Commission on the Implementation Of the Constitution *ICJ-Kenya*

STAKEHOLDERS FORUM ON ISSUES ARISING FROM THE FREEDOM OF INFORMATION BILL, 2008 AND DATA PROTECTION BILL, 2009

DATE: FRIDAY 4TH NOVEMBER, 2011

VENUE: SAROVA PANAFRIC HOTEL, NAIROBI

ORGANISED BY: THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

SUPPORTED BY: THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA)

PREFACE

The Freedom of Information Bill published by the Ministry of Information and Communications on 5th August 2008 was the culmination of long drawn out efforts and pressure from civil society (spearheaded especially by the ICJ Kenya section) to have Kenya enact legislation to give effect to the "right to know".

The push for enactment of an access to information law was driven by the realization that corruption and malfeasance had continued to thrive in Kenya on account of the secrecy and opaqueness of the operations of public institutions; among other key yawning deficits of good governance.

The Bill therefore seeks to establish the Kenya Freedom of Information Commission and to provide for access to information in the possession of public authorities. Further, the Bill is intended to be a means of providing for proactive publication and dissemination of information.

While the Bill was the result of extensive consultation and input by various stakeholders, the fact that there are two different versions of the bill-one produced by civil society and the other by the Ministry; attests to the wide divergence that still exists between Government and civil society perceptions on the final form any emvisaged access to information law should take.

It is against this backdrop that the Commission on the Implementation of the Constitution (CIC), in exercising its mandate recalled the Bills that were tabled before Parliament to ensure that that they are in line with the spirit and the letter of the Constitution, and also to ensure that they receive critical stakeholder input.

It is hoped that the forum, through wider stakeholder input will lead to the harmonization of the two versions of the FOI Bill, the resultant of which will be an enriched comprehensive law that will benefit all Kenyans. The Data protection Bill, 2009 will also receive the requisite critique by the stakeholders which will lead to its refinement.

LIST OF ABBREVIATIONS

AG : Attorney General

CIC : Commission for the Implementation of the Constitution

CIOC : Constitutional Implementation Oversight Committee

FOI : Freedom of Information

ICT : Information and Communication Technology

ICJ-K : The Kenyan Section of the International Commission of Jurists

ICCPR : International Covenant on Civil and Political Rights

KLRC : Kenya Law Reform Commission

LSK : Law Society of Kenya

MOIC : Ministry of Information and Communication

UDHR : Universal Declaration of Human Rights

TABLE OF CONTENTS

1.0. Welcome Remarks.....4

1,1 Objectives of the Forum.....4

1.2. Commentary on he FOI Bill, 2008 and the Data Protection Bill, 2009.....4

1.3. Remarks by Ms. Catherine Mumma.....15

1.4. Commentary 2: Mr. Wachira Maina.....16

1.5. Plenary.....21

1.6. Way Forward 29

1.7. Closing Remarks.....30

2.0. Appendices.....31

2.1 Appendix 1: Program.....31

2,2 Appendix 2: List of Participants.....32

1.0. **WELCOME REMARKS-***MS. Christine Njeru-Researcher –Commission For the Implementation of the Constitution*

The meeting commenced at 8:30 am with a word of prayer from Ms. Njeru. She thanked the participants for taking time out of their busy schedules to be in attendance.

1.1. OBJECTIVES OF THE FORUM

Ms. Njeru began by stating that at CIC, the Bills are reviewed internally, sometimes through consultants. The Commission engages in this task to ensure that the proposed legislation are in accordance with the letter and spirit of the Constitution, while borrowing best practices from other jurisdictions.

Once this is done, CIC subjects the Bills to stakeholder participation, followed by a 'round table' comprised of Commission for the Implementation of the Constitution of Kenya[1], the Attorney General and the Kenya Law Reform Commission (KLRC) to finalize on the Bill

The objectives of the forums are therefore:

- To deliberate upon the issues arising from the Freedom of Information Bill,2008 and the Data Protection Bill, 2009
- To agree on the way forward regarding the processing of the Bills to ensure that their review is expedited

1.2. COMMENTARY ON THE FREEDOM OF INFORMATION BILL, 2008 AND THE DATA PROTECTION BILL, 2009-*Mr Anthony Kuria-Consultant-CIC*

The Freedom of Information Bill, 2008 and the Data Protection Bill, 2009 are geared to fulfill the fundamental right of citizens to access information held by Government and are an integral aspect of human rights protection-notwithstanding that they were drafted prior to the promulgation of the new Constitution in 2010. It is therefore necessary to ensure that any law enacted towards implementing the Constitution gives the relevant constitutional provision it seeks to implement

[1] 2010.

the widest possible purposive scope and interpretation. The fact that Kenya still lacks an access to information law means that corruption and malfeasance have continued to thrive in this environment of opaqueness and secrecy. Citizens therefore need and must have the right to access information held by Government that does not constitute a threat to national security or infringe on the rights of others. Equally, some categories of information held by private bodies need to be made accessible under the regime provided by the two bills.

In this respect, lack of an access to information law has also meant that in spite of the passing of comprehensive anti-corruption legislation, there has been little success in stopping and holding to account the improper enrichment of private entities that conduct business with the Government or with public bodies. Access to information in its widest sense must include provisions to ensure that any private businesses held by public officials are well known.

Commendably, the Ministry of Information and Communications developed the two Bills after wide consultation with stakeholders over a number of years. As such, the ***Kenya Freedom of Information Network that was born out of this process of public participation in developing the two Bills will be crucial in further enriching the Bills in keeping with the mandate of the CIC.***

The consultant proceeded to examine Kenyan laws and administrative procedures that impact on freedom of information and data protection, and made proposals and recommendations from relevant jurisdictions and jurisprudence that will be key in auditing of the two Bills as they relate to the Constitution of Kenya 2010, as well as international best practice that has crystallized over the years in relation to access to information laws.

