Kenya

Analysis of the Draft Freedom of Information Bill, 2014

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Introduction

The past few decades have seen a dramatic growth around the world in the recognition and protection of the right to information (RTI). In addition to the recognition of RTI as a human right, including through decisions of the Inter-American Court of Human Rights[1] and the European Court of Human Rights,[2] as well as in the UN Human Rights Committee's 2011 General Comment on Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[3] which Kenya has ratified, the number of countries with RTI legislation has grown from just ten in 1984 to around one hundred today.

Although Africa remains one of the weaker regions in world on RTI, it has also participated in this trend, especially more recently. Five years ago, only three countries in Africa had passed right to information laws. Today there are thirteen, most recently Mozambique, with the Parliamentary Assembly having approved a right to information law on 21 August 2014.

In Kenya, the enactment of an RTI law is long overdue. In addition to being one of Africa's more stable and progressive democracies, the right to information is explicitly guaranteed by Article 35 of the 2010 Kenyan Constitution. The country's first Action Plan for the Open Government Partnership,[4] drafted in early 2012, pledged to adopt RTI legislation by November of that year. At that time, Kenya's ICT Ministry had adopted a working draft (the 2012 draft) which was broadly praised as a robust framework by civil society, both within Kenya and internationally.[5] However, contrary to expectations, the ICT Ministry failed to table the draft law before the National Assembly and there has been no official progress towards enacting an RTI law since then.

In response to government inaction, ICJ Kenya, along with other members of civil society, began efforts to have an RTI law tabled as a private members' bill in the National Assembly, and have circulated a new draft, the Freedom of Information Bill, 2014 (the 2014 draft) for commentary ahead of a wider consultation.

This Analysis of the 2014 draft is based on international standards regarding the right to information, as reflected in the *RTI Legislation Rating Methodology*,

[1] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151.
[2] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.
[3] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.
[4] The Open Government Partnership is an intergovernmental movement whose member States meet minimum openness standards and which agree to make further commitments to openness. See www.opengovpartnership.org.
[5] See CLD's Press Release of 19 January 2012, available at: http://www.law-democracy.org/wp-content/uploads/2010/09/12.01.19.Kenya-FOI-draft.PR_.pdf.

prepared by the Centre for Law and Democracy (CLD) and Access Info Europe (RTI Rating).[6] A quick assessment of the draft Law based on the RTI Rating has been prepared and should be read in conjunction with this Analysis (the relevant sections of this assessment are pasted into the text of this Analysis at the appropriate places). The overall score of the Law, based on the RTI Rating, is as follows:

Section	Max Points	Score
1. Right of Access	6	6
2. Scope	30	26
3. Requesting Procedures	30	19
4. Exceptions and Refusals	30	17
5. Appeals	30	20
6. Sanctions and Protections	8	5
7. Promotional Measures	16	12
Total score	**150**	**105**

This score places the draft Law in a tie position for 20th place globally, along with Finland and Yemen, from among the 98 laws from countries around the world which have been rated. By contrast, a rating of the 2012 draft found that it scored 114 points, which would have meant that Kenya was tied for 11th place.

Although this drop in score is troubling, the 2014 draft nonetheless has the potential to create a robust and effective RTI system. Its broad scope and robust promotional measures are particular strengths. The biggest negative change from the 2012 draft is that, rather than establishing a specialised Freedom of Information and Data Protection Commission, the 2014 draft proposes delegating oversight responsibilities to the Commission on Administrative Justice, a decision which we believe should be reconsidered.

Overall though, the 2014 draft remains relatively robust. Most of the weaknesses identified here are easily soluble, and many require only clarification of conflicting language or minor tweaks to correct. We urge Kenya's civil society to consider the recommendations in this Analysis, and call on the authorities to take positive and decisive steps to enacting this law before the end of the year.

[6] This document, first published in September 2010, is based on a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other regional mechanisms. The Rating is continuously updated and now covers 98 national laws from around the world. Information about the RTI Rating is available at: http://www.RTI-Rating.org.

