents are declared public they do not become public”<sup>84</sup>

The absence of the rules gives officials a lot of latitude in the sense that they are the ones who decide the circumstances under which information could be released or withheld from the public. Starling, who works for Parliament, noted:

The former Speaker used to decide on a case-by-case basis. Lawyers would write to the Clerk of the National Assembly [, with specific requests on the information that they required for the cases that they were running]. The Speaker would then decide based on his discretion. Quite a number of requests were declined. .... The current Speaker is receptive to ideas. [However, in one instance] a Law Firm wanted a list of members to the \_\_\_\_\_ Parliament for use in court. This request was rejected. I am not sure whether any reasons were given.<sup>85</sup>

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<sup>80</sup> For instance, Henry (interview with Henry, 3 July 2010); Daniel (interview with Daniel, 5 July 2010); Mark (interview with Mark, 9 July 2010); Pauline (interview with Pauline, 30 June 2010).

<sup>81</sup> Interview with Mark, 9 July 2010.

<sup>82</sup> *Ibid.*

<sup>83</sup> Interview with Arnold, 28 August 2010.

<sup>84</sup> Interview with Pauline, 30 June 2010.

<sup>85</sup> Interview with Starling, 1 September 2010.

This experience reinforces the argument that, absent ‘detailed guidance and procedures’, ‘civil servants may continue to deny [applicants information] that they request’.<sup>86</sup>

Clifford, an official who works at the Public Records Office, also underlined that the Director of the Department<sup>87</sup> “has power to expand or reduce [the] classification period.”<sup>88</sup> According to this official, the Director does not act “unilaterally.”<sup>89</sup> Rather, consultations are usually made with the maker of the document and security agents, if need be, before any decision is made on whether or not to classify a record:

Sometimes the maker could insert a clause that a document be classified. The Director could also consult security agents depending on the nature of the document. Any person who wishes to see the document must apply to the Director. If he refuses, an applicant can appeal to the Minister for National Heritage. I believe that there is a provision for this in the *Public Archives and Documentation Act* (Cap 19, Laws of Kenya), but I am not sure.<sup>90</sup>

Contrary to this official’s position, there are no provisions for appeal under the *Public Archives and Documentation Act* (1966), which is the governing legislation for public records.<sup>91</sup> Generally speaking, there is no appeals process within the Government setup. The general absence of a formal appellate framework is problematic for those applicants whose applications for access to any record have been denied. Assuming appeals lie with the Minister as Clifford (above) noted, the *Public Archives and Documentation Act* is silent on the procedures that an aggrieved person should follow in order to access this forum as well as the possible grounds of appeal. The absence of these requirements is highly undesirable in a society that is governed by the rule of law.<sup>92</sup> This framework could also raise issues surrounding the independence of the appeals process. In Pauline’s experience with the National Assembly (detailed above), it is a pity that the

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<sup>86</sup> Svitlana Kravchenko, ‘Is Access to Environmental Information a Fundamental Right?’, (2010) 11 *Oregon Review of International Law* 227 at 254.

<sup>87</sup> Established under section 3 of the Public Archives and Documentation Service Act.

<sup>88</sup> Interview with Clifford, 1 July 2010.

<sup>89</sup> *Ibid.*

<sup>90</sup> Interview with Clifford, 1 July 2010.

<sup>91</sup> According to the preamble of this statute, it was designed ‘to provide for the preservation of public archives and public records’.

<sup>92</sup> See preamble to the 2010, which states that one of its objectives is to establish ‘a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law’.

information could not be provided, despite its seemingly harmless nature. The next section carries this theme further. Let us now look at the next challenge—the culture of secrecy.