The Freedom of Information Bill, 2008

The draft was prepared under the old Constitution as guided by Section 79. However with the passage of the Constitution of Kenya 2010, a lot has changed.

ICJ has been in this process for over a decade and has developed various versions though they haven't seen the light of day.

The relevant municipal laws which should inform the Bill on FOI are:

- The Constitution of Kenya 2010: Article 35 provides citizens with the right of access to information.
- The Kenya Information and Communications Act, 1998: This is the framework legislation for the information, communications, media and broadcasting sub-sectors
- The Media Act, 2007
- The Penal Code Chapter 63 laws of Kenya.
- The Evidence Act Chapter 80 Laws of Kenya
- The Official Secrets Act Chapter 187 Laws of Kenya

All these should be considered to enrich the FOI Bill, 2008.

Regional and International Human Rights Instruments

- *The African Charter on Human and Peoples' Rights-Article 9*
- *The African Union Convention on Preventing and Combating* Corruption Article 9 requires States Parties to adopt legislative and other means to give effect to the right of access to any information that is required to assist in the fight against corruption.
- The *African Charter on Elections and Democracy*: It lists as one of its objectives the establishment of the necessary conditions to foster citizen participation, transparency and access to information.
- The *African Charter on Values and Principles of Public Service and Administration*: Among its two key principles are institutionalizing a culture of accountability and integrity and transparency in public service and administration and the effective, efficient and responsible use of resources hence the need for the right of access to information.
- *The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*: The right of access to information as an international human right is expressed in Articles 19 of both these instruments.

The relevant provisions of FOI under the above mentioned instruments should provide guidelines to the drafting and scope of the proposed legislation

Precedents Set in Kenyan Courts

Kenyan case law is very lean on 'access to information', but three of the following cases encompass judicial decisions on access to information:

Republic v David Munyakei: This case related to the infamous Goldenberg scandal. In 1994, the accused person in the course of his work found out that a company called Goldenberg International was receiving unusually large sums of money for the alleged export of gold and diamonds. His investigations revealed that this scam had led to the loss of billions of public money. He put this information into the hands of Prof. Anyang Nyong,o and Paul Muite, then Opposition legislators. By this act of unbridled selfless patriotism and integrity, and knowing that he was risking his life, Munyakei was arrested and charged for contravening the Official Secrets Act. He only gained his freedom after the A-G entered a *nolle* to terminate the charges. This case was ludicrous in that it led to the inescapable conclusion that perhaps it was at the time official Government Policy to engage in corruption. How could it be proper in law to purport to charge Munyakei for revealing information touching on accounts of the criminal activity of senior individuals within government? Goldenberg had nothing to do with State security, unless of course one of the then Government's official policies was to engage in theft of public resources.

Similarly, when ***John Githongo***, a former Presidential Advisor on Ethics and Anti-Corruption communicated his dossier to foreign governments and journalists of what came to be famously known as the Anglo Leasing Scandal, some elements in the current administration argued that this was an act prejudicial to the Republic of Kenya. Prosecution through the Official Secrets Act was mooted under Section 3 (3) (d) which criminalizes disclosure of such information in a manner prejudicial to the safety or interests of the Republic; but never carried through. It is important to note that Githongo's expose did not imperil the interests of the Republic in any way; the only interests imperiled were those of the individuals named in the scams. These individuals can at no

time be equated with the State. Exposure of corrupt conduct is something beneficial to the State and Githongo's revelations were obviously in the public interest and did save the Government money. How then could exposure of criminal activity risk punishment with prosecution?

The Charterhouse Bank issue: In this well publicized saga, one Peter George Odhiambo, a former Chief Internal Auditor at Charterhouse Bank came across information touching on various economic crimes that included money laundering, tax evasion, violation of the Banking Act and the Central Bank of Kenya Act, being perpetrated by the owners and management of the bank. He relayed this information to the Kenya Revenue Authority and to then Minister for Finance Hon. David Mwiraria. An Inter Agency Task Force chaired by the Kenya Anti-Corruption Commission carried out a detailed investigation. For his effort, the police went to arrest him ostensibly for *'theft of documents'*. Even if he had stolen the said documents, how could whistle blowing in favor of Kenyan revenue, anti-corruption and against money laundering become criminal?

The three cases point to the fact that the lack of a whistle blowing Act coupled with the Official Secrets Act has made Whistle blowing a very dangerous affair in Kenya, making FOI a very important law. The aspect of Whistle Blowing should therefore be enhanced in the proposed legislation.

Other Jurisdictions

South Africa

The South African Promotion of Access to Information Act (PAIA) provides for the right of access to information, including the records of public and private bodies. It represents a landmark in South African history, as it seeks to address the culture of secrecy surrounding information held by state and private institutions. The Act establishes voluntary and mandatory mechanisms to enable the public to gain access to records of public and private bodies as quickly, inexpensively and effortlessly as reasonably possible. In addition, the Act acknowledges the need to educate all South Africans on their rights, in order to enable them to participate in decision-making that affects their lives.

However, the Act does not establish a specialized Information Commission tasked with an oversight role, and this is squarely done by the Courts. Civil Society has pushed the establishment of a Commission on the argument that the courts are really not enforcing the law on access to information.