1. Right of Access and Scope

The right to access information held by public authorities is protected in Article 35 of the 2010 Constitution of Kenya, which the law cites in its preamble. The law also contains strong language on the importance and breadth of the right to information in its statement of principles in Article 3, and in the Memorandum of Objects and Reasons located at the end of the Bill. Article 4(4) calls on the law to be "interpreted and applied on the basis of a duty to disclose", subject only to the regime of exceptions. This is useful but it would be preferable if this provision on interpretation also called for interpretation to seek to give effect to the benefits outlined in Article 3 and the Memorandum of Objects and Reasons. Article 4(4) also creates a clear presumption in favour of access.

One particular problem with the 2014 draft, which unfortunately appears to be carried over from the 2012 draft, is that section 4(1) states that only citizens have a right to access to information. Better practice is to allow anyone to make a request for information, including foreigners and legal persons. The arguments against allowing anyone to make a request – that this might somehow undermine the country's security or place a burden on public authorities – do not hold water. It is simple enough for a foreigner to find a Kenyan citizen to make a request for them, while extensive experience in countries that allow anyone to make a request demonstrates that this will not place a burden on public authorities.

The section 2 definition of "information" is sufficiently broad, covering "all records held by a public entity, regardless of the form in which the information is stored, its source or the date of production." At the same time, it would be useful for the law to state explicitly that one may lodge requests for either information or documents. It is important that, in practice, requesters may lodge both requests for specific documents and for types of information, which can then be compiled from documents.

The law also contains an extremely broad definition of public bodies, though it is somewhat convoluted in precisely how it applies. Section 2 defines a "public entity" based on the definition in Article 260 of the Constitution, which includes any office where "the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament." The law also applies to any entity performing a function established under the Constitution. The term "public entity" is used throughout the 2014 draft when referring to the procedures for accessing and exempting information, but the main right of access provision in section 4(1) creates a right of access to information held by "the State", rather than by "public entities". In order to avoid any possibility of confusion, section 4(1) should instead refer to "public entities".

"Public entities", as defined, should cover virtually all public bodies, including the executive, legislative and judicial branches, as well as constitutional or other oversight bodies. However, it is possible that this may not include all State-owned enterprises, since some of these agencies may be self-sufficient (they may actually pay money into State coffers rather than receiving money out of them). In order to ensure that all State-owned enterprises fall within the ambit of the law, the definition of "public entity" in section 2 should be expanded to explicitly include them.

According to section 4(1)(b), the 2014 draft also applies to private entities where the information is required for the exercise or protection of any right or fundamental freedom. This clause is progressive, and is a welcome inclusion. However, the 2014 draft only imposes this more limited obligation (i.e. to providing only information required for the exercise or protection of a right) on a private body which, among other things, "receives public resources and benefits, utilizes public funds, engages in public functions, provides public services" (we assume the constitutional provision on State funding does not necessarily extend to these bodies). Better practice is to treat such entities as full public bodies for purposes of disclosure, at least to the extent of that public funding or function.

Recommendations:

- The rule on interpretation, in Article 4(4), should be expanded so as to call for the law to be interpreted in a manner which gives effect to the benefits of the law.
- Everyone, including legal entities and foreigners, should have the right to make requests for information.
- The definition of "public entity" in section 2 should be expanded to include explicitly State-owned enterprises.
- Section 4(1)(a) should refer to information held by public entities, rather than information held by "the State".
- Private entities which receive public funding or which undertake public functions should be treated as public entities for purposes of this law.

