

THE FREEDOM OF INFORMATION BILL, 2012

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THE FREEDOM OF INFORMATION BILL, 2012

A Bill for

AN ACT of Parliament to provide for the right of access to information in the possession of public entities; to provide for proactive publication and dissemination of information; to provide for the establishment of the Freedom of Information and Data Protection Board and for connected purposes

ENACTED by the Parliament of Kenya as follows -

PART I—PRELIMINARY

- Short title 1. This Act may be cited as the Freedom of Information Act, 2012.
- Interpretation. 2. In this Act unless the context otherwise requires;
- “Board” means the Freedom of Information and Data Protection Board established under section 19;
- “Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to information;
- “Committee” means the Parliamentary Departmental Committee responsible for matters relating to information;
- “edited copy” in relation to a document, means a copy of a document from which exempt information has been deleted;
- “exempt information” means information withheld by a public entity in accordance with section 6;
- “information” includes all records held by a public entity, regardless of the form in which the information is stored, its source or the date of production;
- “information officer” means any officer of a public entity designated as such for purposes of this Act who in the first instance is the chief executive of the public entity, or any delegated officer in any other instance;
- “interested party” means a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in

the litigation;” group

“member” means a member of the Board appointed under section 23;

“national security” has the same meaning assigned to it by Article 238 of the Constitution;

“personal information” means information about an identifiable individual, including, but not limited to:-

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, age, physical, psychological or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
- (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the fingerprints, blood type, address, telephone or other contact details of the individual;
- (e) a person’s opinion or views over another;
- (f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) any information given in support or in relation to an award or grant proposed to be given to another person.

“private body” for purposes of this Act means any private entities:

- (a) that receive public resources and benefits, utilize public funds, engage in public functions, provide public services, have exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources), or

- (b) which are in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

“public entity” includes –

- (a) the National Assembly, members and staff of Parliament;
- (b) the Judiciary;
- (c) all Government ministries, departments or agencies at all levels of Government;
- (d) a body which -
 - (i) is established by virtue of the President’s powers or by or under an Act of Parliament or an Order made under an Act of Parliament or which is established in any other way by a Cabinet Secretary of the government or by a government department or public entity;
 - (ii) receives any part of its revenues directly from money provided by Parliament or from a levy authorized by an enactment or fee or charge of any other description so authorized;
- (e) a statutory corporation within the meaning of the State Corporations Act;
- (f) a commission of inquiry established under the Commissions of Inquiry Act;
- (g) all local authorities established under the Local Government Act;
- (h) a body carrying out a statutory or public function, provided that the body is a public entity only to the extent of its statutory or public function; or
- (i) any other body or authority designated by the Cabinet Secretary as a public entity for purposes of this Act;

“public officer” has the same meaning assigned to it under Article

260 of the Constitution;

“public record” includes any writing containing information relating to the conduct of the public’s business, prepared, owned, used or retained by a public entity regardless of physical form or characteristics;

“service commission” means the Public Service Commission.

Objects of the Act

3. The objects of this Act include—

- (a) to give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;
- (b) to require public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;
- (c) to create a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;
- (d) to promote routine and systematic information disclosure by public service and private service on constitutional principles relating to accountability, transparency and public participation and access to information;
- (e) to provide for the protection of persons who release information of public interest in good faith; and
- (f) to provide a framework to facilitate public education on the right to access information under this Act

PART II – RIGHT TO INFORMATION

Right to information

4. (1) Every citizen has the right of access to information held by the State in accordance with this Act.

(2) Subject to this Act, every citizen has the right of access to information held by another person, or under the control of a private body where that information is necessary for the enforcement or protection of any right or fundamental freedom.

(3) Subject to this Act, a person's right to access information is not affected by -

(a) any reason the person gives for seeking access as the right to access of information is independent of a person's interest; or

(b) the public entity's belief as to what are his reasons for seeking access.

(4) A person has the right to access information of a public entity or private body expeditiously and inexpensively;

(5) This Act shall be interpreted and applied on the basis of a duty to disclose and non disclosure shall be permitted only in circumstances exempted under section 6.

(6) Nothing in this Act shall limit or otherwise restrict any other legislative requirement for a public entity, or a private body to disclose information.

(7) The right of access to information includes -

(a) both a right to request and receive information; and

(b) an obligation on the part of public entities and officials to disseminate essential information that the public is entitled to know including their core functions and key activities.

Proactive disclosure

5. (1) A public entity shall -

(a) as soon as practicable after the commencement of this Act but not later than twelve months after commencement, and in a form approved by the Board, facilitate access to information upon request.