#### D. Culture of Secrecy

At the moment the country runs on informal sources of information because of the culture of secrecy.<sup>93</sup>

The fourth challenge facing access to information is the culture of secrecy. The sentiments of Evan (above) capture the current trend.<sup>94</sup> A number of interviewees that the author met during this study noted the difficulties of obtaining information from the Government owing to reluctance by officials to release data, which is in their possession.<sup>95</sup> The 2006 *Code of Regulations*, which prohibits officials from communicating with the media,<sup>96</sup> aggravates the situation. History suggests that the Government has not always been keen to release information that is in its custody.<sup>97</sup> “There was a blanket ban. They classified what information per their culture”, asserted Evan.<sup>98</sup> Threats to internal security are often cited to justify with-holding information.<sup>99</sup> The lack of criteria to guide the information that could be released or withheld has aggravated the situation as officials are unsure of how they should deal with this aspect. Information, as Henry, a Government official, observed, is “proprieted”.<sup>100</sup> Based on his experience dealing with other Government departments, he contended that the general attitude is that information:

[S]hould not be shared by civil servants. The safe position is not to give information. There is no obligation to release. .... The risk of giving information is greater than not

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<sup>93</sup> Interview with Evan, 24 June 2010.

<sup>94</sup> Unfortunately, this practice is not unique to Kenya. See Richard Stone, *Textbook on Civil Liberties and Human Rights* (Oxford University Press: Oxford, 2004) at 260 (arguing that the culture of secrecy ‘has traditionally pervaded government in the United Kingdom’).

<sup>95</sup> Interview with Morgan, 22 June 2010; Interview with Evan, 24 June 2010; Interview with Henry, 3 July 2010.

<sup>96</sup> Regulation G6(1).

<sup>97</sup> David Makali, *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers: Nairobi, 2003); International Commission of Jurists, *Freedom of Information Survey: An Audit of Laws Hindering Access to Information in Kenya* (International Commission of Jurists: Nairobi, 2006).

<sup>98</sup> Interview with Evan, 24 June 2010.

<sup>99</sup> Clifford, for instance, observed thus: “If your father was cited as a Home Guard in the Mau Mau era and [it comes out] that he participated in the death of my dad, I would take a machete and chop your head.” Interview with Clifford, 1 July 2010.

<sup>100</sup> Interview with Henry, 3 July 2010.

giving information. So Government officials decide to err on the side of caution. Therefore, they end up not giving information.<sup>101</sup>

Kennedy attributed the reluctance to provide information or reasons for not sharing information to the lack of trust as well as uncertainty on the side of officials: “people are afraid of being quoted. They are afraid of being the source”.<sup>102</sup> Evan, who works for a rights agency, affirmed these sentiments. He explained that in his experience “people would rather not release information as [they are afraid] that it would be used against them”.<sup>103</sup> Daniel, an official who works with a Government security agency, shared his experience in the following words:

Our department received a questionnaire from a student based in a foreign University. He wanted to know Kenya’s position on [the area that the student was researching]. He had all the documentation from his institution as well as a letter from [the applicant’s] Embassy. The questionnaire first came to my senior and, subsequently, it was passed to me, with a request that I advise on the way forward. I discussed it with my senior and we decided not to complete the questionnaire, as some of the information that was being sought was in our assessment a bit sensitive. The student has since sent us two reminders to complete the questionnaire, but we have not responded. I guess he will get tired and move on.<sup>104</sup>

Does this conduct promote ‘public confidence’ as required by the terms of the 2003 *Public Officer Ethics Act*?<sup>105</sup> This experience underscores the reluctance on the part of officials to release any information that is in their custody. It would be argued that the sensitive nature of the information sought justified its non-release. However, if this was the real reason, how come the official found it difficult to communicate this aspect to the applicant? It is apparent that there are no boundaries on what is sensitive or not. To put it in another way, the test is subjective. Accordingly, a lot of power is vested on those officials who receive applications for consideration for release of information. In this instance they decided not to exercise their discretion in favor of the applicant. Unfortunately, this was not an isolated situation as this study found. Pauline, who works for a Non-Government Organization, also stated that she was unable

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<sup>101</sup> *Ibid.*

<sup>102</sup> Interview with Kennedy, 5 July 2010.

