

Elewa. Eleza. Eneza

#julisha

**Report on the
Panel Engagement
on
The Elevation of the Access to Information
Act 2016
Held on
19th February 2019
at
Serena Hotel, Nairobi**

Introduction

This report covers the deliberations during the panel engagement on the Access to Information Act 2016 held on 19th February 2019 at the Serena Hotel in Nairobi. In attendance were 50 guests comprising of State Actors from the Commission on Administrative Justice/ Office of the Ombudsman, Parliament, National Gender and Equality Commission, Office of the Auditor General and the Council of Governors; and Non-State Actors representatives from Africa Check, Kenya Markets Trust, Centre for Human Rights and Civic Education, BGSK, Katiba Institute, Mzalendo Trust, Media Council of Kenya, Article 19 East Africa, Amnesty International Kenya, Hass Petroleum, The Institute for Social Accountability (TISA), 1 FM, PAWA 254, ICJ Kenya, Move on Africa, Millennials Speak, Kenya Human Rights Commission, Centre for Enhancing Democracy and Good Governance, Luminare, Evidence Action, DFID – UKAID, NWSC, ONE and The Africa Centre for Open Governance.



Welcome Remarks by Ms. Wanjiru Gikonyo - TISA)

Ms. Wanjiru explained that the panel conversation was about the right of citizens to access information held by the State. The reason TISA decided to collaborate with civil society organizations (CSOs) to host a dialogue on access to information was because in its work on local governance it found that it is struggling with the issue of access to information in terms of service delivery. TISA would be asked questions by resident associations about who is responsible for certain aspects such as noise pollution, who approves establishment of night clubs within residential areas. Additionally, in its government budget monitoring work TISA has had concerns with the information given by government in terms of quality and timeliness of giving information.

As a result, TISA started making use of the Access to information Act and made several petitions as an institution and advised resident associations to make petition on access to information as well. However, TISA noticed a disturbing trend whereby most of these petitions remained unresolved and had to escalate them to the Commission on Administrative Justice. It reached a point where TISA would copy the Commission on Administrative Justice in its petitions to ensure they were aware anytime TISA made a request for information because the Commission is responsible for ensuring implementation of the Access to Information Act. By the end of 2018, TISA realized that it had a matrix of about 23 petitions and very few had been responded to. Unfortunately, even the few responses received were not helpful. Because of this experience, TISA felt the need to support ongoing efforts around access to information to reinvigorate them. TISA decided to convene the panel engagement comprising of State and Non-State Actors as panelists including representation from

- the commission on administrative justice to speak on the technical aspects of access to information
- council of governors to speak on what the council is doing about the issues of access to information as an enabler of good governance
- office of the auditor general to speak on the role of information in ensuring veracity of audit reports
- champions of the enactment of the access to information act to share their background and experiences on ensuring the enactment of the access to information act
- civil society organizations advocating for the implementation of the access of information act
- proactive citizens who have made use of the access to information act to hold the government accountable

She made a brief presentation of the reasoning behind organizing the panel engagement. She explained that the right of citizen to access information is enshrined in the Constitution. Additionally, the Access to Information Act was passed in 2016 and is in the process of operationalization. However, Kenya has a good reputation of passing good policies and enacting good laws but falls short on implementation of the same. Therefore, the panel engagement will focus on the implementation of access to information Act and discuss it from various perspectives, that is, what is the role of the government, citizens, civil society and the private sector, and how to deal with the aspect of political will and culture. The discussion will contribute towards ongoing efforts and discussions on access to information and generate actionable recommendations that can help to bolster the ongoing efforts.