On the whole, the South African experience of using the courts to develop jurisprudence under the Public Access to Information Act shows the hallmarks of specialist and niche litigation strategy, rather than being a tool of normal professional practice. The explanation for this paucity of enforcement action may be the high costs of High Court litigation according to the Open Democracy Advice Center (ODAC). Nevertheless, there have been a number of significant reported cases that should be of interest to Kenya so as to improve our access to information law.

India

Unlike South Africa, an evaluation of India's Right to Information Act shows that the Indian uptake on their legislation from civil society has been massive with around two million requests for information being filed in the first two and a half years after the law was passed. Indian citizens and civil society organizations have been able to use the Right to Information Act (RTIA) to fight mismanagement and corruption and improve governmental responsiveness. However, there are still daunting barriers to use of the law because of poor planning and bureaucratic indifference or hostility. Provisions in the law to promote "proactive disclosure" of key information are often disregarded. Some of the commissions established to enforce the law are struggling with a growing caseload of complaints about non-compliance by public authorities.

The two extremes in foregoing comparatives on enforcement mechanisms in South Africa and India should guide Kenya while enriching and refining the FOI Bill.

South Korea

Even in the absence of explicit constitutional or statutory authorization, courts in South Korea have upheld a fundamental right of access to information as a corollary of freedom of expression and participation rights. The Constitutional Court of South Korea reached this conclusion in a

1989 case involving a municipal office's unjustified refusal to grant the applicant access to certain real estate records he had requested. The Korean Court argued that unhindered access to state-held information was essential to the "free formation of ideas," which is itself a pre-condition for the realization of genuine freedom of expression and communication. This and subsequent freedom of information decisions of the Korean Court influenced the legislature to adopt in 1996 a comprehensive access to information law.

Costa Rica

This approach has also been embraced by national courts in the Americas. Thus, the Constitutional Chamber of the Supreme Court of Costa Rica held in a 2002 case that the Central Bank's refusal to disclose a report of the International Monetary Fund, requested by a newspaper, violated the constitutional right to information "to the detriment of all Costa Rican citizens." The Court reasoned that the State must guarantee that information of a public character and importance is made known to the citizens and in order for this to be achieved, the State must encourage a climate of freedom of information. In this way, the State is the first to have an obligation to facilitate not only access to this information, but also its adequate disclosure and dissemination, and towards this aim, the State has the obligation to offer the necessary facilities and eliminate existing obstacles to its attainment. In reaching its decision, the Costa Rican Court relied emphatically on the symbiotic relationship between the right to information and the rights of democratic participation, arguing that "the right to information implicates the citizens' participation in collective decision-making, which, to the extent that freedom of information is protected, guarantees the formation and existence of a free public opinion, which is the very pillar of a free and democratic society.

Europe

The Council of Europe, the main human rights organization in Europe, has adopted a new recommendation providing for a right to access official documents in the following terms- "Member states should guarantee the right of everyone to have access, on request, to official documents held by the public authorities". The European Union's bill of rights grants a right of

access to documents held by Union institutions to "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State." Considering that the Charter is based on the constitutional traditions of the member states, the inclusion of the right of access to information therein suggests that this right has not only become ubiquitous, but is widely perceived as a fundamental right on the European continent. The European Court of Human Rights has recognized a right to state-held information under circumstances in which the denial of information affects the enjoyment of other Convention rights, such as the right to respect for private and family life, under Article 8 of the Convention.

In summary, looking at the Jurisprudence of other jurisdictions, the underlying principle was that whether or not there is a law on access to information, there is an obligation of public bodies to provide such information to the wider public, as they are discharging their duties essentially on behalf of the public. Democracy is therefore at the core of access to information. These precedence should inform the provisions of the proposed legislation.

Some of the proposed recommendations:

- An all inclusive FOI Bill with provisions for disclosure by private entities in certain circumstances or under a given criteria would also be an important step to avoid the lethal mix of strife, looting of state resources and corruption that have left some of Africa's resource rich countries like Angola, Nigeria and the Democratic Republic of Congo in shambles.
- In enacting the FOI Bill, principles of ***transparency and accountability*** must be strictly adhered to for both the benefit of the entire citizenry as well as the local communities.
- Among the key objectives of enactment of the FOI bill should be the Government's obligation to progressively realize economic and social rights for its citizens pursuant to Kenya's obligations under the International Covenant on Economic, Social and Cultural Rights which Kenya acceded to in 1976
- The regulation of consumer products and their hazardous effects is another area in which the Government should be required to proactively collect, analyze and publicly disseminate information such as on the dangers of illicit brews. Kenyan law can borrow from the

Aarhus Convention for example in relation to the requirements regulating the sale and advertisement of alcohol and tobacco products or those relating to Genetically modified organisms (GMOs) where the Government will be bound to ensure that sufficient product information is made available to the public in a manner which enables consumers to make informed choices

- The draft Model Law prepared by the AU Special Rapporteur on Freedom of Expression and Access to Information in Africa should be used in guiding the provisions of the proposed FOI legislation

The Data Protection Bill, 2009

The Bill is a brief proposed legislation intent on giving effect to Article 31 of the Constitution of Kenya.

The Bill as established is meant to be enforced by the Freedom of Information Commission. The Key principle behind it is that in the automatic processing of data, the data should not be disclosed to any third parties without the permission or consent of the person to whom the information is obtained.

The Data Protection Bill should be seen as the other side of the coin with regard to the right to access to information as provided in the Freedom of Information Bill. It has been drafted as a bill to regulate the collection, processing, keeping, use and disclosure of certain information relating to individuals that is processed automatically.