(b) the information referred to in paragraph (a) 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) the norms set by it for the discharge of its functions;
 - (v) any guidance used by it in the relation to 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; and
 - (vi) 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 consulted by any person;
- (c) during the year commencing on first January next following the publication of the first statement published under paragraph (b), and during each succeeding year, cause to be published statements updating the information contained in the previous statement or statements published under that paragraph;
- (d) publish all relevant facts while formulating important policies or announcing the decisions which affect the public; and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;
- (e) provide to any person the reasons for any decision taken by it in relation to that person;
- (f) unless there are good reasons to the contrary, allow members of the public to attend its meetings at which decisions affecting them are made and shall give adequate notice of such meetings;

(g) upon signing, public entities shall publish all contracts entered into including –

- (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 provider, contractor or individual to whom the contract has been granted; and
- (iv) the periods within which the contract shall be completed.

(2) Information shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used.

(3) At a minimum, the material referred to in subsection (1) shall be made available –

- (a) for inspection by any person without charge;
- (b) by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made, and
- (c) on the Internet, provided that the materials are held by the authority in electronic form.

Exempt information

6. (1) Notwithstanding section 4(1) exempt information, may be withheld by a public entity where it is satisfied that disclosure of such information is likely to –

- (a) undermine the national security of Kenya;
- (b) impede the due process of law or endanger the safety of life of any person;
- (c) 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;

- (d) infringe on the intellectual property rights of that entity or third party from whom information was obtained;
- (e) cause substantial harm to the ability of the Government to manage the economy of Kenya.
- (f) significantly undermine a public 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; or
- (g) undermine privileged communication in relation to the cause of justice in judicial proceedings or business matters.

(2) Notwithstanding the generality of subsection (1) (a), information relating to national security includes –

- (a) military plans, weapon systems or operations;
- (b) foreign government information with implications on national security;
- (c) intelligence activities, sources, methods or cryptology;
- (d) foreign relations or foreign activities;
- (e) scientific, technology or economic matters relating to national security;
- (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security.

(3) Subsections (1) (d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

(4) Notwithstanding anything contained in subsections (1) and (2), a public entity shall disclose information where the public interest in disclosure outweighs the harm to protected interests.

(5) In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on

the need to –

- (a) promote accountability of public entities to the public;
 - (b) ensure that the expenditure of public funds is subject to effective oversight;
 - (c) promote informed debate on issues of public interest relevant to this Act
 - (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
 - (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.
- (6) Unless the contrary is proved by the public entity, information is presumed not to be exempt if the information has been held for a period exceeding thirty years.

PART IV – ACCESS TO INFORMATION

Application for
access

7. (1) An application to access information shall be made in English or Kiswahili orally or in writing by email, fax, post, telephone or by any other medium, and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
- (2) An individual who, because of illiteracy or disability is unable to make a written request for access to information in accordance with subsection (1), may make that request orally and the public officer concerned shall reduce the oral request to writing in the prescribed form and provide a copy to the requesting individual.
- (3) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

Processing of
application

8. (1) Subject to section 9, a public officer shall make a decision on an application as soon as possible, but in any event, within

twenty one days of receipt of the application:

Provided that where the information sought concerns the life or liberty of a person, the information shall be provided within forty-eight hours of receipt of the application or not later than fifteen working days where the application is complex or relates to a large volume of information.

Transfer of application

- 9.** (1) An information officer may, not later than five days from the date of receipt of an application, transfer the application or any relevant part of it, to another public entity, if the information requested is held by that other public entity.
- (2) Where an application is transferred under subsection (1), an information officer shall inform the applicant immediately but in any event not later than seven days from the date of receipt of the application, about such transfer.
- (3) A public entity to which an application is referred by an information officer under subsection (1) shall make a decision on the application within fifteen days from the date that the application was first made.
- (4) Where the applicant does not receive a response to an application within the period stated in this section, the application shall be deemed to have been rejected.
- (5) An information officer who fails to respond to a request for information within the prescribed time commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or imprisonment for three months or both.

Providing access to information

- 10.** (1) Where a decision is taken to provide the information applied for, an information officer shall send to the applicant a written notice within fifteen working days of receipt of the application, advising –
- (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;
 - (e) the proposed process of accessing the information once the payment is made; and
 - (f) that an appeal may be made to the Board in respect of the amount of fees required or the form of access proposed to be provided.
- (2) Subject to subsection (3), upon receipt of the fee payable, an information officer shall provide the information to the applicant or permit the relevant inspection immediately but in any event not later than two working days from the date of receipt of the payment.
- (3) Any information to be made accessible to an applicant shall be produced forthwith at the place where it is kept, for inspection in the form in which it is held.
- (4) Where the applicant requests that the information in (3) is made available in another form and if it is practicable to do so, such information may be copied, reproduced, or used for conversion to a sound transmission at the expense of the applicant.
- (5) Where information is to be provided under this section and the applicant requests that access be given in either English or Kiswahili, the information shall be given to the applicant in that language –
- (a) forthwith, if the information already exists in that language; or
 - (b) within a reasonable time if the information does not exist in the language in which access has been applied for.

Fees

- 11.** (1) No fee may be levied in relation to the submission of an application.
- (2) A public entity 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.

(3) The Cabinet Secretary shall make regulations prescribing the fees payable for expenses incurred in providing information to an applicant.