She gave a brief overview of the ongoing campaign on access information by TISA and its partners including: the Office of the Ombudsman, Article 19 East Africa that has been a forerunner in the access to information advocacy; AFRICOG; CEDGG who work at the county level; Transparency International Kenya; and Katiba Institute who have filed interesting cases around access to information that have resulted in progressive jurisprudence. These organizations are forerunners on issues of access to information and have wealth of experience on the same. However, the issues of access to information affects all Kenyans and civil society organizations work in a setting of low political accountability and the tendency is to give up. However, Kenya has a progressive Constitution and strong institutions established by the Constitutions (Chapter 15) as independent commissions to deal with the political culture issue. Additionally, the Access to Information Act has progressive provisions. TISA reached out to civil society organizations and after deliberations with them decided to have a campaign on access to information. The campaign goes back to the basics by educating the public, reaching out to citizens and using linkages with influencers in the private sector, civil society organizations and government who are committed to the implementation of the Constitution. TISA reached out to these influencers with the aim to bolster ongoing conversations. For instance, the Commission on Administrative Justice who helped to shape the objectives of the public sensitization campaign by advising the campaign should focus on educating the public about the Act and how to use it. The Commission would then respond to the issues generated from the campaign. Other actors mapped out in the campaign include Parliament, State Organs, Open Government Partnership, Council of Governors, Media.

She explained that the campaign approach is to identify influencers in the different stakeholder groups and engage with them through dialogues, and the actions that will come out from the dialogue. Civil society on the other hand will work to aggregate citizen voice. There is an ongoing social media campaign that seeks to educate the public and harness the feedback from the same.

So far, the campaign has received serious feedback from the public and has connected people whose petitions have stalled with the Commission on Administrative Justice. The campaign will later expand to mainstream media.

She informed the participants that the objectives of the campaign is to generate actionable information to support ongoing efforts around access to information, create allies and look at how to organize around the issue of access to information and move from the access to information being just about passing the law and regulations but link actions to the political culture so that Kenyans can begin to enjoy the gains of the Constitution. The campaign takes a four-tier approach including awareness, engagement, participation and advocacy. The big idea of the campaign is premised on “*Elewa Eleza Eneza*”. The key steps of the campaign are to understand the provisions of the Act, Government being able to respond to the citizens when they make use of the Act and then create an enabling environment. The campaign looks at the government, citizens, private sector and civil society who have a role to operationalize access to information.

Panel Engagements



The first high level panel comprised of: **Hon. Otiende Amollo** (former Ombudsman Kenya and currently a Member of Parliament); **Hon. Priscilla Nyokabi** (former Member of Parliament who sponsored the enactment of the Access to Information Act in 2016 and currently a commissioner at the National Gender and Equality Commission); **Mr. Vincent Chahale** (Director of Legal Services at the Commission on Administrative Justice) and **Ms. Jackline Mogeni** (the Chief Executive Officer of the Council of Governors) and was moderated by **Mr. Charles Warria**. The second panel comprised of active users of the access to information act and champions pushing for the effective implementation of the access to information law including: **Mr. Edward Ouko** (the Auditor General Kenya); **Ms. Sandra Musoga** (Article 19 East Africa); **Mr. Vincent Ngethe** (Deputy Director Africa Check) and **Mr. Boniface Mwangi** (political and social activist) and was

moderated by Ms. Jessica Musila of Mzalendo Trust.



Below are the key issues raised and recommendations made by each of the panelist based on their experience.

1. **Mr. Otiende Amollo** spoke on the importance of having the Access to Information law in Kenya. He explained that having access to information law in Kenya was important enough for the debate to be held for two decades. The idea was first infused in the *Katiba Tuitakayo* initiative by the *Kenya Human Rights Commission, ICJ Kenya* and the *Law Society of Kenya* in 1994. The draft Constitution then included a provision on Access to information. The idea was further emphasized in 1999 and a Bill was drafted and embraced by members of parliament who were willing to table it as a private bill. Professor Kitui who was a parliamentarian at the time adopted the draft bill and sought to push for its enactment until he became a minister of government, thus the idea was lost. The Bill stayed in Parliament for a long time until Hon. Nyokabi pushed for it to be enacted in 2016.

He further explained that the Act had to be passed because Kenya had become a secretive society and bad things thrive in a secretive society, for instance corruption and impunity. The idea of the Government Secrets Act was a license to opaqueness and Kenyans felt that it was important to opening access to information held by government to citizens. Despite the inclusion of the right of access to information in the Constitution, the government introduce the idea of limitation on grounds on national security which became a bottleneck. However, the Access to Information Act introduces national security but defines what it is. The Access to information Act was necessary as a way of opening up our society to accountability.