<sup>103</sup> Clifford, for instance, observed thus: “If your father was cited as a Home Guard in the Mau Mau era and [it comes out] that he participated in the death of my dad, I would take a machete and chop your head.” Interview with Clifford, 1 July 2010).

<sup>104</sup> Interview with Daniel, 5 July 2010.

<sup>105</sup> See section 9(a).

to obtain “judgments from the Children’s Court”<sup>106</sup> for an audit of the judiciary that her organization was conducting. Applicants hardly receive any response on the status of their requests (such as the applicant in Daniel’s situation) or grounds for refusal. For example, in Pauline’s application the refusal was based on the fact that her organization was not party to any proceeding.<sup>107</sup> These experiences reinforce arguments by Kennedy that officials are nervous of being mentioned as the source of information. Thus, and as Henry noted, they prefer to “err on the side of caution”.<sup>108</sup> Sadly, this practice is widespread.<sup>109</sup>

Interestingly, this unofficial ban applies not only to sharing information sharing between the Government and the public. On the contrary it is also applicable between Government agencies. In other words, various Government departments hardly communicate. According to Daniel, “different [Government] agencies do not speak”.<sup>110</sup> Clearly, this is unfortunate, and raises several questions. In particular how is the Government, which was designed originally to function as a single unit, expected to work? Indeed, it is curious how any institution would be able to conduct its affairs effectively or efficiently under such circumstances. Apparently, the success or failure of any organization depends on the extent to which the various departments speak with each other. Eventually the current state of affairs is likely to affect not only operations of the Kenyan Government, but service delivery to the general public as well—a crucial responsibility of any serious State.

However, it is not all Government officials who practice this culture. This study came across some officials who had opted not to take this general approach. Girmo, for instance, who works for Parliament, stated that he was ready to “appear in any court to release any document that relates to a committee that [he] was sitting, as I am an officer of the court”.<sup>111</sup> Perhaps this change in attitude could be attributed to the argument by some that “competent personnel”<sup>112</sup> had been hired to work for this institution. Hopefully, there would be a change in attitude across the

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<sup>106</sup> Interview with Pauline, 30 June 2010.

<sup>107</sup> Alice, an official working with the Anti-Fraud department, affirmed this: “[Court proceedings] are restricted to parties. [Anyone else] must show his or her interest [in order to be granted access]”. Interview with Alice, 1 July 2010).

<sup>108</sup> Interview with Henry, 3 July 2010.

<sup>109</sup> Interview with Pauline, 30 June 2010; Interview with Mark, 09 September 2010.

<sup>110</sup> Interview with Daniel, 5 July 2010.

<sup>111</sup> Interview with Girmo, 1 September 2010.

<sup>112</sup> Interview with Starling, 1 September 2010.

board. As of the moment, the general attitude is not to release any information. The next section explores this theme further.

#### IV. FINDINGS AND RECOMMENDATIONS FOR PROMOTING ACCESS

This study examined issues surrounding access to information in Kenya. It identified some of the obstacles that were encountered by those who sought information from the Government. These hurdles denied the country and members of the public the benefits for disclosure. In this section some of the solutions to these challenges are explored.

This research has established that Kenya's legal framework is not adequate to deal with issues surrounding access to information. Although Kenya is party to international treaties that govern freedom of information and its current constitution provides for the right of access to information, there is still no comprehensive domestic legal instrument to regulate the obligation to disclose information. Indeed, legislation would be required to flesh out this entitlement, with a view towards translating the constitutional promise into a real right. Towards this end, drafters could draw on experience in other States that have passed freedom of information laws, the historical record as well as empirical data in order to draft a piece of legislation that is informed by reality on the ground. In terms of content the legislation should cover the following aspects: the definition of information; an obligation to provide information, not merely documents; targets for responding to requests; procedures for seeking information; charges, if any; exemptions; grounds for refusal; a requirement for reasons; the supervisory authority and their qualifications; and the question of appeals—first instance and subsequent—and points of appeal at all levels. In terms of practice, the goal should be towards maximum disclosure.<sup>113</sup> Any exception should be narrowly construed.<sup>114</sup>