Correction of information

12. (1) At the request of the applicant a public entity shall, at its own expense correct and update any personal information held by it relating to the applicant, which is out of date, inaccurate or incomplete.

(2) A request under this section shall be made in writing to the public entity responsible for the maintenance of the record system containing the out of date, inaccurate or incomplete information and shall –

(a) state that it is a request to amend certain personal information relating to the applicant;

(b) specify the personal information that is to be amended indicating how such information is out of date, inaccurate or incomplete, and how it is adverse to the applicant's interests; and

(c) specify the remedy sought by the applicant.

PART V – REVIEW OF DECISIONS BY THE BOARD

Review of decisions by Board

13. (1) Subject to subsection (2), an applicant may apply in writing to the Board, requesting a review of any of the following decisions of a public entity in relation to a request for access to information –

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information but not granting access to all information to which the application relates;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

- (f) a decision relating to remission of application prescribed fee;
- (g) a decision to grant access to information only to a qualified person;
- (h) a decision refusing to amend a record of personal information in accordance with an application made under section 12; or
- (i) a decision refusing to annotate a record of personal information in accordance with an application made under section 12.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Board may allow, from the day on which the decision is notified to the applicant.

(3) The procedure for submitting a request for a review by the Board shall be the same as the procedure for lodging complaints with the Board stipulated under section 35 or as prescribed by the Board.

Notice to interested party

14. In reviewing a decision, the Board may, where necessary give notice to any interested party.

Protection of person making disclosure

15. (1) A person shall not be penalized in relation to 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 make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.

(2) For purposes of subsection (1), a disclosure which is made to the police or to an appropriate public entity shall be deemed to be made in the public interest.

(3) A person shall make a disclosure under subsection (1) and (2), where the person has reasonable belief in the veracity of the information

(4) Any person who provides false information maliciously intended to injure the other person commits an offence and is liable on conviction to a term not exceeding three years imprisonment.

(5) Disclosure of information under subsection (1) and (2) 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.

(5) For the purpose of this section, a person is penalized if the person is dismissed, discriminated against, made the subject of reprisal or other form of adverse treatment or is denied any appointment, promotion or advantage that otherwise would have been provided or any other personnel action provided under the law relating to whistle blower, and the imposition of any such penalty in contravention of this section shall be actionable as a tort.

(6) Any term of any settlement arising from a claim under this section, insofar as it purports to impose an obligation of confidentiality on any party to the settlement in respect of information which is accurate and which was or was proposed to be disclosed, shall be unenforceable.

(7) In any proceedings for an offence for contravention of any statutory prohibition or restriction on the disclosure of information, it shall be a defence to show that;

- (a) in the circumstances, the disclosure was in the public interest, and
- (b) where the offence is alleged to have been committed by a public officer or Government contractor and involves the disclosure of information obtained by the person in the person's position as such, that the defendant had, before making the disclosure, complied with the provisions of subsection (3).

Management of records

16. (1) In this section-

- (a) "records" means a document or other source of information compiled, recorded or stored in written form or film by electronic process or in any other

manner;

(b) records shall be accurate, authentic, have integrity and useable.

(2) Every public entity shall keep and maintain its records in a manner which facilitates the right of access to information as provided for in this Act.

(3) At a minimum, to qualify to have complied with the duty to keep and maintain records under subsection (1), every public entity shall –

(a) create and preserve such records as are necessary to document adequately its policies, decisions, procedures, transactions and other activities it undertakes pertinent to the implementation of its mandate;

(b) ensure that records in its custody, including those held in electronic form, are maintained in good order and condition; and

(c) not later than three years from the date from which this Act begins to apply to it, computerize its records and information management systems in order to facilitate more efficient access to information

Offence of alteration, defacement, blocking, erasure etc

17. (1) Where an application to access information has been made to a public entity under section 7 of this Act and the applicant would have been entitled, subject to payment of any fee, to provision of any information in accordance with that section, any person to whom this section applies commits an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public entity, with the intention of preventing the disclosure by that entity of all, or any part, of the information provision of which the applicant would have been entitled.

(2) Subsection (1) applies to the public entity and to any person who is employed by, is an officer of, or is subject to the direction of, the public entity.

(3) A person convicted of an offence under this section shall be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two

years, or both.

Defamatory matter
in information
released

18. Where any information provided by a public entity to an applicant under section **10** was supplied to the public entity by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice.

PART V – ESTABLISHMENT, POWERS AND FUNCTIONS OF BOARD

Establishment
of Board

19. (1) There is hereby established a Board to be known as the Freedom of Information and Data Protection Board.

(2) The Board is a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of –

(a) suing and being sued;

taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;

(b) borrowing or lending money; and

(c) doing or performing all such other things or acts as may be lawfully done or performed by a body corporate.

(3) The headquarters of the Board shall be in the capital city of Kenya.

(4) The business and affairs of the Board shall be conducted in accordance with the First Schedule.