Right of Access

Indicator		Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	2	Const. Art. 35

2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	4(4)
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.	2	2	3, Memorandum of Objects and Reasons
	TOTAL	**6**	**6**	

Scope

Indicator		Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	0	4(1)
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	4	2
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents).	2	2	2
7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	8	8	2, Constitution Art. 260.
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	2, Constitution Art. 260.
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	2, Constitution Art. 260.
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	1	2, Constitution Art. 260.
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	2	2, Constitution Art. 260.
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	2	1	2
	TOTAL	**30**	**26**	

2. Duty to Publish

The 2014 draft's proactive publication provisions are spelled out in section 5, which contains a list of categories of information to be released including salary scales, the particulars of contracts that have been signed, information about decision making processes and other administrative information. While the list is reasonably good, in line with proactive publication requirements in other laws, there is a slight ambiguity resulting from the fact that the provision states that published information "may include" the items. This could imply a degree of discretion as to whether or not public entities include all, some or none of the listed information in their dissemination activities. Better practice holds that proactive publication requirements should be mandatory minimum baselines whereby, while public bodies are free to exceed the strictures of the law, and indeed should be encouraged to do so, they must at a minimum publish whatever information is listed.

Recommendation:

- Section 5(1)(a) should be amended to clarify that public entities are required to publish the listed information; i.e. the word "may" in section 5(1)(a) should be changed to "shall".

Note: The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

3. Requesting Procedures

An important principle of effective RTI legislation is that requesters should not have to provide reasons for their requests. Section 4(2) states that a citizen's right of access is not affected by the reason given. Although this is useful, it does not fully capture the purpose underlying this principle. In many countries, merely being asked for reasons can deter people from making a request, due to a fear of reprisals if the information touches on a sensitive area (such as investigating corruption). Moreover, it is not always true that a requester's reasons do not impact their right of access under the 2014 draft since, according to section 4(1)(b), access to information held by private bodies is contingent on it being necessary for the exercise or protection of a fundamental right or freedom. In order to clear up this issue, section 4(2) should be changed to say that public entities may not require users to state their reason for seeking information.

The procedures for filing a request are contained in section 8 and, although they are relatively positive, they could be improved by being spelled out more clearly. A strong RTI law should only require requesters to provide the details necessary for identifying and delivering the information. The only requirements contained in section 8 are that the request should be in English or Kiswahili and should include sufficient details for the information access officer to understand what is being requested. However, section 8 leaves a fair bit of latitude as to the precise requesting procedure, stating only that forms for requests should not unreasonably delay applicants, and that applications cannot be refused on the grounds that requesters failed to use a prescribed form. The language of section 8 could be improved through specific language stating that requesters need only provide the details necessary for identifying and delivering the information.

Official assistance can also be vital to ensuring the smooth processing of requests. Section 8(2) of the 2014 draft requires officials to assist requesters who are illiterate or disabled, but it makes no mention of assistance to other requesters. Instead, section 27(2)(d) leaves this subject to future regulation by the Cabinet Secretary. While some administrative aspects of the internal response procedure can be left to the regulations, which can more easily be adapted as public entities come to grips with their new responsibilities, the requirement for officials to provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification, should be set out directly in the law.

In situations where the authority to which a request is directed does not have the requested information but knows of another authority which does, better practice is to require the original authority to inform the requester and to transfer the request to the agency which holds the information. Section 10 contains clear and appropriate procedures for this type of action but, by using the operative word "may", leaves it up to the discretion of the public entity whether or not to act. Given the struggles that RTI systems around the world face in pushing public bodies to conform to good practice standards, it is unwise to make these kinds of procedures optional.

Section 11(3), which addresses the forms in which access may be granted, has a similar problem, stating that the authorities "may" convert the information into another format at the expense of the applicant "if it is practicable to do so". Better practice is to require authorities to comply with requesters' preferences regarding how they wish to access information as long as this is technically feasible and would not impose an undue burden on the public authority.

The 2014 draft has reasonably good provisions in terms of timelines, requiring officials to respond as soon as possible and in any case within three weeks (section

9), with no extensions and shorter timeframes for information which concerns the life or liberty of a person. However, it is worth noting that many better practice jurisdictions mandate responses within two weeks, rather than three.