Granted, the new constitutional dispensation provides explicitly for the right of access to information. However, it is unclear when the legislation that will breathe life into this right will be passed. This argument lies on the fact that the Fifth Schedule to the *Constitution*, which

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<sup>113</sup> Interview with Pauline, 30 June 2010; Kravchenko, *supra*, note 86 at 228.

<sup>114</sup> Interview with Alice, 1 July 2010.

outlines the key priority legislation to be passed, is silent on the time lines within which Parliament should pass domestic legislation to this end.<sup>115</sup> This implies effectively that, without any consequences, it could take its time before passing this vital piece of legislation, which has a huge impact on the management of affairs in the country. It is notable that under the terms of the draft of January 2010 *Revised Harmonized Draft Constitution of Kenya* that was produced by the Committee of Experts, which was charged with drafting the constitution, a one-year time limit was set on Parliament to come up with the requisite legislation.<sup>116</sup> Unfortunately, this requirement was removed from the legislation as it underwent the review process. It is unclear why the drafters saw it fit to delete it. However, Pauline asserts that “it was a deliberate attempt [owing to] fear of accountability” on the part of Government.<sup>117</sup> The other considerations noted below would have to be taken on board for the envisaged legislation and the constitutional promise to be effective.

This study established that Kenyan laws have a high requirement for the disclosure of information in the sense that individuals must first obtain consent from the high-ranking public officials before they can gain access to certain categories of information. There are two ways of dealing with this aspect. In the first place, the requirement for consent, which is a key obstacle, could be removed all together from the statutes by amending sections 18 and 19 of the *National Assembly (Powers and Privileges) Act* as well as section 27 of the *Service Commissions Act*. The second measure also involves amending these sections of the law, but this time round by outlining the procedure that those seeking these data must follow. Granted, the responsibility of altering laws, by amending or repealing, lies with Parliament.<sup>118</sup> However, other stakeholders, namely, Non-Governmental agencies, Media houses, lawyers organizations, courts, Faith based organizations and the general public as well as Academics and experts in this area of study, would need to be involved in order to ensure that Parliament discharges this obligation in keeping with due process standards.

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<sup>115</sup> By contrast, a time specification has been given by the fifth schedule to the *Constitution* for other rights such as freedom of the media (three years), fair hearing (four years), family (five years) and fair administrative action (four years).

<sup>116</sup> See the Fifth Schedule of the January 2010 *Revised Harmonized Draft Constitution of Kenya*, read together with clause 32.

<sup>117</sup> Interview with Pauline, 30 June 2010.

<sup>118</sup> Article 94 of the *Constitution*.

However, merely setting out the procedure that applicants seeking to access to information must comply is by itself insufficient. In order to make sense of the process it is necessary for the legal framework to set out objective criteria<sup>119</sup> that must be followed by those considering applications for release of information. Lack of criteria to guide the operations of officials was one of the key deficiencies that this research identified. This gap provided those who hold information with a lot of discretion. As this study found, they alone decided how to treat particular requests for information. While some gave information based on previous interaction, in other instances officials chose to err on the side of caution. Either way, the prevailing situation is undesirable for the country. Discretion also holds the potential for abuse.<sup>120</sup> A set of rules is thus necessary to guide the operations of Government officials. As the English House of Lords (per Lord Mustill) underlined in *Re D and Another (minors) (adoption reports: confidentiality)*<sup>121</sup> a complete ban on disclosure is inconsistent with the duty of disclosure.<sup>122</sup> Rather decision-makers must consider:

[B]oth the degree of likelihood that harm will occur, and the gravity of the harm if it does in fact occur. To say that harm must be certain would in my opinion pitch the test too high, since future events cannot be predicted with complete confidence, but a powerful combination of likelihood and seriousness of harm [must be assessed].<sup>123</sup>

To be effective the criteria, which should be engrained in the law, must make it mandatory for decision-makers to provide reasons for their decisions.<sup>124</sup> This position is consistent with the *Constitution*.<sup>125</sup> The yardstick for determining whether a statement in law satisfies the requirements of a decision is whether the reasons clearly demonstrate that a decision-maker has applied legal principles<sup>126</sup> to the issue at hand. In order to meet due process requirements, the

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<sup>119</sup> Several courts in Kenya have underpinned the importance of setting out criteria. See, for instance, *R v Minister of Finance and Others* [2006] 1 EA 343; *Ouko v R* [2007] 2 EA 380; *Michuki v A-G* [2003] 1 EA 158. A number of interviewees, including Mark (Interview with Mark, 9 July 2010) also made this point.

<sup>120</sup> Larry Gaines and Victor Kappeler, *Policing in America* (Matthew Bender: Ohio, 2005) at 256.

<sup>121</sup> (1995) 4 All ER 385.

<sup>122</sup> *Ibid* at 392.

<sup>123</sup> *Ibid*.

<sup>124</sup> For the advantages of reasons, see Edwin Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', (2007) 19 *International Journal of Refugee Law* 51 at 92.

<sup>125</sup> See article 47(2) ('If a right or fundamental freedom or a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action').

<sup>126</sup> On language, see also Peter Neyroud and Alan Beckley, *Policing, Ethics and Human Rights* (Willan Publishing: Devon, 2004) at 190 (arguing that 'inaccessible language' could lead to 'apathy by its intended audience').

reasons must be in writing, clear and in easy to understand language.<sup>127</sup> Practice would thus need to be changed in order to ensure that the constitutional requirement is met. Statutes such as the *National Assembly (Powers and Privileges) Act*, *Preservation of Public Security Act*, *Service Commissions Act*, *The Evidence Act* and the *Official Secrets Act* must be amended. The blanket ban should be removed. Several commentators have made this point. Stone, for instance, underpins that for the freedom of information law to operate effectively ‘all the legal controls operating against’ it must be removed.<sup>128</sup> In South Africa, the Constitutional Court found in *Shabalala v A-G*<sup>129</sup> that a blanket ban was inconsistent with the right of access to information. Some commentators have also asserted that blanket exclusions affect this right.<sup>130</sup> In place the law should allow for judicial scrutiny of any application under this head based on set criteria.

It was established by this research that there is currently no appeal process for those whose applications for access to information have been rejected. In *Oyoo* the High Court deplored the fact that the *CDF Act* does not provide an avenue for any person who is ‘aggrieved by the list of projects submitted by a particular member of parliament.’<sup>131</sup> Clearly, this is inconsistent with due process requirements. Meeting this shortfall requires the inclusion of an appeals or review process in the assessment framework.<sup>132</sup> An independent and impartial court or tribunal should hear applications for appeal or review lodged by any dissatisfied individual. As required by article 47 of the *Constitution*, claims must be heard expeditiously and efficiently. The requirement for reasons could go a long way towards strengthening the appeal and review framework. Notably, the time for lodging appeals as well as the grounds for appeal would need to be set out by the amending law or comprehensive legislation.

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<sup>127</sup> See also Stephen Everson, (ed.), *Artistotle: The politics and the Constitution of Athens* (Cambridge: Cambridge University Press, 2007) at 49.

<sup>128</sup> Stone, *supra*, note 94 at 258.

<sup>129</sup> (1994) 4 All SA 583 at 790-791.

<sup>130</sup> Jonathan Klareen and Glenn Penfold, ‘Access to Information’ in Stuart Woolman, Theunis Roux and Michael Bishop, (eds), *Constitutional Law of South Africa* (Juta: Cape Town, 2006) at 62-1 to 62-24 at 62-10.