The Bill attempts to converge all protection of privacy under one law, and to place all actors in the sector under a single regulator, the Kenya Freedom of Information Commission. Thus at the outset, a key issue to be addressed is whether it is good practice or efficient and/or practical to enact two different legislations addressing what are fundamentally two different sides of the same coin (i.e. with regard to the Freedom of Information Bill)

During the initial meeting with the CIC, one important issue that arose was the transgender issues where the official records shows that a person is a particular gender, but they later change their

gender, what happens in such instances? This peculiar issue might need to be addressed by the technical working group.

What should be incorporated into the Bill

Personal Information Protection Principles

The Bill should from the outset outline the guiding principles of the issues it seeks to regulate. The following principles should therefore be prescribed as duties and obligations for responsible parties and also in providing certain rights for persons whose information is being collected:

- information can only be collected or stored if it is necessary for or directly related to a lawful, explicitly defined purpose and does not intrude upon the privacy of the data subject to an unreasonable extent;
- information must be collected directly from and with the consent of the data subject;
- data holder must be informed of the purpose of any such collection and of the intended recipients of the information, at the time of collection;
- information must not be kept for any longer period than is necessary for achieving the purpose for which it was collected;
- information must not be distributed in a way incompatible with the purpose for which is was collected;
- reasonable steps must be taken to ensure that the information processed is accurate, up to date and complete;
- appropriate technical and organizational measures have to be taken to safeguard the data subject against the risk of loss, damage, destruction of or unauthorized access to personal information; and
- data subjects are allowed a right of access to their personal information and a right to demand correction if such information should turn out to be inaccurate.

Additionally, it would be neater and tidier for the Bill to insert provisions on the fundamental Right to Data Protection in the following terms

- Every person shall have the right to secrecy for the personal data concerning him especially with regard to his or her private and family life, in so far as he or she has an interest deserving such protection. Such an interest is precluded when data cannot be subject to the right to secrecy due to their general availability or because they cannot be traced back to the data subject.
- In so far as personal data is not used in the vital interest of the data subject or with his consent, restrictions to the right to secrecy are only permitted to safeguard overriding legitimate interests of another. But even in the case of permitted restrictions, the intervention with the fundamental right shall be carried out using only the least intrusive of all effective methods.
- Everybody shall have the right to obtain information as to who processes what data concerning him or her, where the data originated, for which purpose they are used, as well as to whom the data are transmitted as well as the right to rectification of incorrect data and the right to erasure of illegally processed data.
- The fundamental right to data protection, except the right to information, shall be asserted before the civil courts against organisations that are established according to private law, as long as they do not act in execution of laws. In all other cases the Freedom of Information Commission shall be competent to render the decision, unless an act of Parliament or a judicial decision is concerned.

The Bill should make provisions for what sort of information is not subject to protection. This should include:

- information that is in the public domain
- information relating to the physical or mental wellbeing of an individual who is under the care of the requester and who is under the age of 18 years; or incapable of understanding the nature of the request

- information is about a deceased individual and the requester is the individual's next of kin or legal personal representative making the request with the written consent of the individual's next of kin or legal personal representative; or the executor of the deceased's estate

- information relates to the position or functions of an individual who is or was an official of the information holder or any other public body or relevant private body;

Legally privileged documents should be protected unless the person entitled to the privilege has waived the privilege. Other protected information include

- information relating to an academic or professional examination or recruitment or selection process prior to the completion of that examination or recruitment or selection process if the release of the information would be likely to jeopardise the integrity of that examination or recruitment or selection

- information which would disclose a matter relating to the deliberative processes of the body concerned (including opinions, advice, recommendations and the results of consultations considered by the body for the purpose of those processes); and the granting of the **request** would be contrary to the public interest.

In conclusion, the consultant stated that it is welcome that the Ministry of Information and Communication has engaged relevant Government ministries and agencies as well as other stakeholders with the intention of enactment of an all inclusive FOI Bill. The FOI fraternity in Kenya thus has a unique opportunity to push this side of transparency and access to information which is critical to "demand-driven" efforts to combat corruption and which must be practiced with or without a law. Keeping information secret or deliberately vague and obscure to citizens is one sure way to fan the tide of corruption.

1.3. **REMARKS BY Ms. CATHERINE MUMMA-***Commissioner-Commission on the Implementation of the Constitution*

Ms. Mumma thanked ICJ Kenya for its support towards the forum. The forum, she stated, is intent on giving critical stakeholder input to the Freedom of Information Bill, 2008 and Data Protection Bill, 2009 that will culminate into the passage of very comprehensive legislation.

The Commission for the Implementation of the Constitution felt that even though the Bill is not in the fifth schedule of the Constitution as a priority legislation to be enacted, it is one of the important laws which needs to be passed soon to ensure that citizens have success to public information in line with the Constitutional principles of transparency, inclusivity and public participation.

The Ministry of the Information and Communication drafted the FOI Bill which was presented to Parliament, but the CIC, in exercising its mandate requested the Bill to be recalled to ensure that it is in line with the letter and spirit Constitution, and that it receives the requisite stakeholder input.

The Ministry was a bit disturbed that CIC was reopening the entire issue, but this is not about the CIC but is about the set procedures envisaged in the Constitution.

CIC is open to receiving critique with regard to the Bills so as to enrich the legislation. This will be followed by a small technical working group which will clean up, harmonize and structure the legislation and come up with an improved draft which will be presented to the round table, before it is forwarded to Cabinet and then Parliament.

