KENYA NATIONAL COMMISSION ON HUMAN RIGHTS SUBMISSIONS

To

TASKFORCE ON IMPROVEMENT OF GOVERNMENT INFORMATION AND PUBLIC COMMUNICATIONS FUNCTION TO ALIGN THEM WITH EMERGING PUBLIC SECTOR DYNAMICS AND EXPECTATION

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A. INTRODUCTION

1. The Kenya National Commission on Human Rights ('KNCHR' or the 'Commission') is an Independent National Human Rights Institution established under Article 59 of the Constitution and operationalised by the Kenya National Commission on Human Rights Act No 14 of 2011 (revised 2012). The KNCHR is an “A status” accredited independent National Human Rights Institution in compliance with the UN Principles relating to the status of national institutions (Paris Principles). The Commission also enjoys an affiliate status with the African Commission.\(^1\) The Commission has a broad mandate to promote and protect human rights in the Republic of Kenya. The Commission implements its mandate through strategies such as complaints handling, investigations, public interest litigation, public education and awareness, advocacy, review of legislation and policy, advisory and research.

2. The Kenya National Commission on Human Rights is the designated State Organ in ensuring state compliance with regional and international human rights obligations.\(^2\) KNCHR is also the national monitoring agency under Article 33 (2) of the Convention on the Rights of Persons with Disabilities.

3. The Commission makes this submission pursuant to its constitutional and statutory mandate and in response to the call for submissions by the Taskforce for Improvement of Government Information and Telecommunications under the Ministry of ICT dated 26\(^{th}\) June, 2018. This submission is divided into four main parts as follows:

- **Part A:** Introduction: Highlight of the mandate of the Commission
- **Part B:** Background: Defines the State’s obligation under national and international legal framework on the right to access information.
- **Part C:** Proposals Regarding Government Information and Public Communication
- **Part D:** Conclusion/Summary of Recommendations

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\(^1\) Affiliate Status granted in line with [http://www.achpr.org/sessions/60th/resolutions/370/](http://www.achpr.org/sessions/60th/resolutions/370/).

B. BACKGROUND: OBLIGATION OF STATE TO ACCESS TO INFORMATION

4. The freedoms of expression and access to information are fundamental as individual human rights, as much as cornerstones of democracy and as means of ensuring respect for other human rights. Enjoyment of other rights such a participation in governance, freedom of association and openness, transparency and accountability in the delivery of public services are corollary to securing the right of access to information.

5. The right to information is recognised by regional and international instruments. All the treaties ratified by Kenya form part of the laws of Kenya under Article 2(6)) of the Constitution of Kenya. Article 19 of the Universal Declaration of Human Rights (UDHR) provides that: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’. The International Covenant on Civil and Political Rights (ICCPR) similarly provides that, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.3

6. At international level, it is recognised that ‘freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated.’4 The right to information is sine quo non to the enjoyment of the right to freedom of expression. As has been aptly captured elsewhere, ‘Freedom of information is in the blood which runs in the veins of freedom of expression’.5 Indeed, the reports of the UN Special Rapporteur on Freedom of Opinion and Freedom of

3 Article 9(2) ICCPR.
5 Judge Bell of the Victorian Civil and Administrative Tribunal in XYZ v Victoria Police.
Expression have supported the recognition of a right to freedom of information within the framework of the right to freedom of expression in the ICCPR. Article 19, (2) has been interpreted to clarify that information held by public bodies ‘includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.’

7. Regionally, Article 9 of the African Charter provides that ‘every individual shall have the right to receive information’. This right is also affirmed in Article 7 of the African Charter on the Rights and Welfare of the Child; Article 23 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa and the Declaration of Principles on Freedom of Expression in Africa (the Declaration), adopted by the African Commission in 2002 to supplement Article 9 of the African Charter. The African Commission has also adopted other soft law standards such as the Model Law on Access to Information for Africa of 2013 and the Guidelines on Access to Information and Elections in Africa of 2017. In addition, Kenya has ratified the Africa Union Convention on Preventing & combating corruption, Article 9 of which is on access to information. The African Charter on Values and Principles of Public Service and Administration, which lists as two of its principles ‘institutionalising a culture of accountability and integrity and transparency in public service and administration’ and the ‘effective, efficient and responsible use of resources’ provides in article 6 for the right of access to information. Several other African Union instruments such as the African Youth Charter, the African Charter on Statistics and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa explicitly recognise the importance of access to information.