As regards to the issues on why it is difficult for government to publicize tender documents and why government is hesitant to publicize documents on the Standard Gauge Railway (SGR) even after the president directed for them to be made public, Hon. Otiende explained that access to information act as contemplated by the Act is not restricted to information requested by the public, but there is a category of information that the government should proactively disclose including contracts they enter into and projects they intend to implement. Therefore, information on SGR should be available on

government website. But the reason why government is not providing this information is because the mode of contracting by public institutions is designed to be opaque for the benefit of some people. The Access to Information Act acts with the presumption that all information held by public institution should be made public unless in exceptional circumstance when it can be restricted. But a large percentage of government officials operate on the opposite of this presumption that every information is secret unless there is a compelling reason why it should be made public.

2. **Hon. Priscilla Nyokabi** shared her experience in pushing for the implementation of the Access to Information Act. She joined ICJ Kenya in 2004 when it was advocating for the implementation of the access to information law. A study had been done indicating gaps on access to information. A Bill was then drafted and ICJ talked to many members of parliament to push for its implementation but were not successful. When she decided to vie for Parliament in 2013, one of her agenda was to be the mover of the law. After being elected, she put a notice in 2013 but the Bill was finally debated in 2016. Two key factors helped and these were the fact that the Constitution provided for the right to access to information and the Access to Information Bill was among the priority Bill listed in the Constitution that were to be enacted within 5 years after the enactment of the Constitution.

Although she is no longer a parliamentarian she still works closely with the Commission on Administrative Justice and is also involved in the development of the regulations which she believes are urgent. Although she considers it peculiar that in Kenya even though a right is granted by the Constitution and an Act of Parliament implements the right we use regulations to forestall implementation of a law. She raised a concern that in Kenya a law cannot be implemented due to lack of regulations and also the fact that it takes too long to develop regulations. The commission is now fully constituted, and they have put a lot of effort in developing the regulations.

She also raised concern that county budgets are opaque due to the a deeply entrenched culture of secrecy that is a hinderance to access to information. This culture of secrecy requires an active citizenry that demand information. However, citizens are not making use of the law to request for information. The civil society, media and activist also need to make use of the law. She stated the importance of tracking budget allocations and expenditure for development and recurrent expenses at the national and county level. She expressed her dissatisfaction in the mismanagement to the level 5 hospital allocations whereby there are hospitals that receive less allocation but deliver services while others receive more allocations but are not able to deliver any services. To be able to understand this disparity there is need for access to information of how the money was spent. She emphasized the need to link access to information with issues that matter such as health or water.

She further stated that without access to information there is lack of accountability. It is unfortunate that the fight against corruption does not mention lack of access to information as a gap. Corruption cannot be fought without access to information. There is need to breakdown information to establish why service delivery is not efficient. There is need for access to information to push for accountability and development.

3. **Mr. Vincent Chahale** explained that the access to information law requires the participation of all sectors of the society including citizens, public institutions, parliament. The Commission on Administrative Justice (CAJ) is mandated to provide oversight of requests it receives for denial of information from citizen. The access to information law can help in socio economic development of a country because one requires information to know the decisions to make, and to fight against maladministration, corruption and impunity because one need information to curb these. However, CAJ has noted with concern that people request information concerning their individual interest. Thus, there is a gap of people requesting information that can help the public or for public consumption. There is also low public awareness of the Access to Information Act and the right to access information under Article 35 of the Constitution. Thus, CAJ is open to partner with civil society organizations to create public awareness to citizens of their right to access information. Citizens need to understand that access to information law is citizen driven and citizens need to demand information. CAJ only comes in to facilitate the provision of the information requested. Further, CAJ issued a circular to all public institutions to provide the set of information to be proactively disclosed within 30 days and will conduct an exercise to determine which organizations will not provide information with a view to take appropriate actions.

4. **Ms. Jackline Mogeni** clarified that the Ministry of ICT which is part of the national government is responsible for the digitization government documents and not county governments. However, there are county governments that have made efforts to go digital for instance in the collection of levies. However, she noted that some counties still do not have fiber optic connection. She indicated that counties are working closely with the national government to ensure they will digitize their records by the set deadline of September 2019.

On the issues of budget making and implementation she indicated that the laws only requires county governments to undertake public participation in budget making process and not implementation. It is the responsibility of citizens to look for the approved budget on county assembly and council of governor's websites. She also informed the participants that the Controller of Budget prepares budget implementation reports which are available for the public. She urged the participants to scrutinize budget documents before approving the same during public participation forums. She also urged civil society organizations to partner with the council of governors to inform the public.