Functions of
Board

20. (1) The functions of the Board shall be to –

(a) Prescribe what they need to hear about compliance; assess functions relating to information dissemination and make recommendations

(b) receive reports from public entities with respect to the implementation of this Act and the Act relating to data protection.

(c) assess and act on reports received from public entities with a view to assessing and evaluating

the use and disclosure of information and the protection of personal data;

- (d) investigate, on its initiative or upon a complaint made by any person or group of persons on violation of the provisions of this Act and the Act relating to data protection;
- (e) develop and facilitate public education and awareness programmes on the right of access to information and to protection of personal data;
- (f) work with all public entities to promote the right to access to information under this act and any other law.
- (g) monitor state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data;
- (h) perform such other functions as the Board may consider necessary for the promotion of access to information and promotion of data protection.

(2) The Board shall exercise powers necessary for the performance of its functions under this Act, the law relating to Data Protection and the Constitution.

(4) The Board may enter into association with such other bodies or organizations within and outside Kenya as the Board may consider desirable or appropriate and in furtherance of the purpose for which the Board is established.

Guiding principles

21. In the performance of its functions under this Act the Board shall be guided by the national values and principles of the Constitution.

Independence of Board

22. (1) The Board shall not be subject to the direction or control of any other person or authority in the achievement of its objects and purpose, the performance of its functions and the exercise of its powers.

(2) Despite subsection (1), the Board shall, for purposes of accountability report to the Cabinet Secretary on the overall

fulfillment of its objects, purpose, functions and powers.

- Membership of Board
- 23.** (1) The Board shall consists of five members who shall serve on a part time basis and appointed in terms of this Act to represent the following-
- (a) the Cabinet Secretary as an ex officio;
 - (b) security sector as an ex-officio;
 - (c) Kenya National Commission on Human Rights Commission as an ex-officio;
 - (d) media sector;
 - (e) financial sector;
 - (f) academic sector;
 - (g) libraries and archives;
 - (h) insurance sector;
 - (i) information technology sector;
 - (j) medical sector;
 - (k) human resources sector;
 - (l) accounting fraternity;
 - (m) civil society organization;
- (2) The Board members shall, at their first meeting, elect a chairperson and vice-chairperson from amongst the members and the chairperson and vice chairperson shall be of opposite gender.
- Qualifications for appointment of members**
- 24.** (1) A person shall be qualified for appointment as a member of the Board if the person-
- (a) holds a degree from a university recognized in Kenya;
 - (b) has knowledge and at least ten year's experience in matters relating to human rights, law, information, and communication technology, mass communication, security studies public administration and corporate governance;
 - (c) has had a distinguished career in their respective field; and
 - (d) meets the requirements of Chapter Six of the Constitution.
- (2) A person shall not be qualified for appointment as a member of the Board if such person—
- (a) is a member of Parliament or a County Assembly;

- (b) is a member of the governing body of a political party;
- (c) is a member of a local authority;
- (d) is an undischarged bankrupt; or
- (e) has been removed from office for contravening the provisions of the Constitution or any other law.

Procedure
for
appointment

- 25. (1)** The Public Service Commission shall, within fourteen days of the commencement of this Act or of the occurrence of a vacancy in the Board request-
- (a) the Cabinet Secretary and the Human Rights Commission to appoint candidates for the Board; and
 - (b) the umbrella bodies representing the sectors stated in paragraphs (c) to (n) of subsection (1) of section **23** to nominate candidates for appointment as members of the Board in a competitive and transparent manner
- (2) A person shall not be qualified for nomination unless such person holds qualifications specified in section **24**.
- (3) Within fourteen days of receiving the request from the Public Service Commission under subsection (1), the umbrella bodies concerned shall by advertisement in at least two local daily newspapers of national circulation, invite applications from persons who qualify for nomination as a member of the Board.
- (4) The umbrella bodies concerned shall consider the applications received under subsection (1) to determine their compliance with the provisions of this Act, interview the applicants and forward the names of two persons so qualified, who shall be of opposite gender, to the Public Service Commission for appointment.
- (5) The Public Service Commission shall, within twenty-one days of receipt of the names of the nominees under subsection (6), consider all the nominations received and approve or reject any nomination.
- (6) The Public Service Commission shall, appoint the members from the list of nominations approved by it.
- (7) In appointing persons as members of the Board, the Public

Service Commission shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(8) Despite the foregoing provisions of this section, the Cabinet Secretary may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

Powers of chairperson

- 26.** (1) The chairperson shall—
- (a) preside over all meetings of the Board
 - (b) be the spokesperson for the Board; and
 - (c) supervise and direct the work of the Board.

(2) If the office of chairperson becomes vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

Tenure of office

- 27.** (1) Subject to subsection (2), the chairperson and members of the Board shall be appointed for a single term of five years and are not eligible for re-appointment.

(2) The first chairperson of the Board shall serve for a period of six years.