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7 Paragraph 18; Human Rights Committee General Comment No. 34 on the Right to Access to Information.
8 Resolution 222 (ACHPR/Res.222 (LI) 2012) called on the African Commission to modify the Declaration of Principles on Freedom of Expression to include access to information. There is since a draft in place.
8. The **AU Model law on Access to Information in Africa**\(^9\) adopted by the African Commission on February 2013 is crafted to guide African countries to adopt and implement access to information legislation. In adopting the Model Law on Access to Information for Africa, the African Commission went a step further than the Declaration, ‘by providing detailed and practical content to the legislative obligations of Member States to the African Charter with respect to the right of access to information, while leaving the specific form in which such laws will be adopted to individual States Parties’.\(^10\) Under the Model Law, one of the principles is that, ‘**Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively**’.\(^11\) Proactive disclosure is also underscored. Every information holder is under an obligation to ‘**create, keep, organize and maintain information in a manner which facilitates the right of access to information**’.\(^12\)

9. Notably, the obligation to respect freedoms of opinion and expression is binding on every State party as a whole. This includes, ‘All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local.’\(^13\) In the Kenyan scenario, it must not be lost on us that county governments play a crucial role in promotion, protection and fulfilment of the Bill of rights including the right to access to information. The **County Government Act**\(^14\) recognizes that timely access to information, data, documents and other information relevant to policy formulation and implementation as one of the main principles influencing citizen participation in management of the County government. The Act has an entire part that is dedicated to Public Communication and Access to Information - Part IX.

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\(^10\) 7 Model Law p 7
\(^11\) S. 2 Model Law.
\(^12\) S. 6 Model Law.
\(^13\) Para 7, Human Rights Committee General Comment No. 34 on Article 19: Freedoms of opinion and expression (12 September 2011).
\(^14\) See S. 87, Part IX County Governments Act.
10. Policy direction towards improving government information and public communications must be aligned with Constitution of Kenya, 2010. Most specifically, the government information and public communication must conform to Article 10 of the Constitution which provides for the national values and principles of governance. The Constitution of Kenya 2010 provides for an elaborate bill of rights under Chapter four that binds all state officers, public officers or organs in the provision of information and public communication.

11. Article 35 of the Constitution provides for the right of citizens to access information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. The provision reads as follows:

35. (1) Every citizen has the right of access to— (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation.

12. Access to information is related to fair administrative action issue secured under Article 47 of the Constitution which provides that, ‘Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair’. Transparency and provision to the public of timely, accurate information are amongst the values and principles of public service.  

13. Article 54 (1) (b) obligates the State to ensure that all persons with disabilities have reasonable access to all places, public transport and information. Article 7 of the constitution further obligates the State to promote the development of Kenyan sign language, Braille and other communication formats and technologies accessible to persons with disabilities.

14. The Access to Information Act No. 31 of 2016 (“ATI Act”) was enacted to give effect to Article 35 of the Constitution of Kenya, 2010 on the right to access to information. The ATI Act came into force on 21st September, 2016. The enactment of the Access to Information Act was as a result of dedicated advocacy efforts by various stakeholders (including the National Human Rights Commission). The country visit by then African Commission Special Rapporteur on Right to Information and Freedom of Expression, Ms Pansy Tlakula in 2015 served to bolster the efforts.

