Statement on Kenya's draft Freedom of Information Policy

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1. INTRODUCTION

In January 2007, the Kenyan Ministry of Information and Communications published a "draft Freedom of Information Policy", designed to "provide a framework for the implementation of the Freedom of Information Bill and review of existing laws, regulations and procedures".[1] The Policy follows a draft Government Bill published in 2005,[2] as well as a draft Freedom of Information Bill developed by the Kenyan Section of the International Commission of Jurists (ICJ) in 2006.[3] The ICJ Bill has since been presented to parliament by Professor Prof. Anyang' Nyong'o, but has not yet been discussed;[4] the status of the government bill is unclear.

We welcome the fact that the process to introduce freedom of information legislation in Kenya is moving forward. We recall that access to information is a fundamental human right, recognised in numerous international human rights treaties that Kenya is party to.[5] International bodies including the African Commission on Human and Peoples Rights and the UN Special Rapporteur on Freedom of Opinion and Expression have urged States to adopt and implement freedom of information laws.[6] The right of access to information is also a central tool in the fight against corruption; the United Nations Convention against Corruption,[7] which Kenya has ratified,[8] requires States to ensure "that the public has effective access to information."[9]

At the same, time, the draft Policy now published raises a number of important questions and concerns. A key concern in this regard is that as yet, there is no legislation to implement; but at the same time the draft Policy states its aim as 'implementing freedom of information legislation'. With both a private members initiative and a government bill on the cards, clarity is needed as to how the government intends to proceed. Other concerns include that the draft Policy is, in many places, insufficiently detailed to provide for real and effective implementation of the right to freedom of information; and that the draft Policy insufficiently addresses the need to review existing legal restrictions on access to information to allow for the realisation of the public's right to know. The following paragraphs discuss these concerns in more detail.

[1] The draft Policy is available from the ministry's website: http://www.information.go.ke/.
[2] The draft Bill is no longer available through the Ministry of Information's current website, but can still be accessed through the web archive: http://web.archive.org/web/20060307182011/http://www.information.go.ke/.
[3] This Bill can be downloaded from http://www.icj-kenya.org/publications/bill_information_06.pdf.
[4] Professor Anyang' Nyong'o, a member of parliament, introduced a Procedural Motion "Seeking leave to introduce a Bill for an Act of Parliament entitled the Freedom of Information Bill" on 4 October 2006. See: http://www.bunge.go.ke/motions_tracker.php.
[5] *See* primarily Article 19 of the *International Covenant on Civil and Political Rights*, New York, 16 December 1966, acceded to by Kenya 1 May 1972; and Article 9 of the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Kenya 23 January 1992.
[6] See the Commission's Declaration of Principles on Freedom of Expression in Africa, October 2002, Principle IV; and the Special Rapporteur's Annual Report to the UN Human Rights Commission, E/CN.4/2000/63, 18 January 2000, paragraph 44.
[7] Adopted by United Nations General Assembly Resolution 58/4 of 31 October 2003.
[8] Kenya ratified the Convention on 9 December 2003.
[9] Article 13(1)(b).

2. PURPOSE OF THE DRAFT POLICY

The 'mission statement' behind the draft Policy, quoted on page 2, is:

> To provide a framework for the implementation of the Freedom of Information Bill and review of existing laws, regulations and procedures.

However, paragraph 1.4 of the draft Policy states that, as part of its implementation, a Freedom of Information Bill is to be published. This leads to the important question: is the purpose of the draft policy to implement a Bill, or is a Bill needed to implement the draft Policy, and does it serve as a consultation document for that?

Ordinarily, a policy for the implementation of legislation is published only after the relevant legislation has been adopted, or as a package when the legislation is first published. Neither is the case here. Although a first government bill on access to information was published as long ago as 2005, this was never tabled in Parliament and its current status is uncertain. The private members bill on freedom of information referred to above has not been discussed in Parliament either. As a result, there is currently no legislation to implement, whether current or under consideration, and this raises confusion regarding the question what the Policy is aiming at in terms of implementation. This confusion is reflected in the draft Policy itself. In many places, it reads more like a consultation document than an implementation policy. For example, the entire section regarding the establishment and functioning of the Information Commissioner discusses what the Act will do, not how it will be implemented. Similarly, Section 3.14, on exceptions and protected information, gives detail on policy considerations behind the legislation – not on implementation.

However, other paragraphs do appear to aim to implement legislation and refer to the Freedom of Information Act as though it has already been adopted. For example, Paragraph 3.5.1 refers to the Freedom of Information Act as a relevant consideration for public authorities when developing an information policy framework, and Paragraph 3.5.2 states a number of minimum standards for such information policy frameworks. Yet these paragraphs raise the question how the government can predict to get legislation through parliament to provide for all of these in exactly the same detail as is stated in the draft Policy.