Section 12 prohibits fees being charged for filing requests, and otherwise states that fees for providing information are optional and must be limited to the actual costs of copying and delivering the information. Fees are also to be set centrally by the Cabinet Secretary. These are broadly in line with international standards, although the law could be improved by adding in waivers for poor requesters or requests which are of significant public interest.

Recommendations:

- Section 4(2) should be amended to say that public entities may not require requesters to provide their reasons for seeking information.
- Section 8 should require officials to provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.
- Section 8(1) should be amended to say that requesters need only provide the details necessary for identifying and delivering the information.
- In sections 10(1) and 11(3), the word "may" should be changed to "shall".
- Consideration should be given to reducing the overall time limit for responding to requests from three weeks to two weeks.
- Section 12 should include fee waivers for poor requesters, or requests which are of strong public interest.

Indicator		Max	Points	Article
13	Requesters are not required to provide reasons for their requests.	2	2	4(2)
14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	0	8(1)
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	2	8
16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.	2	0	27(2)(d)
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they	2	2	8(2)

	are illiterate or disabled.			
18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	0	
19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	1	10
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	1	11(3)
21	Public authorities are required to respond to requests as soon as possible.	2	2	9(1)
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	1	9
23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	2	
24	It is free to file requests.	2	2	12
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	2	12
26	There are fee waivers for impecunious requesters	2	0	
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	2	
	TOTAL	**30**	**19**	

4. Exceptions and Refusals

One of the most significant problems with the 2014 draft, and an area where the draft is notably weaker than the 2012 draft, is that it does not contain a rule stating that its provisions on access prevail over those in other legislation to the extent of any conflict. On the contrary, section 4(1) states that the right of access is subject to the provisions of this law "and any other law". This is a major weakness, with the

potential seriously to undermine the positive features of the law by preserving a patchwork of secrecy rules in other, often outdated, legislation.

Section 6(1) contains a list of exceptions which is, in general, very narrow and well drawn. The exceptions cover national security, due process of law, privacy, commercial interests and intellectual property rights, the ability of the government to manage the economy, the ability of a public entity to give adequate consideration to a matter prior to a final decision, a public entity's position in actual or contemplated legal proceedings and legal professional privilege.

In addition, section 6(2) contains a list elaborating on the "national security" exception. One relatively minor problem, which is a holdover from the 2012 draft, is that foreign relations are included in the exception for national security. While harm to foreign relations is indeed a legitimate reason for withholding information, most foreign relations in a country like Kenya address other concerns, such as economic, developmental, cultural and environmental issues. It is, therefore, better practice to separate out protection for international relations from national security.

There is also some risk that authorities will treat the sub-categories on the list as being equivalent to free-standing exceptions, which is troubling in that many of these sub-categories do not contain their own internal harm tests. In order to mitigate this risk, section 6(2), which states that the national security exception includes information in the subcategories, should be amended to say that the national security exception may include information in the subcategories.

The only exception which is problematical from the perspective of international standards is section 6(1)(f), which protects a public entity's ability to give "adequate and judicious consideration to a matter". While an exception for internal deliberations is recognised as legitimate, this phrasing could be overbroad in nature, or at least interpreted in an overbroad manner, as it might, for example, be understood in terms of resources or ability to do research. In more tightly drawn regimes of exceptions, the reference is limited to internal advice, with a view to protecting the free and frank flow of such advice.

Among the most important features of a strong exceptions framework is the public interest override, whereby information should be released even if this may cause harm to a protected interest if the overall public interest in disclosure outweighs that harm. Section 6(4) of the 2014 draft contains a relatively strong version of this test, though once again the use of the word "may" is troubling, particularly in light of the fact that, in the 2012 draft, the wording was virtually the same except that the operative word was "shall". The public interest test is a core aspect of a strong right to information law and it should not be discretionary in its application.