15. At domestic level, a number of laws recognise the right of access to information, in addition to the Access to Information Act and the Constitution of Kenya. For instance, the Public Service (Values and Principles) Act (No. 1A of 2015) provides that a public officer shall not unduly delay the provision of any information where required to provide that information (Section 8 (1)(b)). Under section 8 (2) of the Act, the public service, a public institution or, where permitted, an authorized officer shall develop guidelines for the provision to the public of timely and accurate information, and the promotion of transparency and accountability. There is also the Public Finance Management Act, 2015. Section 10 of the Act provides that the Parliamentary Budget Office shall subject to Article 35 of the Constitution, ensure that all reports and other documents produced by the Parliamentary Budget Office are prepared, published and publicized not later than fourteen days after production.

16. Access to information is therefore fundamental to the exercise of the Bill of Rights and realisation of the national value and principles of governance enshrined under Article 10 of the Constitution. The High Court in the case of Katiba Institute v Presidents Delivery Unit & 3 others16 underlined the centrality of the right to access information noting that; ‘This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends

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16 Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR.
on the citizen’s ability to access information held by public authorities. Where they don’t know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country’s governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country. The High Court went on to underscore the fundamental importance of the right thus:

We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused [Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR Para. 57].

C. PROPOSALS REGARDING GOVERNMENT INFORMATION AND PUBLIC COMMUNICATION

Proactive Disclosure

17. The State, at both levels of government, must proactively disclose public information in accessible formats. The international community has long recognised the inherent duty of the State to put out information that is of public interest:

‘To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public

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17 Para. 28 Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR [Emphasis added].
States parties should make every effort to ensure easy, prompt, effective and practical access to such information.\textsuperscript{18}

\textbf{18.} Section 4 of the Access to Information (ATI) Act stipulates as follows:

1) "Subject to this Act and any other written law, every citizen has the right of access to information held by—
   a) the State; and
   b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

2) Subject to this Act, every citizen's right to access information is not affected by—
   a) any reason the person gives for seeking access; or
   b) the public entity's belief as to what are the person's reasons for seeking access.

3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4) 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.

5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (emphasis added)

The Access to Information Act establishes the principle of proactive disclosure, one of the most important principles of an access to information regime. Section 5 of the Act provides a framework for public entities and private bodies to proactively disclose the information that they hold. A public entity must facilitate such access. This means that citizens can and should expect routine and systematic information disclosure by public entities and private bodies.

\textsuperscript{18} Para. 19 General Comment No. 34 on Article 19 of ICCPR (12 September 2011); accessible at https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.
19. Our Courts have elaborated on the proactive nature of the State’s duty to disclose information:

i. “It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. …the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the Constitution and is protected by the same Constitution.”¹⁹

ii. The…consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...

20. In the case of Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others, the High Court ruled that, ‘The recognized international standards or principles on freedom of information,… include maximum disclosure: that **full disclosure of information should be the norm**; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”²⁰

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¹⁹ Paras. 32 & 34, Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR.
21. Human rights standards demand that the procedures for accessing information should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.21

Review of Archaic/Retrogressive Laws

22. For a long time, public servants have withheld information under the guise of confidentiality. This hushed state of affairs was further fortified by oaths of secrecy/confidentiality taken by public officials making governance in secrecy a reality and the order of the day. Our legislative regime is still littered with a number of restrictive laws that curtail information access such as the Official Secrets Act, Chapter 187 and the Preservation of Public Security Act, Chapter 57 have provisions that restrict access to information. The Official Secrets Act which came into force in February of 1968 for instance stipulates as follows at section 3:

(7) Any person who-

(a) allows any other person to have possession of any official document issued for his use alone, or communicates to any other person any code word so issued; or

(b) without lawful authority or excuse, has in his possession any official document or code word issued for the use alone of some person other than himself; or

(c) on obtaining possession of any official document by finding or otherwise neglects or fails to restore it to the person or authority by whom or for whose use it was issued or to a police officer,

shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.