Ms. Mumma stated that the stakeholders and technical working group needs to be vigilant so that the Bills are not mutilated when they are presented to Cabinet and Parliament, as has happened in the past. Important issues should not fall through the cracks as a result of erratic amendments. "*This law is for Kenyans and therefore we should work together.*"

1.4. **COMMENTARY 2:** *Mr.Wachira Maina- Advocate of the High Court of Kenya and Consultant for ICJ-Kenya*

Mr. Wachira commenced by stating that he has been involved in FOI advocacy with ICJ Kenya since 2001 and hopes that this time, the efforts will be fruitful. He stated that the two versions of

the FOI Bill by the Ministry of Information and Communication and ICJ-Kenya all address key principles of FOI, but the articulation of these principles in legislative and operational terms need to be strengthened in different ways. He stated that he would give a commentary on seven parts which can assist improve both Bills. The parts are:

(a) Incorporation of International Standards

According to Article 2(6) of the Constitution of Kenya 2010, any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. Based on this provision, there is no need for Kenya to have a future domestication legislation on FOI. The present drafting process can amalgamate all FOI provisions in ratified treaties and conventions. These include provisions in:

- The Universal Declaration of Human Rights (UDHR)-Article 19
- 1992 Rio Declaration
- 1998 - UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (or Aarhus Convention)
- The International Covenant on Civil and Political Rights, ICCPR
- UN Convention on Anti-Corruption-Articles 10 and 13
- African Charter on Human and Peoples' Rights—Article 9
- 2002- Declaration of Principles on Freedom of Expression in Africa
- African Union Convention on Preventing and Combating Corruption-Article 9

Domestication of all these provisions into the FOI Bill will not only save the country from a future obligation of domestication, but will also strengthen the legislation.

(b) Unresolved Constitutional issues

Under article 35(1) (b) of the Constitution, every citizen has the right to gain access to any information held by another- including a state organ- that is required in order to enforce any right. This provision essentially makes the right to access information a citizen right, which is against international standards. It means that foreigners cannot have access to information. Why this right is restricted as a 'citizenship right' is not clear. Does it have a theoretical or logical Justification?

Many of the protections of the Bill of Rights are all described as 'rights of persons' and not citizens.

Secondly, the definition covered in relation to 'information held by the state' is very narrow. A wider definition is required. This should be termed as 'public Information' because it is paid for by taxes contributed by the public. Thus this information should be readily available to the public.

These issues cannot be addressed by the FOI Bill, but by the interpretation of the Constitution by the Judiciary and possibly future amendment of the Constitution.

Going forward, there should be a short policy memo that accompanies the FOI Bill to cabinet/ Parliament as regards the unresolved Constitutional issues. The definition of 'State Information' can be cured by judicial interpretation, but the citizenship issue might require Constitutional amendment. However, the court can anchor the argument that the Constitution did not intend to discriminate on the basis of citizenship/nationality

(c) FOI obligations imposed by the Constitution of Kenya 2010

When drafting the FOI Bill, It is important to look at the obligations of transparency, accountability and participation as articulated by Constitution under the following provisions:

- Article 2(6) on ratified international treaties and conventions
- Article 10 on the National Values and principles of governance
- Article 11 on promotion and preservation of culture
- Interpretive provisions in Article 20
- Article 21: The Constitution requires the state to "enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms."[2]
- Freedom of expression: Does the constitution protect whistle-blowers? The freedom of

[2] Article 21(4)

expression includes "the freedom to seek, receive or impart information or ideas."[3] Given the principles of interpretation required by the constitution, it is clear that it is plausible to read this provision as allowing a person to disseminate any information they have in their possession since no exception is made for "*information that has come into their possession in the course of employment*." Indeed, the only relevant limitation to the right to disseminate information is the obligation to "respect the rights and reputation of others."[4] Government agencies have no reputational rights to lose and are therefore not covered by this exception.

- Freedom of the media: The Constitution bars the state from exercising "control over (a) or interfere with any person engaged in broadcasting, the production or circulation of any publication" or the dissemination of information by any medium"[5] or (b) penalizing "any person for any opinion or view or the content of any broadcast, publication or dissemination"[6]
- Right to information under Article 35

(d) Cascading the information access machinery to the counties

- Designation of information officers at the county level and specification of archiving mechanisms at the county level to ensure places of access for the public.

- Specification of oversight mechanisms (the current machinery reports back to Parliament but surely on matters within the responsibility of county governments should be reported back to county assemblies. This needs a lot more attention)

(e) Electronic Freedom of Information

- Obligations to maintain digital copies (has special relevance to the new institutions under the constitution and to devolution;

[3] Article 33 (1) (a)
[4] See article 33(3). Other exceptions to the right to express oneself include (a) propaganda for war;

(b) incitement to violence;(c) hate speech; or (d) advocacy of hatred that (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4). But these are not relevant to the whistle-blower protection issue raised here.

[5] Article 34 (1) (a)
[6] Article 34 (1)(b)

- Mandatory maintenance of websites lowers cost of accessing information (the new statistical portal supported by the World Bank has been incredibly useful) the more the information released, the fewer the requests made (can create a small efficient information commission.

(f) Exemptions Provisions

There is need to strengthen exemption provisions in the Bill. They relate to defamation and National Security.

An articulation of tests for exemptions is required. The Ministry of Information and Communication version of the FOI Bill focuses only on national security, which is to be reckoned in accordance with international standards.

Some information such as public order, National Security, personal privacy, international deliberations, foreign relations and commercial secrets can be withheld for limited periods. However, a test for disclosure should be developed. This could be:

- Harm test: Information withheld only if some harm can be shown by public body
- Public Interest Test: Release information even if causes harm if release is in the public interest

International norms such as the Johannesburg principles can be used to guide this process.