Section 6(6) provides that exceptions are presumed to lapse after thirty years unless an ongoing need for the exception is proven. Better practice is to set a shorter time period, for example of twenty years. Experience in other countries has demonstrated that this is long enough and some countries have gone so far as to specifically reduce longer periods to twenty years or even less. Furthermore, public authorities should always have to prove that an exception applies. A higher standard of proof or a procedural barrier should apply where information is to be kept confidential beyond the presumed maximum period. For example, this could require the permission of the oversight body (as is done in Mexico) or a specific process to be undertaken by the public authority (for example, that the reasons for continued confidentiality need to be written down and attached to the file).

The 2014 draft also fails to include a proper severability clause. Again, this seems to be an omission rather than a deliberate exclusion, since section 11(1)(b) makes reference to decisions to release an "edited copy" of a document, which is defined in section 2 as a document where exempted information has been deleted. Once again, though, the absence of a specific requirement is a problem. The 2014 draft should be amended so that, where possible, public entities are required to release information in a redacted form rather than withholding it entirely.

Another apparent oversight is in relation to the process for refusals. Better practice is to require public authorities to provide written reasons when refusing to disclose information, which must include specific references to the provision in the law which is being relied upon to withhold the information, as well as information about the possible mechanisms for appealing against the refusal. Although section 11 mandates that information access officers must inform requesters of the possibility of appealing against the quantum of fees being charged, or the form of access being provided, there is no mention of any need to contact requesters whose requests have been denied.

Recommendations:

- The RTI law should override other laws in case of conflict.
- Foreign relations should not be included within national security but should instead be listed as a separate exception.
- Section 6(2) should be amended to say "information relating to national security may include" the information in the list of sub-categories that follows.
- Consideration should be given to limiting the internal deliberation exception in section 6(1)(f) to cases where the disclosure would inhibit the free and frank provision of advice, and thereby undermine the ability of the public authority to give proper consideration to a matter.

- In section 6(4), the word "may" should be replaced with the word "shall".
- Consideration should be given to reducing the presumed maximum period of confidentiality from thirty to twenty years. To extend confidentiality beyond this period, public authorities should have to go through a specific procedure.
- There should be a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.
- Public authorities should be required to inform requesters when their request has been denied, including with reference to a specific grounds for refusal, and to inform the requester of their right to lodge an appeal.

Indicator		Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	0	
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.	10	9	6(1)(f)
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	4	6
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	3	6(4)
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	1	6(1)(f), 6(6)
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	0	27(2)(g)
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	0	11(1)(b)

35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	0	
	TOTAL	**30**	**17**	

5. Appeals

The biggest change between the 2012 and 2014 drafts is in terms of the system of oversight. Where the 2012 draft proposed to create a dedicated Freedom of Information and Data Protection Commission to deal with complaints from individuals about how their requests had been processed and with a general mandate to promote RTI, the 2014 draft instead hands those responsibilities to an existing agency, the Commission on Administrative Justice.

In some ways, the Commission on Administrative Justice appears well equipped to play this role. For example, the Commission on Administrative Justice Act (CAJA) includes robust safeguards to protect the Commission's independence, such as a selection panel including non-political entities such as the Public Service Commission, the Association of Professional Societies in East Africa and the National Council for Persons with Disabilities. The members of the Commission on Administrative Justice serve a single term of six years with no possibility of reappointment, and may only be removed in line with the procedure spelled out in Article 251 of the 2010 Constitution, which requires the approval of the National Assembly and the President, as well as the appointment of a special tribunal to investigate the matter. The Commission on Administrative Justice also reports to the National Assembly, which is tasked with approving its budget, granting it a measure of financial independence. The CAJA also contains requirements of professional expertise for candidates for the Commission, and prohibitions on appointing members of governing bodies of political parties, local authorities, county assemblymen or members of the National Assembly.

All of these are relatively good safeguards, which we would want to see in the constitution of a professional, independent and robust oversight body. Nonetheless, experience in countries around the world demonstrates that the success of an RTI law depends in important ways on having a dedicated administrative oversight body to deal with complaints and appeals and to undertake promotional measures. Where this function is allocated to a body with a more general oversight function, such as the Commission on Administrative Justice, RTI tends to get lost among the other issues that the body has to deal with and, as a result, fails to get the degree of attention it needs. It is also unlikely that a general oversight body will develop the specialised expertise required to deal with information requests. We strongly

recommend that Kenya go back to the position under the 2012 draft, and create a dedicated information commission.