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21 Para. 19 General Comment No. 34 on Article 19 of ICCPR (12 September 2011); accessible at https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.
23. The above are just a few examples of laws that restrict access to information; there are many other including: National Assembly Powers and Privileges Act, Security Laws (Amendment) Act 2014, National Intelligence Service Act 2012 and Public Order Act. The Constitution is the Supreme law of the land and any other laws must be in conformity with its provisions. The Commission further invokes solace in the transitional Clauses of Schedule 7 to the Constitution which categorically provide that laws in existence prior to the effective date shall be read with necessary modifications as to bring them in conformity with the Supreme law of the land.

Privacy and Protection of Personal Information

24. Access to information provisions must be read alongside the relevant provisions of Article 31 on privacy, which Article states as follows:

   Every person has the right to privacy, which includes the right not to have— (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed. Public and private entities receiving and processing, storing and disseminating personal data must therefore be wary of the provisions governing privacy and principles of data protection which are internationally accepted.

25. Everyone has the right to privacy, including the confidentiality of their communications and the protection of their personal information. Everyone has the right to communicate anonymously or use pseudonyms on the internet and to secure the confidentiality of their communications and personal information from access by third parties through the aid of digital technologies.²²

26. In line with the Constitution, regional and international obligations on data privacy and protection, Kenya needs to fast track adoption of a legislative framework on the protection of personal information of individuals. Such law should provide that the processing of personal information be in accordance with the following principles:

i. with the consent of the individual concerned;

ii. conducted in a lawful and fair manner;

iii. in accordance with the purpose for which it was collected, and adequate, relevant, and not excessive;

iv. accurate and updated and where incomplete, erased or rectified;

v. transparent and disclose the personal information held; and

vi. confidential and kept secure at all times.

**Accessibility of Government Information and Public Communication to Persons with Disabilities**

27. Under the Constitution and the Access to Information Act, access to information is a right to be enjoyed by all without discrimination. In enjoying this right, some individuals require more than the statement on paper: they will require that certain steps be taken to make the right real. For example, for **persons with disabilities to enjoy the right of access to information**, they will require access to the websites of public bodies, through accessible digital formats. They will also require the provision of sign language interpreters, Easy Read text and language, Braille and tactile communication, augmentative and alternative communication, and all other accessible means, modes and formats of communication of choice by persons with disabilities in official interactions. These should be provided in a timely manner and without additional cost.
28. Persons with disabilities face barriers in various aspects of life including access to information that impedes their ability to live independently and participate fully in all aspects of life with dignity. The identification and elimination of these obstacles/barriers is key towards ensuring equal opportunity for participation in society.

29. Kenya is a party to the Convention on the Rights of Persons with Disabilities which forms part of the laws of Kenya by virtue of article 2 (6) of the Constitution of Kenya. With respect to access to information, Article 9 of the Convention on the Rights of Persons with Disabilities obligates State Parties to take appropriate measures to ensure persons with disabilities access on an equal basis with others to information and communication and information and communication technologies and systems. Article 9(1) obligates state parties to identify and eliminate obstacles and barriers to accessibility to information and communication for persons with disabilities.

(a) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
(b) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
(c) To provide live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
(d) To promote access for persons with disabilities to new information and communication technologies and systems, including the internet; and
(e) To promote the design, development, production and distribution of accessible information and communication technologies and systems at an early stage so that these technologies and systems become accessible at minimum cost.

30. Article 21 of the Convention on the Rights of Persons with Disabilities obligates state parties to take appropriate measures to ensure that persons with disabilities can exercise right to freedom of expression and opinion including the freedom to seek,
receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice by:

a) Providing information intended for the general public to persons with disabilities

b) Accepting and facilitating use of sign language, Braille, augmentative and alternative communication and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions

c) Urging private entities that provide services to the general public, including through the internet to provide information and services in accessible and usable formats of communication of their choice for persons with disabilities

d) Encouraging mass media, including providers of information through internet to make their services accessible for persons with disabilities

e) Recognizing and promoting the use of sign languages

The provisions of the Convention on the Rights of Persons with Disabilities and the Constitution create legally binding obligation to ensure that government communication and public communication is accessible to persons with disabilities.