Vacancy of office of chairperson and members

- 28.** (1) The office of the chairperson or a member of the Board shall become vacant if the holder—
- (a) dies;
 - (b) resigns from office by notice in writing to the Public Service Commission;
 - (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The Public Service Commission shall notify every

resignation, vacancy or termination in the Gazette within seven days and selection and appointment shall be carried out as provided in section 25.

**Removal
members**

- of** 29. (1) A member of the Board, other than an *ex officio* member, or the holder of an independent office, may be removed from office only for—
- (a) serious violation of the Constitution or any other law, including a contravention of Chapter Six;
 - (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
 - (c) physical or mental incapacity to perform the functions of office;
 - (d) incompetence; or
 - (e) bankruptcy.
- (2) A person desiring the removal of a member on any ground specified in clause (1) may present a petition to the Public Service Commission setting out the alleged facts constituting that ground.
- (3) On receiving a petition under subsection (2), the Public Service Commission—
- (a) may suspend the member or office holder pending the outcome of the complaint; and
 - (b) shall investigate the matter expeditiously assess, the facts and if the Commission agrees by two thirds majority of the members present and voting that the facts disclose a ground for removal under subsection (1), recommend the removal of the member to the Cabinet Secretary and the Cabinet Secretary shall remove the member in accordance with the recommendation.
- (4) A person aggrieved by the decision of the Public Service Commission and the Cabinet Secretary under subsection (3) may appeal to the Court of Appeal
- (5) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the

office while suspended.

Committees of Board

30. (1) The Board may, from time to time establish, committees for the better carrying out of its functions.

(2) The Board may—

(a) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Board;

(b) hire such experts or consultants as are necessary for the functions of the Board.

Terms and conditions of service of members

31. The allowances payable to, and other terms and conditions of service of the chairperson and members of the Board and the salaries and other terms and conditions of service of the Chief Executive Officer and staff of the Board shall be determined by the Public Service Commission on the advice of the Salaries and Remuneration Commission.

Chief Executive Officer of Board

32. (1) The Board with the approval of the Public Service Commission shall appoint a person as Chief Executive Officer of the Board through a competitive recruitment process.

(2) A person shall be qualified for appointment as Chief Executive Officer of the Board if the person –

(a) is a citizen of Kenya;

(b) holds a degree from a university recognized in Kenya;

(c) has had at least ten years proven experience at management level; and

(d) meets the requirements of Chapter Six of the Constitution.

(3) The Chief Executive Officer of the Board shall be head of the secretariat and shall be responsible to the Board for the day to day running of the Board.

(4) The Chief Executive Officer shall hold office for a term of three years and shall be eligible for re-appointment once only for a further term of three years.

**Removal of
Chief Executive
Officer**

- 33.** (1) The Chief Executive Officer may be removed from office by the Board in accordance with the terms and conditions of service for—
- (a) inability to perform the functions of the office arising out of physical or mental incapacity;
 - (b) gross misconduct or misbehavior;
 - (c) incompetence or neglect of duty;
 - (d) violation of the Constitution; or
 - (e) any other ground that would justify removal from office under the terms and conditions of service.
- (2) Before the Chief Executive Officer is removed under subsection (1), the Chief Executive Officer shall be given—
- (a) sufficient notice of the allegations made against him or her; and
 - (b) an opportunity to present his or her defence against the allegations.

**Staff of the
Board**

- 34.** (1) The Board may appoint such officers and staff as are necessary for the proper discharge of the functions of the Board under this Act or any other law, upon such terms and conditions of service as the Board may determine, in consultation with the Public Service Commission, taking into account gender, and ethnic balancing.
- (2) The Board shall ensure that all members of staff are adequately trained for their respective positions, and in particular that all members of staff directly involved in inquiries and investigations undergo appropriate training on human rights and fundamental freedoms.
- (3) The Board shall issue a certificate of appointment to every employee of the Board involved in investigations and the employee shall, when exercising any of such powers, produce the certificate for identification by the person who is to be interviewed or person who is in control of the premises to be entered or information to be accessed.

**Inquiry into
complaints**

- 35.** (1) A person wishing to lodge a complaint under this Act shall do so orally or in writing to the Chief Executive Officer or

such other person as may be duly authorized by the Board for that purpose.

(2) A complaint lodged under subsection (1) shall be in such form and contain such particulars as the Board may, from time to time, prescribe.

(3) Upon receipt of a complaint under subsection (1), the Board may -

(a) call for information or a report regarding such complaint from the public entity or any other body within such reasonable time as may be specified by the Board:

Provided that –

(i) if the information or report is not received within the time stipulated by the Board, the Board may proceed to inquire into the complaint without such information or report;

(ii) if on receipt of the information or report the Board is satisfied either that no further action is required or that the required action has been initiated by the public entity, the Board shall, in writing, inform the complainant accordingly and take no further action.