5. **Ms. Sandra Musoga** stated that one of the most important things that determines successful implementation of access to information law/regime is the promotional aspect of the law. In as much as access to information law has been enacted and is progressive, there must be awareness creation of the Act because it is supposed to be a game changer in terms of influencing open government, enhance socioeconomic development etc. There is need to create awareness of the existence of the Access to Information Act especially among citizens. The demand side is a very important side in access to information. Citizens should be informed that they have the right to access information under the Constitution and a law has been enacted creating an enabling framework. Citizens need education on how to exercise this right, and which steps they should take if they are denied information.

In the case of supply side/public officials, they not only need to be aware of the existence of the Act but also understand their mandate under the Act which is to proactively disclose information. The Act provides an offence of failure to disclose information by a public official and imposes a penalty of Kshs. 50,000/- or 3 months imprisonment. Public officials must also understand the paradigm shift established by the Act that information belong to citizens and not government, government is only a custodian of information on behalf of the public. This aspect of a paradigm shift needs to happen for proactive disclosure to come alive. She further stated that proactive disclosure is cheap because it is all about putting information out for the public to easily access. Public institution basically need to put in place platforms for dissemination of information. This does not require sophisticated systems and can be done at low costs or even devolved to the local level. Proactive disclosure simply means open government.

In her view, what needs to happen for the law to be effectively implemented is putting in place structures and systems, organizational support, and development of simple guidelines that establishes the minimums. Other players such as civil society, the media have a role in promoting Access to Information Act. She was of the view that the media is not using the law enough.

As regards the role of judiciary, she stated that judges have pronounced themselves on the right to access information as provided for in Article 35 of the Constitution even before the enactment of the Act. The Courts recognized the right to information exists in the Constitution and recognized it as a national value. They set the ground for the right to access information and its importance in governance, inclusion and jurisprudence lays this down well. Initially Courts were cautious in expanding the scope of who can access to information and limited the right to Kenyan citizens and only to natural persons. But with time there has been improvement with the Court interpreting citizens to include legal person. The Courts are also recognizing the importance of proactive disclosure and have also issued judgements whereby they stated that the facts presented did not meet the threshold of proving non-disclosure of information on grounds of National Security. She indicated that there is need to sensitize magistrates on the right to access information as more focus has been placed on sensitizing judges. She also informed the participants there are minimal appeals on judgments made on access to information and the precedence set remain and there is minimal push back. She emphasized on the need for citizens to litigate more on access to information.

6. **Mr. Edward Ouko** stated that the Constitution of Kenya is delivery based, in terms of the basics citizens expects such as education, bill of rights. The Office of the Auditor General (OAG) as established in the Constitution is designed to go beyond auditing figures recorded in books but also audit impact of money spent, that is, whether money has been spent efficiently and economically.

The Office of the Auditor General seeks to mainstream social accountability audits by including civil society organizations and citizens in the audit process. Therefore, public audits will not only audit budget records and management of the same but also where the shilling hits the ground. For this to happen there is need for coordination, information

sharing, and the Office of the Auditor General seeks to work closely with civil society organization and citizens to achieve this.

The Office of the Auditor General is currently working on a framework for social accountability audits that adequately responds to issues social accountability should address including corruption, impunity and misuse of public funds. He noted some challenges to this process including secrecy and lack of openness in budget making process, resistance to public participation in budget making process. He emphasized on the importance of public participation in budget processes to enable the public track how the government spends public funds. The OAG is also facing the challenge of limited financial and human resources to undertake audits effectively especially at the county level who continue to get more public resources. He stated that the office of the auditor general is investing and leveraging on technology to produce more better audits and share with CSOs on the ground who will then give them feedback. The OAG will then prepare report and share it with CSOs to act. The hope is that this framework of working with civil society will make Kenya more transparent.