28. Whereas Kenya has a progressive legal and policy framework that obligates the state to ensure access to information and communication for persons with disabilities, the implementation of the same remain very low. The Commission in its monitoring report on the rights of persons with disabilities has noted that ‘communication remains a challenge for persons with disabilities and as a result they are locked out in participating in civic life. Out of the sampled institutions, only special schools, few hospitals, and courts had accessible formats of communication though not all.’

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29. During Kenya’s review under the Convention on the Rights of Persons with Disabilities in 2015 by the United Nations Committee on the Rights of Persons with Disabilities, the following concerns were noted with respect to access to information:
✓ Deaf are excluded for accessing information specifically information and education material through television. Section 39 of the Act provides that all television stations shall provide a sign language inset or sub-titles in all newscasts and educational programmes, and in all programmes covering events of national significance. 16 years into the implementation of the Act has not seen any of the television stations (including state owned television the Kenya Broadcasting Corporation) providing information to the deaf in accessible formats;\textsuperscript{24} There are no subtitles, captions and signing for other broadcast content such as breaking news, entertainment shows and advertisements etc.

✓ Limited provision of sign language interpreters in public office to facilitate access to public services free of charge\textsuperscript{25}
✓ The lack of information on low cost information and communication technology for persons with disabilities including those living in rural areas\textsuperscript{26}
✓ Lack of access to information concerning health programs\textsuperscript{27}
✓ Policy framework for implementation of accessibility must fully cover accessibility in all dimensions, including information and communication though braille, Sign

\textsuperscript{24} Submissions by the United Disabled Persons of Kenya to the Committee on the Rights of Persons with Disabilities available at https://tbinternet.ohchr.org/\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCO%2fKEN%2f20210&Lang=en
\textsuperscript{26} Ibid
\textsuperscript{27} Joint Submission of Albinism Foundation of East Africa and others to the Committee on the Rights of Persons with Disabilities available at https://tbinternet.ohchr.org/\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fKEN%2f21375&Lang=en
Language, alternative and augmentative modes of communication and easy to read and easy to understand language

✓ Concern has also been raised as to whether websites of government agencies and department are compliant with the international web accessibility standards

**Recommendations:** The Commission strongly recommends to the State to:

(i) **Enact the Persons with Disabilities Bill approved by Cabinet in 2018** which *obei*gates public institutions to provide information in accessible formats and technologies appropriate to different kinds of disabilities.

(ii) **Adopt and implement the Draft National ICT policy**\(^{28}\), 2016 which *requires* content producers for distribution and public consumption in Kenya to *produce* such content in accessible formats such as audio description, audio subtitles, captions and signing for access to persons with disabilities. The Draft ICT Policy identifies as a strategy adoption of international web accessibility standards for government websites as a measure to promote accessibility for persons with disabilities.

(iii) **Amend the Persons with Disabilities Act to broaden obligation of content producers to produce content that is in accessible formats for all types of disabilities.**

The Commission further submits that government information and public communication must be tailored towards accommodating all special interest groups to ensure that no one is left behind. Special interest groups include women, illiterate, intersex, children, youth, and persons with disabilities. Government information and public communication must ensure that that the needs of special interest groups are taken into account from the onset.

**Disaggregation of government information**

30. Disaggregation of government information and data that informs on dimensions of various segments of society and how government policy has impacted on them is critical towards improving openness and accessibility of information provided by government agencies. The Commission therefore proposes that information on government communication further encompasses disaggregation of data that capture not gender, sex and location dynamics but also disaggregation that captures status of persons with disabilities, age, minority and marginalized groups.

Centralized portal for government circulars, directives and other public information

31. There is lack of comprehensiveness on the information that is availed in public government websites. Even where it is available, the information is strewn across various websites and portals, which are unknown and unpublicized for the benefit of the common mwananchi. The Commission also expresses concern over the multiple and parallel sources of information in the various government platforms. Various government Ministries and departments, corporations stream information on the various sites, which are not accessible to the larger public. Moreover, the government communicates important administrative issues through circulars touching on various subjects including financial management to accounting officers. The commission further notes that such circulars and communication cannot be accessed in a one-stop shop for future consultations.