We are concerned that the overall result is that, in its current form, the draft Policy is poorly suited either for the goal of consulting on or preparing the way for a freedom of information bill, or for implementing freedom of information legislation. If the purpose of the draft Policy is to start a lengthy consultation process on legislation, that would be cause for significant concern. Such consultation would cause further delay to the realisation of the public's right to know without serving a real purpose: the government consulted around a draft bill in 2005, and in the two years since should have gathered sufficient responses and feedback to allow it to move ahead and either declare its support for the current private members initiative, or to have brought a bill of its own.

We would therefore recommend that effective freedom of information legislation is introduced in parliament as a matter of urgency. The government should either declare its support for the private members bill that has been tabled, or urgently introduce a legislative proposal of its own, and the draft Policy should be reworked to provide a realistic strategy for the implementation of that legislation. We would be happy to provide technical support in this process as it progresses.

3. LACK OF DETAILED GUIDANCE

Assuming that the goal of the draft Policy is to implement legislation – and we refer to our concerns and recommendations in that regard expressed in the previous section – we are concerned that the current draft should provide more detailed guidance to public authorities. Implementation of freedom of information legislation entails a wholesale change of culture at all levels of government; as Jack Straw, then UK Home Secretary, said at the introduction of the UK's Freedom of Information Bill, in 1999, freedom of information laws "transform the culture of Government from one of secrecy to one of openness".[10] Such a change needs to be well-managed to be successful, and requires a detailed implementation strategy that tells public authorities exactly what can be expected of them – and the public what they can expect of public authorities. In its current form, the draft Policy does not provide that detailed guidance.

Of the five substantive sections, only Section 3 provides any real guidance to public authorities on how to implement an access to information regime. Section 2 reviews the existing legal framework; Section 4 lays down a data protection policy, and Section 5 discusses the envisaged review and appeals process. This leaves only seven pages, in Section 3, for guidance on the implementation of access to information legislation. This is simply not enough. The substance of the guidance provided in those seven pages is also lacking; most of it is merely descriptive of the content of the (as yet non-existing) freedom of information Bill or Act. For example, Section 3.10 deals with the very difficult issue of how freedom of information will affect private bodies. All it says is: "This policy will apply to private bodies that carry statutory functions and those that are contractors to public organisations." This is not sufficient: an implementation strategy should give far more precise guidance as to what this will mean in practice. One question that needs to be answered, for example, is the meaning of the word 'contractor'. Does this mean that a company that provides cleaning services for government buildings is bound by freedom of information requirements? How about the company that provides security guards at the entrance to a ministry, or the taxi company that picks up employees? These are seemingly mundane yet important questions that ought to be addressed.

Among the few sections that really do aim to provide guidance is Section 3.5, on 'Management of Information' and the duty on public authorities to adopt their own information policy frameworks. While even this could be elaborated further, it at least gives guidance to public authorities as to what will be expected of them. We recommend that the entire draft Policy is reworded along these lines, with the explicit goal of providing guidance to public authorities on the implementation of freedom of information requirements.

4. NEED TO REVIEW EXISTING LEGAL RESTRICTIONS

Part of the draft Policy's 'mission statement' is to provide for the "review of existing laws, regulations and procedures". We welcome this statement of intent; there currently exists a range of legislation and regulations that impede access to information. All of this needs to be

[10] Hansard, House of Commons Debates, 7 December 1999, col. 714.

reviewed, and to the extent necessary, amended or repealed to be brought in line with the aim of realising the right to freedom of information.

However, Section 2 of the draft Policy, which is entitled "Existing Framework for Managing Information Held by Public Organizations" merely describes the existing legal framework without stating any intention to reform or review it. We are concerned that this is not sufficient.

We are strongly of the view that if the right to freedom of information is to be realised in Kenya, a thorough review needs to take place of the entire existing legal framework. Such a review should aim to eliminate any existing access restrictions that are incompatible with the guarantee of freedom of information, and amend existing rights of access to certain categories of documents so as to provide for a unified access regime. The Official Secrets Act, the Statistics Act and the Public Archives and Documentation Act, to name but a few, all contain serious restrictions on disclosure that are not compatible with the right of access to information. These need to be amended, or where necessary abolished altogether, to be brought in line with the exceptions regime in new access to information legislation. The existing legal framework also includes legislation that provides a right of access to certain categories of documents. For example, the Registered Land Act allows for public inspection of certain public registers. Legislation such as this should be brought under the umbrella of freedom of information legislation in order to provide for a unified access regime. If this is not done, a confusing legal situation might arise in which access is guaranteed through two potentially conflicting regimes.

Ideally, the process to amend and repeal existing legislation should take place alongside the consideration of the freedom of information bill in parliament.

Recommendations

- Effective freedom of information legislation should be introduced in parliament as a matter of urgency, and the draft Policy should be reworded to provide a detailed strategy for the implementation of that legislation.
- The draft Policy should be reworked to provide real and effective guidance to public authorities on the implementation of the right of access to information.
- The existing legal framework for access to information should be reviewed and amended and repealed to the extent necessary, alongside the consideration of freedom of information legislation in parliament. This review should aim to eliminate access restrictions that are incompatible with the guarantee of freedom of information, and amend existing rights of access to certain categories of documents to provide for a unified access regime.