According to international standards, an oversight body should have the necessary mandate and powers to perform its functions, including the power to review classified documents and to inspect any premises. Section 23 of the CAJA allows the Commission on Administrative Justice to demand any document, issue summonses and question any person, but according to section 26(e) it can only inspect premises "on order of the court".

The 2014 draft accords the Commission on Administrative Justice a relatively broad mandate, including the ability to investigate virtually any infringement of the right to information, pursuant to a complaint or on its own initiative. The Commission on Administrative Justice also has the power to impose a variety of binding orders according to section 22(c) of the 2014 draft. Section 23(5) also provides a good enforcement mechanism, in that orders of the Commission may be filed with the High Court, and executed in the same manner as a judicial order.

Some aspects of the Commission on Administrative Justice's complaints and investigative procedure are unclear based on the 2014 draft and the CAJA. For example, the law fails to stipulate that appeals will be free of charge and not require a lawyer. In addition, the law should clarify that, in the event of an appeal claiming an infringement of the right to information, the government bears the burden of proving that it acted in accordance with the law. More broadly, a strong RTI system should include clear procedures, including timelines, for dealing with external appeals. These are not contained in the 2014 draft, although it is unclear whether or not they are addressed in the Commission on Administrative Justice's own regulations.

In line with international standards, section 23(3) of the 2014 draft allows for a judicial appeal in addition to the appeal to the oversight body.

Recommendations:

- A dedicated information commission should be established to process appeals regarding requests for information and to undertake promotional measures, rather than allocating these functions to the Commission on Administrative Justice.
- The oversight body should have the power to inspect the premises of public authorities.
- The law should make it clear that appeals to the oversight body are free of charge and do not require a lawyer.

- The 2014 draft should clarify that, in appeals relating to the right to information, the government bears the burden of proving that it acted in accordance with the law.
- The law should include clear procedures, including timelines, for dealing with external appeals.

Indicator		Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	0	
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	2	14(1)
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	2	2	CAJA s. 11, Constitution Article 251
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	2	CAJA s. 8(c), 47
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	2	CAJA s. 10
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	1	23, 24. CAJA s. 26(e)
42	The decisions of the independent oversight body are binding.	2	2	21(3)
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	2	22(c)
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	23(3)
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	1	27(2)(f)
46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	4	2	14(1)
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	0	
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	2	22(c)

TOTAL	**30**	**20**	

6. Sanctions and Protections

When establishing a new RTI system, it is important to include an adequate system of sanctions, to promote respect for the new law. According to sections 9(5) and 10(5) of the 2014 draft, information access officers who fail to respond within the prescribed time limits face a potential fine and a jail term of up to three months. The 2014 draft also includes sanctions of a fine and a jail term of up to two years for destroying, altering or concealing information which is the subject of a request with the intention of preventing its disclosure (section 18), and a fine and a prison term of up to six months for obstructing the work of the oversight body (section 23(6)). Together, these sanctions, if properly applied, should be sufficient to enforce compliance with the law.

The 2014 draft does not contain a specific system for redressing the problem of public entities which systematically fail to disclose information or underperform, though it is possible that this role is within the general ambit of the Commission on Administrative Justice.

In addition to sanctions, a strong RTI law should include adequate legal protections to ensure that officials can disclose information freely without the threat of being penalised for doing their duty. Section 16(8) provides a defence for disclosing information in violations of any law if the employee can demonstrate that the disclosure was in the public interest and that the person has a reasonable belief in the veracity of the information. Better practice, however, is to provide protection for all good faith disclosures pursuant to the law. Officials already face important historical barriers to disclosure (the culture of secrecy) and they need protection for good faith acts if this is to be addressed. Requiring them to show that the disclosure was in the public interest, something which is complex and which they are not well qualified to do, is not reasonable. Section 19 also provides them with protection against defamation suits for disclosing defamatory information under the law, if that information was originally provided to them by a third party.