(b) Without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

Powers of Commission

36. (1) In the performance of its functions under this Act, the Board shall have the power to –

(a) issue summonses or other orders requiring the attendance of any person before the Board and the production of any document or record relevant to any investigation by the Board;

(b) question any person in respect of any subject matter under investigation before the Board;

(c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Board

(2) The Board may, if satisfied that there has been an infringement of the provisions of this Act, order –

- (a) the release of any information withheld unlawfully;
- (b) a recommendation for the payment of compensation; or
- (c) any other lawful remedy or redress.

(3) A person or entity dissatisfied with an order made by the Board under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.

(4) An order of the Board under subsection (2) may be filed in the High Court by any party thereto in such manner as the Board may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.

(5) If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Board may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

(6) A person who –

- (a) fails to attend before the Board in accordance with any summons or order issued under subsection (1)(a); or
- (b) knowingly gives any false or misleading statement or information to the Board; or
- (c) causes an obstruction or disturbance in the course of any proceedings before the Board,

commits an offence and shall, on conviction, be liable to a fine not exceeding three hundred thousand shillings, or to imprisonment for a term not exceeding six months, or to both.

(7) Public entities, relevant private bodies, and private bodies are obliged to provide such reports as required by the Act to the Board.

(8) The Board shall, in consultation with the public, develop and

publicize guidelines detailing the reporting requirements including the manner, means and timeframes that apply to public entities, relevant private bodies and private bodies.

(9) The Board has the discretion to request any further information from the public entity, relevant private body or private body to facilitate and enhance monitoring at any time and may issue an order compelling the provision of such further information.

Powers relating to investigation

37. (1) The Board may, for the purpose of conducting any investigation pertaining to an inquiry, utilize the services of any public officer or investigation agency of the Government and where a public officer is so utilized under this subsection, the Board shall pay such expenses as may be incurred by the public officer or agency for the service rendered.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public servant or agency whose services are utilized under subsection (1) may, subject to the direction and control of the Board—

(a) summon and enforce the attendance of any person for examination;

(b) require the discovery and production of any information; and

(c) subject to the provisions of this Act, requisition any public records or copy thereof from any public officer.

(3) The provisions of section **36** shall apply in relation to any statement made by a person before any public officer or agency whose services are utilized under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Board.

(4) The public officer or agency whose services are utilized under subsection (1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Board in that behalf;

(5) The Board shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Board may make such inquiry, including the examination of any person or persons who conducts or assists in the investigation, as it considers necessary.

PART VI - FINANCIAL PROVISION

- Funds of the Board **38.** (1) The funds of the Board shall on an annual basis be appropriated by Parliament for that purpose.
- (2) The Board may receive grants and donations from any other source provided that such grants and donations shall not be made or received for purposes of influencing the decision or ability of the Board in any way and shall be disclosed in the annual report of the Board.
- Financial year **39.** The financial year of the Board shall be a period of twelve months ending on the thirtieth June in each year.
- Annual estimates **40.** (1) At least three months before the commencement of each financial year, the Board shall cause to be prepared estimates of the revenue and expenditure of that financial year.
- (2) The annual estimates shall make provision for all estimated expenditure of the Board for the financial and in particular shall provide-
- (a) the payment of the salaries, allowances and other charges in respect of the staff of the Board and the members;
- (b) for the payment of the pensions, gratuities and other charges in respect of retirement benefits payable to the members of staff of the Board;
- (c) the maintenance of the buildings and grounds of the Board;
- (d) the maintenance, repair and replacement of the equipment and other property of the Board;
- (3) The annual estimates shall be submitted to the Cabinet Secretary for approval before the commencement of the financial year to which they relate, and once approved, the sum provided in the estimates shall not be increased without the prior consent of the Cabinet Secretary.
- (4) No expenditure shall be incurred for the purposes of the Board except in accordance with the annual estimates approved under subsection (3).

(5) The Cabinet Secretary shall make a decision without delay and where approval is denied the Cabinet Secretary shall provide reasons in writing for denial.

(6) The Cabinet Secretary shall, in determining whether to approve or disapprove the annual estimates, consider only the feasibility of the financial proposals and not the appropriateness of the purpose to which the funds are proposed to be applied.

Accounts and audit

41. (1) The Board shall cause to be kept proper books and records of accounts of the income, expenditure, assets and liabilities.

(2) Within a period of three months after the end of each financial year, the Board shall submit to the Auditor-General or to an auditor appointed under subsection (3), its accounts in respect of that year together with –

(a) a statement of income and expenditure during that financial year; and

(b) a statement of the assets and liabilities of the Board on the last day of the financial year.

(3) The accounts of the Board shall be audited and reported upon by the Controller and Auditor-General, or by an auditor appointed by the Board with the written approval of the Controller and Auditor-General in accordance with the provisions of the Public Audit Act, 2003.

(4) Notwithstanding subsection (3), the Board's accounts may be audited by other persons as the Board may from time to time authorize.

Bank account

42. (1) The Board may open and maintain such bank accounts as may be necessary for the performance of its functions.