(g) Stronger Whistle-blower protection

Freedom of information laws will be ineffective unless they make "it safe and acceptable for people to raise concerns about illegality and corruption plaguing organizations with which they are involved."[7]This calls for cccess to information laws that remove all the bureaucratic secrecy requirements and related clauses in employment contracts that punish employees who want to reveal illegalities in organisations. Allowing such internal constrains to stand would enfeeble freedom of information by allowing employers to defeat the law by simply inserting secrecy clauses in employment contracts.

[7] Open Sesame, at p. 56.

The media has escalated the misconception that the Witness Protection Act is a whistle blower Act. This is wrong. A proper distinction between a whistle blower and a witness should be made.

Recommendation: enactment of whistle blower protection rules as a subsidiary to the FOI Bill. A single clause in the FOI Bill is not enough to address the issue of whistle blowing.

1.5. PLENARY

At this point, the floor was opened for plenary discussions. Some of the comments, suggestions and observations made by the participants included:

A representative from the Kenya Law Reform Commission thanked CIC for bringing the wider array of stakeholders to discuss the Freedom of Information Bill, 2008 and the Data Protection Bill, 2009.He stated that the Kenya Law Reform Commission had convened a similar forum in 2006 to discuss the same issues, an indication that the process has been on-going for a number of years. ***He proceeded to state that both the ICJ-K and Ministry of Information and Communication versions FOI Bills need to be revised and harmonized. They all address fundamental issues***. On the whistle blower protection, he stated that KLRC has a working draft of a Whistle Blower Bill which was developed in 2008, and can be circulated to the group for input. He acknowledged that the issues mentioned by Mr. Wachira (the consultant) on whistle blowing are what are in the Bill. Lastly, he stated that Kenya Law Reform Commission will be willing to participate fully in the working group of the Freedom of Information Bill, 2008 and the Data Protection Bill 2009.

A representative from the World Bank thanked the two consultants for their informative presentations. She stated that the World Bank has done a lot of work and research around freedom of information and access to information in many countries. It therefore has a huge data bank with a wealth of information on the same. She stated that what is unique about Kenya is that the new Constitutional dispensation makes provision for the enactment of a freedom of information framework. She proposed a working framework that will harmonize the two versions of the FOI Bill, the end result of which will be a strong and comprehensive document which will be beneficial to all Kenyans.

On the Data protection Bill, 2009, she stated that it has not been discussed much or received a lot of scrutiny as the Freedom of Information Bill, 2008. She stated that it is as much a human rights issue which needs to be critically examined. Internationally, there is a move to have data protection law. Though there is need to balance both interests, that is, the right to privacy and the right to freedom of information.

She stated that both versions of the FOI Bills agree on some key principles. Therefore the working group that will be formed after the forum will have to consider the following:

- Whether Kenya will have an FOI Bill which is separate from the Data Protection Bill. This is the trend that many countries have followed. Or will they opt to amalgamate them?
- What oversight model will Kenya have? Will it opt for a Commission or Board, or none at all? What functions will this body have and will it be able to protect both the Freedom of Information legal framework and Data Protection framework comprehensively?
- Will Kenya have two separate commissions to deal with freedom of information and data protection independently?
- What definition and concept of privacy will be adopted? This has to be universal. The courts and all other bodies (duty bearers) will have to be working on one common concept and definition. There is a lot of jurisprudence from EU dealing with privacy which the World Bank can share to the working group.
- How far will this regime apply to private bodies, to what extent and how?
- In many cases, it is important to have a very strong law that incorporates all aspects of international laws, but how realistic is it to implement the law, especially with regard to the new governance structures? Issues of infrastructure and finances have to be considered greatly.

A representative from the Ministry of Planning, National Development and Vision 2030 stated that this is an era where ICT has to be integrated to all spheres of life. Currently, every Ministry is

developing ICT systems so as to deliver information to the doorsteps of citizens. The Government acknowledges that there is need for citizens to be able to access information easily***.An ICT component should therefore be incorporated into the Freedom of Information Bill. She stated that there is need to have a one-stop-shop for information which is up-to-date, authentic and easily accessible.*** Secondly, ***a definition of what is confidential information needs to be properly articulated***. On another note, she stated that the E-Government is considering issuing Kenyans with one identification document which has all their information (rather than having separate documents like the National ID Card, driving license, Personal Identification Numbers etc.). This information may be useful for the Freedom of Information framework.

On the Data Protection Bill, she stated that in this era of internet hackers and cyber crimes, there is no absolute guarantee to ensure the protection of digital data. How will this be addressed in the legislation?

Ms. Mumma in response stated that CIC is working on a number of legislation which relate to citizenship, immigration and the use of one official document. This information may be circulated to the working group to give input to the process.

A participant suggested having a reversal of Article 35 of the Constitution, by stating that "the state has the right of information held by the individual." Secondly, he stated that the FOI Bill needs to be harmonized with Constitutional provisions, especially with regard to definitions. Third, he wondered why the Data Protection Bill, 2009 and the Freedom of Information Bill, 2008 were separated. He stated that it is possible to house both Bills in one document comfortably. Fourth, he inquired why there is need to have a fully fledged commission. It may just be too expensive to have a Commission. Fifth, the working group should consider already existing policies and legislation to ensure that roles are not duplicated. The group should consider offices such as the Government Security Information Office and the E-Government.

Lastly, in Clause 21(2) of the Freedom of Information Bill, 2008, the definition of 'national security' should be amended to be in line with that of the Constitution.. The Bill should qualify to

what extent information should be issued, especially with regard people who may have ill motives, for example informants from enemy states.

Ms. Mumma stated that the Central Bureau of statistics should be invited to this process.