From the perspective of protections, section 6(7), which provides for a jail term of up to three years for wrongfully disclosing exempt information, is troubling. It is worth noting that this penalty is substantially more severe than the penalties for violating the right to information, discussed above. Progressive RTI laws do not contain sanctions, in particular harsh sanctions, for the wrongful disclosure of information. The introduction of an effective right to information system requires a major cultural shift among the public service, and new penalties for wrongful

disclosures, in addition to the many pre-existing penalties for this under Kenyan law, will make this transition significantly more difficult.

Another important protection is for whistleblowers, eliminating the potential for reprisals against those who, in good faith, release information which discloses wrongdoing. In the 2014 draft this is included in section 16(1), which protects anyone who makes a disclosure in the public interest, as long as they have a reasonable belief in the veracity of the information. This is a relatively strong protection, but it could be further improved by stating explicitly that the test for this is subjective, whereby so long as the whistleblower believes they are acting in the public interest they are entitled to protection, rather than having to rely on a judicial finding that what they did served the public interest.

Recommendations:

- A system for imposing sanctions on public authorities which systematically fail to respect the right to information should be developed.
- The law should include a specific clause granting legal immunity for any acts undertaken in good faith in the exercise or performance of any power, duty or function under it.
- Section 6(7) should be deleted or, at the very least, the penalty should be substantially reduced.
- The whistleblower protection clause in section 16(1) should apply to anyone who genuinely believes they are acting in the public interest.

Indicator		Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	2	9(5), 18, 23(6)
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	1	6(7), 16(8), 19
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2	2	16(1) – (3)
	TOTAL	**8**	**5**	

7. Promotional Measures

The 2014 draft includes reasonably robust promotional measures. One important aspect of this is that public entities must have a contact point for information requests. Ideally, this will take the form of a dedicated information officer, but in some smaller agencies that may not be possible. According to section 7(1), the information access officer is by default the chief executive officer, unless the duties are specifically delegated to someone else.

Promotional work, such as awareness raising and other efforts to promote compliance with and understanding of the law, are also important to getting a new RTI system off of the ground. According to section 21(1)(d), the Commission on Administrative Justice is given this responsibility. The Commission on Administrative Justice is also tasked with collecting annual reports from all public entities on the steps they have taken to implement the law (section 26), and with presenting a consolidated annual report on implementation of the law to the National Assembly (section 25(1)).

All of these are generally positive features. However, the additional responsibilities reinforce concerns about whether the Commission on Administrative Justice will have the resources to play this role. At the very least, the Commission on Administrative Justice will need substantially more funds and staff to deal with this extra workload. A better solution would be to create a specialised information commission, as discussed in the section on Appeals.

Some awareness raising efforts are delegated to public entities themselves, notably by section 5(1)(a)(vii), which requires them to produce 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". In addition to this general guide, public entities should be required to create and update lists or registers of the documents in their possession, and to make these public.

Another positive feature of the 2014 draft is that it includes relatively robust new information management standards in sections 17 and 27(2)(e). However, the 2014 draft does not require public entities to provide appropriate training programmes on the right to information to their staff.

Recommendations:

- If oversight responsibilities remain in the hands of the Commission on Administrative Justice, it should be granted substantially more resources to

deal with its additional responsibilities.

- Public entities should also be required to create and update lists or registers of the documents in their possession, and to make these public.
- Public entities should be required to ensure that their staff receive appropriate training on the right to information.

Indicator		Max	Points	Article
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	2	7(1)
55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	2	21(1)(d)
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	2	5(1)(a)(vii)
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	2	17, 27(2)(e)
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	0	
59	Training programmes for officials are required to be put in place.	2	0	
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	2	26
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	2	25(1)
	TOTAL	**16**	**12**	