PART VII – MISCELLANEOUS

Annual reports

43. (1) The Board shall submit an annual report to the National Assembly through the Cabinet Secretary, and may at any time submit special reports to the Cabinet Secretary on any matter relating to any of its functions.

(2) The annual report submitted by the Board under subsection (1) shall include an overall assessment by the Board of the performance of the Government with regard to access to information during the period under review.

(3) The Cabinet Secretary shall lay the annual report of the Board before the National Assembly within two months of receipt thereof, with any comments thereon which the Cabinet Secretary considers necessary.

(4) The Cabinet Secretary shall be required, in every year, to report to Parliament the steps which the Government has taken in implementing recommendations made in the Board's reports.

Reports by public entities

44. (1) On or before the first day of February of each year, every public entity shall submit to the Board a report covering the preceding year, which shall include –

(a) the number of requests for information received by the entity and the number of requests processed;

(b) the number of determinations made by the authority not to comply with the requests for information under section 7, and the main grounds for such determinations;

(c) the average number of days taken by the entity to process different types of requests;

(d) the total amount of fees collected by the public entity while processing requests; and

(e) the number of full-time staff of the public entity devoted to processing requests for information and the total amount expended by the entity for processing such requests.

Common Seal of Board

45. (1) The common seal where applicable, of the Board shall be kept in such custody as the Board may direct and shall not be used except on the order of the Board.

(2) The common seal of the Board when affixed to a document and duly authenticated shall be judicially noticed and unless the contrary is proved, any necessary order or authorization by the Board under this section shall be presumed to have been duly given.

Regulations.

46. (1) The Cabinet Secretary may, by regulations, and after consultation with the Board, prescribe anything which may be prescribed under this Act including –

- a. the manner in which applications under this Act are to be made;
- b. the form in which information requested under this Act is to be supplied;
- c. the making of applications for personal information by representatives of the individual to whom the information relates;
- d. the measures which public entities shall take in order to assist persons in exercising their rights under this Act;
- e. the measures which public entities shall take to ensure that adequate records are created and maintained by public entities;
- f. the procedures that should be followed by a complainant in asking the Board to review any ;
- g. a public entity to consult with a third party before giving access to information obtained by it from that party;
- h. procedures requiring a public entity to ensure that personal information is accurate;
- i. compensation to be sought by an individual who has suffered damage as a result of the holding of inaccurate information about the individual's personal affairs by a public

entity; or

- j. the records that public entities shall be required to keep.

(2) The Cabinet Secretary may, after consultation with the Board, make regulations generally for the better carrying into effect of the provisions of this Act and the Data Protection Act.

Consequential amendments.

- 47.** The written laws identified in the Second Schedule are amended in the manner identified therein.

FIRST SCHEDULE

(S.4)

PROVISIONS AS TO THE CONDUCT OF AFFAIRS AND BUSINESS OF THE BOARD

- Tenure of office
1. Unless the appointment of the chairperson or Board Member is termed earlier under this Act, a person appointed as the chairperson or as a Board Member shall hold office for a term of five years from the date of appointment and shall be eligible for appointment for a further and final term of five years:
- Provided that in the case of the initial Board Members, the Members shall, at the first meeting of the Board, elect from amongst their number –
- (c) the Chairperson whose terms of office shall expire at the end of six years; and
 - (d) Vice-chairperson whose term shall expire at the end of five years from the date of appointment.
- Vacancy
2. The office of a person appointed as a chairperson or Board Member shall become vacant if the person –
- (a) dies;
 - (b) resigns from office by writing under his hand addressed to the President through the Minister;
 - (c) is convicted of an offence and sentenced to imprisonment for a term of three months or more without the option of a fine;
 - (d) is unable to discharge the function of his office by reason of physical or mental infirmity as certified by two registered medical practitioners
 - (e) is absent from three consecutive meetings of the Board without good cause; or
 - (f) if declared bankrupt by a court of competent jurisdiction.
- Meetings
3. The Board shall meet at such times and places as it shall deem appropriate but shall meet at least once in every month.
- (2) Subject to this Act the Board may regulate its own procedure and formulate its own rules.

(3) The quorum for any meeting of the Board shall be five Members.

(4) All orders and decisions of the Board shall be authenticated by the chairperson or any other Board Member authorized in writing by the chairperson in that behalf.

Minutes

4. The Board shall cause minutes of all proceedings of its meetings to be entered in books kept for that purpose.

Majority decision

5. The decisions of the Board shall be that of the majority and shall be signed by the members thereof agreeing thereto.

SECOND SCHEDULE

(s.14)

**OATH/AFFIRMATION OF THE OFFICE OF A
COMMISSIONER/SECRETARY**

1 having been appointed (a Member/the Secretary to) the Kenya Freedom of Information Commission under the Freedom of Information Act 2008, do solemnly (swear/ declare and affirm) that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said.....

before me this Day of.....

.....
Chief Justice.

SECOND SCHEDULE

(s.46)

CONSEQUENTIAL AMENDMENTS

Records Disposal Act

Cap
14

1. (1) This paragraph amends the Records Disposal Act.