7. **Mr. Vincent** who works for Africa Check, a fact checking and research organization explained that access to information is important in the work they do. Basically, they scrutinize claims made by public figures and evaluate them for accuracy then publish reports and assign a verdict on whether the information is true, false or unproven. Access to information comes in because they rely on government information. They began engaging with the Access to information Act in 2018 by making requests to the various government departments in the Ministry of Interior, Civil Registry, Kenya Roads Board, NHIF and the Children's Department. They did not receive any feedback until after 21 days when they started making follow up, and that is when government took them seriously. However, they were still taken in circles and only managed to get information from the Children Department.

Based on their experience in requesting information from public institution, their key findings are that public officials do not want to give citizens information because they felt the information requested is sensitive. Some are not aware of the right of citizen to access information held by public entities. Another key finding, they discovered is that some government information contradicts each other. They also found that government data has huge gaps therefore the public are consuming incomplete information. He further stated that in instances where public entities refused to give them information they were forced to seek information in other documents such as the auditor general reports and strategic plan documents.

As a journalist, he emphasized that journalists are uniquely placed to continuously file requests for information. Africa Check has uploaded some of its requests for information letter for the public to follow their lead. He hopes that journalist should actively make requests for information.

8. **Mr. Boniface Mwangi** shared his experience of an application he filed in court requesting for information from IEBC on mechanisms put in place to ensure police officers vote. However, he noted with concern that Court processes took long, one and a half years, and

gave a ruling that was not conclusive. He also shared his experience of when he wrote to KRA requesting information to enable him to prove his case and defend himself in Court. However, KRA has never responded to his request. The case is still in Court and he cannot defend himself without the information requested.

From his experience he stated that it is hard to rely on Court processes because they take long, and one may get a ruling that does not make sense. To mitigate this, he advice on the need to rely on people working in public institutions with the institutional memory and can leak information to the public. He further advised for the public to put pressure on public officials who steal or misuse public funds. If this does not work, then they should go to Court. Although Court process take long, the Court may give a ruling in favor of the people and set precedence which may be implemented in the long run. He noted that accountability can be ensured if there is public participation, for example in Makeni County where the public must approve projects before they are implemented. He urged the youth to start by going back to their neighborhoods and reclaim grabbed public spaces by exerting public pressure on public officials. He concluded by stating that resistance is the best way to ensure access to information.

Plenary Discussions

Concern	Response
<ol style="list-style-type: none"> 1. What is the Huduma Card? 2. The Huduma Card requires the public to give a lot of personal information to the government. Is there a data protection law to protect the information given? 3. Why is the government wasting public funds on collecting information that they already have in their database such as NHIF and NSSF? 4. Many young people are suffering due to the information demanded for then when applying for government jobs, that is, clearance certificates (HELB, EACC, CID). How can this issue be resolved? This information is in government domain and they should not require youth to pay to obtain this information from government 	<p>Huduma cards comes in the context of centralization of information for both citizens and non-citizens. The idea is to make the life of citizens and government easier and also secure citizens. The card was introduced through a Statutory Miscellaneous Amendment Bill that was assented in December 2018. The amendment passed through unnoticed by most members of Parliament because the Statutory Miscellaneous Amendment Bill introduced numerous amendments and most members of Parliament choose to focus on their areas of interest. The motivation behind the Huduma card is right but it is being prematurely implemented because of the following</p> <ul style="list-style-type: none"> - There was insufficient public participation - Introduction of such a serious amendment through a Statutory Miscellaneous Amendment Bill is not right - The data protection bill is yet to be enacted because of the ongoing tussle between the Ministry for ICT and CAJ. It is dangerous to have NIMS without a data protection law in place - There is a sense of overarching due to inadequate information - The idea behind Huduma card makes the fundamental assumption that Kenyans are at the same level in terms of possession of birth certificate sand ID cards while this is not the case. Therefore, centralization of information may end up being for the privileged few. - Kenya always faces challenges when implementing information technology, for instance, biometric