32. The Commission advises to embrace a government of Kenya portal through which all information of public interest is communicated, with cross linkages with the host websites where need be. In view of these observations and the importance of communication, the Commission further advises that government circulars communicated to heads of institutions and accounting officers be placed in a stop shop accessible to accounting officers for purposes of ensuring accessibility. Various channels/medium of communication must also be employed to enable wide reach to persons of all walks of life. The role of third parties as conduits of government information becomes indispensable in this cause. (See discussion on role of third parties below).
Engagement with the Government Advertising Agency (GAA) to promote Government Information and Public Communication

33. Kenya National Commission on Human Rights is one of the key Constitutional Commissions that influence policy, legislation and public accountability. Though there has been marked improvement in understanding human rights within Government, cooperation is still not optimal. Sessional Paper No.3 of 2014; National Policy and Action Plan on Human Rights requires State’s cooperation, coordination and communication on matters human rights.

34. The experience of the last four (4) years has shown that the reallocation of the budget lines of the Constitutional Commissions on public communication and advertising to the Government Advertising Agency (GAA) has slowed the timely and proactive engagement of human rights communication through public awareness, public outreach and advocacy due to the slow approval processes and in some instances lack of available funds.

35. At times, access to key Government Advertising Agency (GAA) officials and information on procurement of services for media engagement has been slow. It is important to note that the Commission is key to informing the members of the public on their human rights and fundamental freedoms. There can be no accountability in the management of public and private institutions unless the public is fully informed by the Commission on what these institutions are doing on their behalf, and unless the practice of information sharing and public participation on human rights matters is institutionalized.

Recommendations: The Kenya National Commission on Human Rights strongly recommends to the State to:

i. Properly resource the Constitutional Commissions by considering the direct re-allocation of the public communication and advertising budget lines from Government Advertising Agency (GAA).
Securing the Role of Third Parties in Access to Information

36. The Human Rights Committee has previously noted that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output.29

37. Articles 33 and 34 of the Constitution of Kenya protect freedom of expression and media freedom, key components for any open and democratic society. Notably, a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other rights. The telecommunications and internet access sector have been critical in enabling access to and the dissemination of information. Individuals and companies within the digital access sector play an essential role in the vast expansion of access to information and communications services. The State should therefore take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

38. The Declaration of Principles on Freedom of Expression and Access to Information in Africa30 oblige States to facilitate freedom of expression and access to information online and the means necessary to exercise these rights.31 In Kenya for instance, section 29 of the Kenya Information and Communications Act was declared as unconstitutional by the High Court in Geoffrey Andare v Attorney General & 2 others32 as its effect was to criminalise publication of certain information in vague and

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29 See Para 18 Human Rights Committee General comment No. 34 on Article 19: Freedoms of opinion and expression (12 September 2011).
31 Article 84, Draft Declaration of Principles on Freedom of Expression and Access to Information in Africa. 
c. sends a message or other matter that is grossly offensive or of an indecent, obscene or
overbroad terms, hence having a chilling effect on freedom of expression. The draft Declaration also oblige States to refrain from interfering with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as removing, blocking and filtering of content, unless such interference is justifiable and compatible with international human rights law.

39. The State should also ensure that public broadcasting services operate in an independent manner and should guarantee their independence and editorial freedom. The Commission therefore recommends that the State adopts measures to protect the internet and enhance its access in line with the regional obligations including the Declaration on Access to Information and the Model Access to Information Law.