(2) Section 2 of the Act is amended by deleting the words “Chief Archivist” wherever they appear and substituting therefor the expression “Kenya Archives and Documentation Service and the Kenya Freedom of Information Commission”.

Public Archives and Documentation Service Act

Cap.
19

2. (1) This paragraph amends the Public Archives and Documentation Service Act.

(2) Section 5A of the Act is amended by inserting the following new proviso immediately after the word “public” appearing in the last line of subsection (1)

“Provided that the restriction from circulation shall only relate to

exempt information provided for in section 6 of the Freedom of Information Act 2012.”

(3) The Act is amended in section 6 by deleting subsections (2) and (3).

(4) Section 7 of the Act is amended by inserting the expression “in consultation with the Kenya Freedom of Information Commission and” immediately before the words “with the approval of the Minister”.

No. 4
of
2003

Public Officer Ethics Act 2003

3. (1) This paragraph amends the Public Officer Ethics Act, 2003.

(2) Section 41 of the Act is amended by inserting the following proviso immediately after the word “both” appearing in the last line –

“Provided that the provision of this section as to divulging of information without lawful excuse shall only apply to exempt information provided for in section 6 of the Freedom of Information Act, 2012.”

No. 4
of
2006

Statistics Act 2006

5. (1) This paragraph amends the Statistics Act, 2006.

(2) Section 11 of the Act be amended by inserting the following new proviso immediately after the word “Act” appearing in the last line –

“Provided that the provision of this section as to secrecy shall only apply to exempt information provided for in section 6 of the Freedom of Information Act 2012.”

MEMORANDUM OF OBJECTS AND REASONS

The Ministry of Information and Communications has formulated the Bill herein with a view to enhancing access to information held by Government Ministries and other public authorities. The Bill recognizes access to information as a right bestowed on the Kenyan people, and seeks to promote proactive publication, dissemination and access to information by the Kenyan public in the furtherance of this right. It also spells out the mechanisms for ensuring public access to information, as well as the factors that may hinder the right to this access. The Bill is borne of the realization that access to information held by the Government and public institutions is crucial for the promotion of democracy and good governance.

Part I of the Bill contains preliminary provisions.

Part II contains provisions on the right to information. **Clause 5** obliges a public authority to publish in the public interest information in its possession (proactive disclosure). **Clause 6** contains provisions on information which is exempted from disclosure to the public.

Part III contains provisions on the right of access to information. **Clauses 7 and 8** detail the manner in which an application for information is to be made and the manner in which such an application is to be processed. **Clause 9** provides for the transfer of an application for information from one public authority to another when it becomes apparent that the information applied for is not in the domain of the public authority to which the application is initially made but is in the possession of another authority. **Clause 10** accords every person the right to access information in the domain of a public authority. **Clause 11** provides that no fee will be levied in respect of information applied for as a general rule, but a public authority is allowed to levy some fee to cater for incidental cost of availing the information applied for, for example, cost of making and supplying copies to an applicant. **Clause 12** provides that a person can make an application to a public authority to correct inaccurate personal information in its possession regarding such person.

Part IV contains provisions on internal review of decisions made by a public authority **clause 14** provides that the board can notify interested parties to a review. **Clause 15** provides for the protection of persons who make disclosures that are of public interest. **Clause 16** obliges public authorities to keep their records in a manner that facilitates the right of access to information while **Clauses 17 and 18** provide for various offences and penalties.

Part V provides for the establishment, powers and function of the Kenya Freedom of Information and Data Protection Board, Membership of the Board is provided for in **Clause 23**. **Clause 20** thereof lays down the functions of the Board while the objects and principles guiding the Board in the discharge of its functions are set out in **Clause 21**. **Clause 22** confers the Board with independence from the

Government and other entities, and requires the Board to carry out its mandate without any political bias or interference. **Clauses 24 to 31** lay down the elaborate procedures for appointment and removal of Chairperson and Members of the Board including the tenure of office while **clause 32** provides for the appointment of Chief Executive Officer to the Board.

Part VI contains financial provisions with **clause 38** thereof setting out the sources of funds of the Board. **Clause 40** provides for the preparation of the annual estimates of the Board and the details to be contained in the estimates while **clause 41** provides for the auditing of the accounts of the Board by the Controller and Auditor General or an auditor appointed thereunder.

Part VII contains miscellaneous provisions and **clause 43** thereof imposes an obligation on the Board to prepare annual reports on its functions for the laying before the National Assembly. Similarly, public authorities are obliged, under **clause 44** to prepare and submit to the Commission reports on various aspects of access to information. **Clause 46** empowers the Minister to make regulation, in consultation with the Commission, for the better carrying into effect the provisions of the Bill once enacted into law.

The enactment of this Bill will occasion additional expenditure of public funds to be provided through the estimates.

Dated the....., 2012.

SAMUEL POGISHO,

Minister for Information and
Communications