<sup>131</sup> *Supra*, note 60 at 4.

<sup>132</sup> See also United Nations High Commissioner for Refugees, *Asylum-Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (31 May 2001), paragraph 43 (‘A key procedural safeguard deriving from general administrative law and essential to the concept of effective remedy has become that the appeal be considered by an authority different from and independent of that making the initial decision’).

Fieldwork established that vital information is sometimes withheld from the public hence frustrating any meaningful public participation in the management of affairs. In other words, the Government is not proactive in issues surrounding access to information. The CDF example affirms this position. The measures that have been discussed in this section (above) would contribute a great deal towards improve the current status of the running of this fund particularly at the constituency level. In addition, there is need to divest this process from the MPs by amending section 23 of the *CDF Act*, as part of the problem lies in the appointment process. This will not be an easy task considering the political capital that MPs gain by effectively running this fund. However, all stakeholders must join hands to push for a change in the law. Minimum criteria for members to the Constituency Development Committee should be established. These should be consistent with article 73 of the *Constitution*, which requires public officials to demonstrate the following attributes: integrity, competence, impartiality, honesty and discipline. If they are to deliver, officials must be recruited via an independent and transparent process.

The new constitutional dispensation of Kenya also embraces the concept of public participation at all levels. Article 118 of the *Constitution* requires Parliament to ‘facilitate public participation and involvement’ in all its affairs. Further, the constitution guarantees ‘every person’ the right to petition Parliament ‘to consider any matter within its authority’.<sup>133</sup> Although these provisions are yet to be tested, they are fundamental steps in the right direction on aspects relating to, among others, access to information.

This research established that there is a culture of secrecy in Kenya, which makes it difficult for one to receive information from the State. Rooting out this attitude is not an easy task. There are no easy, quick solutions. Although similar trends have been noted in other countries,<sup>134</sup> Kenya can not take comfort in this fact. Legal measures by themselves can not resolve the problem.<sup>135</sup> Rather a combination of measures is required to ensure that this trend is reduced to an all time

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<sup>133</sup> Article 119.

<sup>134</sup> See, for instance, Stone, *supra*, note 94.

<sup>135</sup> See also Stephen Everson, (ed.), *Aristotle: The politics and the Constitution of Athens* (Cambridge: Cambridge University Press, 2007) at 49 (A ‘change in a law is a very different thing from a change in an art’) at 49.

low. Continuous training and re-training on ethics<sup>136</sup> and best practices as well as divine intervention are some of the measures that could be adopted to meet this goal. In addition, those who lead organizations must embrace excellent leadership habits. Hopefully, these traits will trickle down to the rest of the team. Setting realistic performance targets is also one way of ensuring the officials comply with their legal mandate. All those who engage in corrupt or improper practices, irrespective of rank or file, must face the criminal justice system. Otherwise, ‘every other correction’ is likely to be ‘useless’.<sup>137</sup> In order to ensure that information is easily available to the public and other Government agencies there should be a requirement that each Department establishes the office of an Information Officer. Among others, this office should coordinate all aspects of access to information within the relevant department. Public education is key in ensuring that the community is aware of the entire content of the right of access to information.<sup>138</sup>

Lastly, the constitutional requirement that the right of access to information is limited to citizens is problematic. If Kenya is to attract any foreign investment, this right must be extended to non-nationals. This argument lies in the fact that any potential investor would be interested in knowing all aspects of an institution that the person is interested in putting his or her resources in.<sup>139</sup> Either way, if this right was not extended to non-citizens, what would prevent an individual from using locals to gain information? The fact that one can now access information via the internet further erodes this claim. Simply put, it is in the interest of the country to accord non-nationals this right. The fear of this information being used for terrorist purposes<sup>140</sup> would be difficult to maintain particularly if the legislation adopts the recommendations proposed above. Accordingly, article 35 of the 2010 *Constitution* must be amended.