PART D: CONCLUSION

39. The Kenya National Commission on Human Rights welcomes the efforts and noble intention of the State and the Taskforce to improve on government communication and access to information. As a country, it is not for dearth of legal framework on access to information but the implementation of the same that is a real challenge. The National Commission has discussed the various dimensions and considerations that ought to be taken into account and particularly has emphasized the following:

i. **Proactive Disclosure**: That all State agencies and organs at both national and county levels of government have an obligation under national, regional and international law to proactively disclose information to its citizens, in the first

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*menacing character; or*

d. sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.
instance, without the need to apply for the same. Full disclosure should be the norm. Citizens can and should expect routine, systematic and timely information disclosure by public entities and private bodies. Indeed, the State, at both levels of government must ‘publish and publicise any important information affecting the nation’ in line with Article 35(3) of the Constitution. The State must also, timeously provide open access to such specific information as people may require from the State. Institutional Service charters must make provision for and comply with such obligation and the set timelines.

ii. **Review of Retrogressive Legislation:** The State should amend and overhaul all the laws and administrative/institutional protocols and bottlenecks that compromise on the right to access information. Laws such as the Official Secrets Act amongst other laws need to be reviewed to comply with the Constitution and international human rights standards.

iii. **Accessibility:** All government communication and information of public interest must be disseminated in platforms and in formats that are accessible to all persons including persons with disabilities. Failure to do so amounts to discrimination and a violation of Kenya’s national and international human rights obligations. The Commission recommends the enactment of the Persons with Disabilities Bill approved by Cabinet in 2018 which obligates public institutions to provide information in accessible formats and technologies appropriate to different kinds of disabilities. The Commission further recommends the adoption and implementation of the Draft National ICT policy\(^{33}\), 2016 which requires content producers for distribution and public consumption in Kenya produce such content in accessible formats such as audio description, audio subtitles, captions and signing for access to persons with disabilities. The Draft ICT Policy identifies as a strategy adoption of international web accessibility standards for government websites as a measure to promote accessibility for persons with disabilities.

iv. **Centralised repository:** Unclear, multiple sites and parallel platforms of communication only serve to obfuscate access to information by the public. The Commission stresses on the need for transparency on source and storage of all government communication and information of public interest. Kenyans must for instance know where to get the latest government communication without the need to hop from one platform to the other. Such information must be posted timeously, disseminated in various media and updated regularly.

v. **Freedom of Media including Internet use:** As a means to protect the rights of media users, of diverse ethnic and linguistic minorities to receive a wide range of information and ideas, the State should encourage independence and diversity of the media. In recognition of diversity and freedom of media and expression, it is imperative that the State provides a safe environment for private actors to thrive and disseminate information in languages that are accessible to all populations. State owned media houses must have the independence necessary to provide complete and balanced information. The Internet space must be safeguarded and expanded to enhance reach of information to all persons including in marginalised areas. The State should shun measures that may unduly interfere, directly or indirectly with universal, equitable and affordable access to the internet and that are justifiable and compatible with international human rights law.

vi. **Implementation of ATI Act:** The Commission calls for full implementation of the Access to Information Act, 2016 to ensure the full enjoyment of the right to access information to the greatest extent possible.

vii. **Data Privacy and Protection:** In line with the Constitution, regional and international obligations on data privacy and protection, the Commission calls for the State to fast track adoption of a legislative framework on the protection of personal information of individuals. Such law must abide by the principles of data privacy
and protection including lawfulness and fairness, accuracy, data minimization, purpose limitation, transparency, integrity and confidentiality.

viii. **Sustainable Development Goals**: Knowledge and information are key drivers behind the implementation of all the Sustainable Development Goals (SDGs). According to the UN ‘The 2030 Agenda recognizes the need to develop knowledge societies where everyone has opportunities to learn and engage with others, which starkly highlights the need for access to Information and Communication Technologies (ICTs)’. This is what is required by SDG 9, which calls on states to “build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation.” **SDG Goal 16** aims for promotion of, ‘peaceful and inclusive societies for sustainable development provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. If we are to meet the targets under SGD 16 i.e to substantially reduce corruption and bribery in all their forms; ‘Develop effective, accountable and transparent institutions at all levels; Ensure responsive, inclusive, participatory and representative decision-making at all levels; Broaden and strengthen the participation of developing countries in the institutions of global governance’, then all nations must strive to ensure access to public access to information, whether good or bad, palatable or otherwise. Indeed, the Goal 16 calls upon States to “[e]nsure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.”