A representative form the Ethics and Anti Corruption Commission stated that the Kenya Anti-Corruption Commission has since 2006 made lobbying for freedom of information as one of its objectives as it is a very important component of its mandate. He thanked the consultants for their insightful presentations. ***He stated that when there is a blanket right to access of information held by the state, this should be limited to the citizens only and not to foreigners. This is an issue of sovereignty and such blanket right would downplay sovereignty of the state. For foreigners, a different approach towards seeking this information should be adopted. This could be through mutual relations between government agencies, following precise channels and procedures of communications***. Secondly, there is needed to be succinctly clear that ***Civil Society should also have a right to access information in their capacity as Civil Society Organizations collectively.*** This right is critical to the watch-dog role it serves in society. Third, with regard to whistle blowers, he stated that they become 'heroes' to the general public, but within their employment realms, they become 'sellouts'. In fact they may become unemployable. How do we mitigate the scorn that the blower might face? ***It would be important to have anonymous reporting mechanisms and other modes to ensure protection of the_identity of the whistle blowers.*** Third, he wondered what will be done to ensure that the Judiciary properly interprets the broad rights of access to information and only resorts to the exemptions in only exceptional cases.

On access to information by the media, the FOI Bill provides that such information will be availed to them within 15 days. He wondered whether there ***will be officers who will give instant information to media when they require it for covering topical issues, as that is the nature of their work***.

He also stated hat he hadn't had an opportunity to look at the ICJ-K version of the FOI Bill, and stated that the Commission would be interested to see the Civil Society view of the freedom of information.

As regards management of information, he stated that there is need to have some requirements/guidelines to specify how information should be stored for easy access.

Lastly, he stated that the working group must ***list all the relevant international provisions which Kenya has ratified on FOI so that they can guide the legislation***

A representative from the Law Society of Kenya ICT Committee stated that LSK is willing to assist on the technical aspect of drafting the both the legislation.

Second, he stated the structural arrangement of the legislation needs to be addressed. The Freedom of Information Bill, Privacy Act**,** Data Protection Bill, Cyber crimes Bill, the E-transactions Act (incorporated in the Kenya Communications Amendment Act), and the Copyrights Act should all have harmony on what is data ad information. They should all be stand-alone-legislation but managed under the auspices of one Commission. In his opinion, it would be undesirable and messy to have several commissions handling the respective legislation.

A representative from AFRICOG stated that there is a general problem of accessing information in a timely fashion, especially with regards accessing proposed legislation in order to give the critical input required in the process of drafting and formulation of laws.

She stated that AFRICOG has a general interest in all provisions that envisage transparency and access to information from the Government and public bodies and such information trickling down to all levels. AFRICOG will give comprehensive comments later after a thorough look at the Freedom of Information Bill, 2008 and the Data Protection Bill, 2009.

However, she stated that she would make general comments. First, the guiding objects and principle under clause 6 of the FOI Bill are a bit scanty. This should be strengthened. Second, contradictory provisions with existing law, particularly in relation to definitions should be harmonized. Third, National security should be very restrictively defined. Fourth, it is important to look at other existing laws, other than the ones already mentioned to give input to the proposed legislation.

A representative from TISA stated that there is need to standardize information from all the Ministries. Second, in refining the proposed legislation, ***it is important to consider oaths taken not to disclose certain information in accordance with the Public Officers Ethics Act.*** Will there be exceptions for such oaths? Lastly there is need to address the issue of ***accessing information held by private entities dealing with public information.***

Another representative from AFRICOG commented on the Data Protection Bill, 2009. He stated that ***there is need to set standards with regard to accessing public information held by the private sector, particularly those held by communication companies, banks etc***. Second, it is important to ***remove bureaucracies/many procedures in accessing information.*** Third, the aspect of open-Government partnerships should be scaled up with regard to the extent, nature and accessibility of information contained in websites maintained by the state.

A representative from ICJ Kenya stated that in deciding whether a commission should be established to oversee the implementation of the FOI framework, the pros and cons should be considered. Yes, it will have cost implications to it, but it will reduce the number of cases which Kenyans keep lodging to courts to have access to information, which is also a very costly affair. Whatever route is decided upon, what should be addresses is whether the FOI framework will be properly enforced.

Jurisprudence world over has shown that commissions provide an Independent, accessible and simple alternative model for enforcing these rights. But the success depends on how much resources are allocated to the commissions.

Another participant stated that for the FOI and Data Protection framework to succeed and be effective, there is need for:

- ***change culture in the Public Service;***
- ***reforms in the Judiciary-to ensure justice is accessible to all Kenyans; and***
- ***Civic education of the public.***

It is also important to base the drafting of the legal framework on the situation on the ground (the unique situation of Kenya) and tailor the law according to what will work for the Country.

Another participant observed that there is a general grievance-driven attitude towards the concept of 'National security'. He stated that this mentality should be changed as it will cloud the drafting and legislative development process

A participant inquired what the chances were of getting through the political huddles that may hinder the legislation from being passed by Parliament. Was there any strategy in place to ensure that the legislation receive the support they require for passage? In response, Ms. Mumma stated that CIC has been meeting with CIOC on the laws which need to be passed based on timelines and others as proposed by the Constitution. One of the principles that they are advocating for is public participation in the implementation process, and the FOI Bill is a key law that will propagate the principle of public participation and inclusivity. The CIC has therefore been able convince the CIOC that FOI is a priority legislation, especially with regard to the upcoming general elections. So far, she believes that there is support for it. Hopefully, it will be passed before the next general election elections.