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<sup>136</sup> Section 9(g) of the *Public Officer Ethics Act, 2003* requires public officers to their responsibilities in a ‘professional manner’. See also Ysaiah Ross, *Ethics in Law: Lawyers’ Professional Responsibility and Accountability in Australia* (Butterworths: Sydney, 2001) at 24 noting the importance of continuous training on ethical issues. For the benefits of ethics, see O.C. Ferrell, John Fraedrich and Linda Ferrell, *Business Ethics: Ethical Decision Making and Cases* (Ohio: South-Western, 2008) at 18-22.

<sup>137</sup> Charles Montesquieu, *The Spirit of Laws* (Prometheus Books: New York, 2002) at 117.

<sup>138</sup> Arnold (Interview with Arnold, 28 August 2010) also expressed similar sentiments.

<sup>139</sup> According to Evan (Interview with Evan, 24 June 2010), (‘markets thrive on information’).

<sup>140</sup> Some interviewees, for instance, Zena, (Interview with Zena, 23 June 2010).

## V. CONCLUSION: THE CHALLENGE AHEAD

This paper has demonstrated that, although Kenya's *Constitution* provides an unqualified right of access to all and any information in the hands of the state and to any information that is in private hands, there are several hurdles to be surmounted for the promises that are contained in the books to be translated into real practice. All stake holders must take a proactive role in the passage and implementation of the operational law. Laws that protect whistle blowers could go a long way towards reinforcing this right.<sup>141</sup> Lessons from elsewhere must also be embraced if national legislation is to bear fruit particularly in its application.<sup>142</sup> There is also need for hard evidence to support the positive impact of access to information. A systematic approach to this would contribute immensely towards the implementation of the law. Granted, the lot of ground has been covered in Kenya.<sup>143</sup> However, there is still a lot of work to be done. That is the challenge ahead.

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<sup>141</sup> See also Powe, *supra*, note 1 at 173 ('[W]ithout leaks it would be impossible to understand Government, especially diplomacy and national security'). Alice (Interview with Alice, 1 July 2010) and Timothy (Interview with Timothy, 23 June 2010) also made a similar point.

<sup>142</sup> Timothy (Interview with Timothy, 23 June 2010) also noted that 'practical examples' from other jurisdictions could enrich the implementation of the new law in Kenya.

<sup>143</sup> For instance, Zubira observed that "A lot has changed since [she] joined Government in 1990" (Interview with Zubira, 11 November 2010).

**APPENDIX ONE**  
**LIST OF INTERVIEWEES**

| <b>Pseudonym</b> | <b>Sex</b> | <b>Date of Interview</b> | <b>Specialization</b>          |
|------------------|------------|--------------------------|--------------------------------|
| Alice            | Female     | 01 July 2010             | Anti-Corruption (Government)   |
| Arnold           | Male       | 28 August 2010           | Governance                     |
| Daniel           | Male       | 05 July 2010             | Security (Government)          |
| Clifford         | Male       | 01 July 2010             | Records (Government)           |
| Etimgeta         | Male       | 03 July 2010             | Law                            |
| Evan             | Male       | 24 June 2010             | Human Rights                   |
| Girmo            | Male       | 01 Sept 2010             | Legislation (Government)       |
| Henry            | Male       | 03 July 2010             | Public Complaints (Government) |
| Kennedy          | Male       | 05 July 2010             | Public Relations (Government)  |
| Mark             | Male       | 09 July 2010             | Communications                 |
| Morgan           | Male       | 22 June 2010             | Law                            |
| Pauline          | Female     | 30 June 2010             | Human Rights                   |
| Starling         | Male       | 01 Sept 2010             | Legislation (Government)       |
| Timothy          | Male       | 23 June 2010             | Human Rights                   |
| Zena             | Female     | 23 June 2010             | Human Rights                   |
| Zubira           | Female     | 11 November 2010         | Legal (Government)             |