	NB: Personal information is protected, and one cannot request for personal information about an individual
How can one get access to the County Integrated Development Plans because they are not available on county and council of governor website?	Visit the council of governors' website best practices portal or send email to info@cog.go.ke or contact the custodian f CIDP Samuel Mutisya 0726389806
How does one ascertain that information shared by county governments is authentic?	<p>It is a criminal offence for a public officer to alter/ deface information they give to the public and the access to information act provides a penalty if one is convicted of such an offence. So far CAJ has not received any complaints from members of the public. If received CAJ will forward complaint to the director of public prosecutions.</p> <p>However, CAJ is cognizant of the fact that there may be lack of synchronization of information from government institutions.</p> <p>Nevertheless, CAJ plans to leverage on ICT to create a database for storing all information given to the public by the government and verify the same for authenticity.</p>
There is lack of feedback mechanisms by county governments after conducting public participation in the budget making process and this creates a disconnect and citizen apathy	Citizen should demand the government to provide budget implementation report before they request them for their views in the budget making process.
How do we get information to citizens on matters of public interest such as the Big Four Agenda?	Government should use local leaders to educate the public at the grass roots level about the Big Four Agenda
How can we tackle the issue of youth apathy in participation in budget process?	The only way to deal with citizen apathy is to connect their apathy to their level of poverty. Explain to them that when you do not participate in the budget making process you will not get services. There is need to connect people's daily lives with the budget.
How can Kenyans change their mindset for pro politic to pro development?	Members of County Assemblies should mobilize citizens to participate in budget processes
<ol style="list-style-type: none"> 1. Is it possible for the OAG to be given prosecution powers to curb wastage of public funds? 2. What actions should the OAG take to ensure timely public audit reports? 3. When will the social accountability audit framework be ready? 4. What can be done to ensure implementation of recommendations made after discussion of public audit report to enhance implementation of recommendations? 	<p>Key institution responsible for ensuring good governance and accountability are the legislature, executive and Parliament.</p> <p>The OAG is established by the Constitution under Chapter 15 is an oversight institution reports to the public through Parliament, giving assurance to the public. The OAG does its works and submit reports to the PAC committee which then presents a report for adoption by the whole house. However, there is a delink between the work done by the OAG and PAC when it presents report for adoption by the whole house. This is where to the work done by the OAG is thrown out.</p> <p>OAG will continue to do its work and document the same to awake the conscious of Kenyan and inform them.</p>

	<p>Although PAC is frustrated when they present their report on the OAG report, the media should step in and continuously highlight issues raised in OAG reports.</p> <p>The OAG is discussing the possibility of having powers to surcharge through taking administrative actions and wastage to be charged on officers found guilty of wastage of public funds.</p> <p>Social accountability framework is currently being developed. Guidelines will be developed and shared with CSOs for input on how OAG can work with CSOs.</p> <p>The Constitution requires the OAG to provide audit reports by 31st December. However, this has not been the case because of the various challenges faced by the OAG including limited financial and human resource, culture of secrecy and resistance to audit by public institutions.</p> <p>OAG is leveraging on IT to produce audit reports in a timely manner and efficient manner</p> <p>Citizens demand OAG to be allowed to read out its reports to the public of how the government spent public funds to the public. This event should be highly publicized.</p>
--	---

Comments

1. Hon. Otiende stated that the auditor general reports outside Parliament serve a fundamental purpose. The reports can be used whether Parliament adopts or refuses to adopt the reports
 - There is nothing that stops the media and civil society from using the findings of the reports to name and shame public institutions that misuse public resources.
 - The DCI and DPP can use the report findings to investigate and prosecute public officials for misuse of public funds
 - The idea of surcharging is in the Constitution Article 226. Parliament has authority to impose this, but it is not because of the outdated Standing Orders. Article 95 and 96 enables Parliament to resolve matters that are of concern to the public, Thus Parliament should give resolutions.
 - Civil society and citizens should work with Parliament otherwise they will not go far. They should find a language of embracing and persuading Parliamentarians
2. Ms. Sandra requested for support from Mr. Otiende to push the Committee of Delegated Legislation to enact the regulations to the Access to Information Act. She also requested for support to CAJ.
3. Mr. Vincent urged the media to keep issues on access to information in the limelight. He raised concern of how most websites of public institutions are rarely updated until when elections are nearing. He emphasized that information should be produced by public institutions in the course of business and update their website. Further, the government should think through on the appropriate time to hold public consultations because most people work during morning hours and are genuinely not available to participate.

Way Forward

1. There is need to amplify access to information - Look for ways to amplify coverage in media
2. Look at what has come out of panel engagement and deliberate
3. TISA to reach out to media
4. There is need to engage Parliament - how to strengthen engagement with Parliament
5. Citizens to file access to information requests