A participant observed that the FOI Bill hardly has any penalties. It only criminalizes aspects of Clause 43(1). There is need to protect the privileged information issued to third parties being passed to foreigners. Mr. Wachira in response to this stated that this is already covered in the existing legislation relating to spying and should not be introduced in the FOI Bill. A delicate balance has to be struck. The purpose of law is to cure a problem. The FOI framework is intended to cure the lack of access of information by the public to information held by the state or public institutions. Public taxes are used to develop, process, and store such information; therefore it is only prudent that the public has access to it. Access to information is a resident rights and not a citizenship right as expressed in the ICCPR-it is a right that is available to all persons. ***There is both a theoretical problem and a logical problem with regard to Article 35 of the Constitution with respect with it being termed as a 'citizenship right'.***

How important is it for foreigners to be able to access information? Mr. Wachira stated that it is very important for them to have the right to access information. He gave the example of a foreign company operating in Kenya, which sometimes may be by virtue of one of the shareholders being a foreigner, if the company requires important information that is necessary for running its business. Why should it be restricted from receiving that information?

An overall observation was made to the effect that there needs to be a classification of information as classified, top secret, secret and restricted. Secondly, the harm that may be occasioned in disclosing the information needs to be elaborated.

The issue of communication companies releasing private information to the public was discussed; for instance, when spouses attempt to monitor each other's call-logs through private investigators. This is an invasion of privacy and should be addressed in the Data Protection Bill.

It is important to have other service providers who may hold information included the working group, so that the concerns of their operations can be incorporated into the legislation.

There is need to look at infrastructural issues in the Bill. Do we have the infrastructure at the county level to implement the provisions of the Bill? What needs to be done?

Another participant stated that the working group should not be over prescriptive on the Bills. Other countries leave some aspects open for interpretation by the courts.. If the right to access to information is denied, then the Judicial avenue still exist, and judicial precedents there-from can also build jurisprudence on the right to access information in Kenya.

Another observation was to the effect that if a commission has to be formed as an oversight mechanism, It would be important to consider whether there is a necessity of having nine commissioners. Probably a chairperson and two other commissioners would be sufficient.

In response to this, it was acknowledged that there will be cost implications with having nine commissioners, but what should guide the requisite number should be functions and duties that will be allocated to the Commission. There is a lot of money that is being lost to corruption, and if

this mechanism might reduce corruption by enhancing transparency, then it is not an expensive price to pay.

A Frame work was proposed for the working group that will work on the legislation. This proposal was to the effect that the working group should consider:

- the scope of whatever legislation they will draft, will it relate to public bodies, private institution or both;
- agree on a definition of privacy;
- agree on a definition of information;
- the framework of the legislation, that is, will there be one amalgamated law or two separate laws on freedom of information and data protection;
- The oversight mechanism: will there be one commission, two commissions or no commission? How many commissioners will be required;

However, what it may not be resolved by the working groups, is the issue of foreigners having access to information.

Another participant stated that the Government is in the process of installing information centers in every part of the country which will enable all citizens to access information very easily. The information centers will be under the supervision of a specific department but can work together of the proposed commission to ensure proper access to information.

It was stated that there is need for a strong transitional provision on how information will be handled /managed in the mean time. This is very critical.

1.6. **WAYFORWARD-** *Ms. Catherine Mumma, Commissioner-Commission for the Implementation of the Constitution*

The following was the way forward that was agreed upon:

- A small working group consisting of the two consultants, representatives from the Ministry of Information and Communication, Kenya Law Reform Commission, the Attorney General, Law Society of Kenya, AFRICOG, Kenya Human Rights and Equality Commission, CIC, NSIS and ICJ-Kenya will be formed to work on the proposed legislation.

- ICJ-Kenya will be in charge of coordinating the working group.

- Other members who are not included in the working group are free to access the group and provide information and relevant material.

- The two consultants will first commence on incorporation all the comments given in the forum.

- The subsequent draft of the legislation which will be produced after input of the working group will be subjected to wider stakeholder engagement.

1.7. **CLOSING REMARKS-***Ms. Catherine Mumma-Commissioner-Commission for the Implementation of the Constitution.*

Ms. Mumma thanked ICJ Kenya for organizing the forum. She also thanked everyone for their contribution towards enriching the drafting process of the legislation.

The meeting came to a close at 12:45pm.

2.0. APPENDICES

2.1. APPENDIX 1: PROGRAM

TIME	ACTIVITY	SESSION MODERATOR
8:00am-10:15am	• Welcome Remarks & objectives of the forum • Remarks by the Ministry of information & Communication • Overview of: i. The Freedom of Information Bill 2008 and Data Protection 2009 ii. Issues arising from the Bills • Remarks from the International Commission of Jurists on additional issues arising from the Bills	Commissioner Catherine Mumma Mr. Anthony Kuria (Consultant-CIC) Mr. Wachira Maina (Consultant-ICJ_K)
10:15am-10:30am	**HEALTH BREAK**	
10:30am-1:00pm	• Plenary discussions • Concluding remarks and way forward	Commissioner Catherine Mumma
	LUNCH BREAK	

2.2. APPENDIX 2: LIST OF PARTICIPANTS

NO.	ORGANIZATION
1.	Consultant-CIC
2.	Rapporteur-ICJ K
3	Legal Researcher ICJ
4	Consultant
5	ICJ-Kenya
6	Legal officer-OOP
7	Consultant ICJ-K
8	Ethics & Anti-Corruption Commission
9	Researcher SSR
10	State Law Office
11	World Bank
12	Ministry of Information and Communication
13	AFRICOG
14	ICJ-K

15	TI-Kenya
16	Ministry of Planning National Development
17	TI-Kenya
18	KLRC
19	Office of Prime Minister
20	KNCHR
21	TISA
22	LSK ICT Committee
23	Article 19
24	NCS
25	AFRICOG
26	LSK Committee
27	CIC
28	MOIC
29	NIS